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ALLAHABAD SERIES

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(2023) 3 ILRA 7
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.01.2023

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Revision No. 3576 of 2019

Bhola Yadav ...Revisionist
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Revisionist:
Sri Sharad Chand Rai, Sri Shri Krishna Mishra

Counsel for the Respondents:
G.A., Sri Janardan Mishra, Sri Rajni Kant Chaube

(A) Criminal Law - Revision - Indian Penal Code, 1860 - Section 302 -murder , The Code of criminal procedure, 1973 - Section 161 - Examination of witnesses by police , Section 319 - power to proceed against other persons appearing to be guilty of offence - Power under Section 319, Cr.P.C. is a discretionary and an extra-ordinary power - to be exercised sparingly and only in those cases where the circumstances of the case so warrant - 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. (Para - 9)

Father of complainant was killed due to old enmity - Three witnesses corroborated allegations of F.I.R. - application filed by prosecution under Section 319 Cr.P.C. - trial court summoned revisionist to face trial with co-accused - Investigating Officer collected plethora of evidence regarding fact - revisionist was not present at the time of occurrence - co-accused has already been acquitted disbelieving prosecution evidence . **(Para - 2,3,11)**

HELD:- Impugned order failed to meet the test laid down for exercising powers under Section 319 Cr.P.C. It has been passed in a cavalier manner without taking into account all facts and circumstances of the case, making it unsustainable. **(Para -12)**

Criminal revision allowed. (E-7)

List of Cases cited:

1. Hardeep Singh Vs St. of Punj. , 2014(3) SCC 92

2. Soma Bhai Vs St. of Guj. , A.I.R. 1925 SC 1453

3. Brijendra Singh & anr. Vs St. 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 the learned A.G.A. and perused the material placed on record.

2. The revisionist, by way of filing the present revision, has sought to quash the impugned judgement and order dated 15.05.2019 passed by Additional Session Judge/Special Judge (POCSO Act), Court No.8, Allahabad in Session Trial No.793 of 2015 (State Vs. Lallu Ram and others) arising out of Case Crime No. 273 of 2015 under Section 302 I.P.C., Police Station Handiya, District Prayagraj/Allahabad. By the impugned order, learned trial court, on an application filed by the prosecution under Section 319 Cr.P.C., has summoned the revisionist to face trial with co-accused, Lallu Ram.

3. An F.I.R. was lodged on 22.06.2016 alleging therein that today father of complainant, Jagmal Prasad was returning from Allahabad,on the way, at 5.30 p.m. when on his Vikki motorcycle, he reached near Village Chaknandu Nahar Puliya, Lallu Ram Yadav and Bhola Yadav due to old enmity opened fire on the head of Jagmal Prasad by a country-made pistol. He died on spot. At the same time, Samar Bahadur, brother and Ram Prasad, uncle of the complainant, who were returning home, hearing the sound of fire, reached at the spot, then accused persons, waving the country-made pistols ran away from the spot. After investigation charge-sheet was submitted only against one accused, Lallu Ram Yadav. The other named accused, Bhola Yadav was exonerated. During course of trial three witnesses, Amar Bahadur PW 1, Samar Bahadur PW 2 and Ram Prasad PW 3 were examined. Thereafter, an application under Section 319 Cr.P.C. was filed by the prosecution on the grounds that the complainant in the F.I.R., in his statement under Section 161 Cr.P.C. and in testimony before the court has corroborated the allegations of the F.I.R. that Lallu Ram Yadav on the exhortation of Bola Yadav with intention to kill has opened fire on Jagmal Prasad causing his death. There are other eye-witnesses,Samar Bahadur PW 2 and Ram Prasad PW 3, who also in their statement under Section 161 Cr.P.C. and before the trial court, have fully corroborated aforesaid statement. The Investigating Officer has submitted charge-sheet only against Lallu Ram while it is clear that Bhola Yadav is also involved in the incident with co-accused Lallu Ram Yadav. Prayer was made to summon the accused, Bhola Yadav. Learned trial court has allowed the application and summoned the revisionist-accused.

4. It is contended by the learned counsel for the revisionist that there is no evidence against the revisionist fulfilling conditions required for summoning under Section 319 Cr.P.C., hence the impugned order is not sustainable in the eye of law. It is further contended that from the statements of Amar Bahadur PW 1, Samar Bahadur PW 2 and Ram Prasad PW 3 who are alleged to be eye-witnesses of the incident, it is clear that they were not present at the time of the incident, but they came later on. It is next contended that Investigating Officer during the course of investigation has collected the evidence of the fact that the revisionist-accused was employed at Mumbai and at the relevant time he was at Mumbai in relation to his employment. The Investigating Officer has collected reliable and cogent evidence in this respect and on these grounds exonerated the revisionist-accused. Learned trial court while passing the impugned order has lost sight of the evidence collected by the Investigating Officer that revisionist-accused was not present in the village at the time of occurrence. Learned counsel has submitted that the Apex Court in ***Hardeep Singh Versus State of Punjab, 2014(3) SCC 92*** has held as follows:

"though only a prima face 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."

5. He has further contended that trial of Lallu Ram Yadav was completed which culminated into his acquittal. The eye-witnesses account produced by the prosecution was disbelieved by the trial court, so there is no evidence against the revisionist-accused on which he could be tried. The fate of the trial is well-known and it may be a futile exercise. The impugned order suffers from material illegality and is liable to be set aside.

6. Learned counsel for the opposite party no.2 and learned A.G.A. appearing for State contended that revisionist-accused is named in the F.I.R. with specific allegations of his complicity in the heinous crime of murder in which father of the complainant lost his life. The complainant, Amar Bahadur himself is the eye-witness. There are two other eye-witnesses, Samar Bahadur and Ram Prasad. All of them in their statements under Section 161 Cr.P.C. has fully corroborated the allegations of the F.I.R. establishing the complicity of the revisionist-accused in the incident. They have reiterated it before the trial court in their testimony. It is further contended that the plea of alibi is to be proved to the satisfaction of the court. Learned counsel has placed reliance on the case law of ***Soma Bhai Versus State of Gujrat A.I.R. 1925 SC 1453.*** Relevant paragraph-17 is quoted below:

"17. It was lastly contended by the learned Counsel for the appellant that as the accused was found at Surat at 9 P.M. when he lodged the report against Ratilal Deva and others regarding the concealment of smuggled silver, hence the accused could not have been present at the time of occurrence. In other words, this was a sort of plea of alibi which was sought to be taken by the appellant. There is, however, no evidence on the record to prove that the accused was seen at Surat by the police officer at 9 P.M. The evidence of Circle Inspector Rijhsinghani clearly shows that he saw the accused at about 10 P.M. The occurrence took place at Dandi a little before 9 P.M. There was ample time for the accused to have gone to Surat by a jeep. It may be mentioned that it is admitted case of the appellant that he went to Surat in a jeep and in fact he explained that he got the injuries on his head because his jeep suddenly came to a stop in view of the crowded streets of Surat and his head dashed against the window-screen of the jeep. It is well settled that a plea of alibi has got to be proved to the satisfaction of the Court."

7. Learned counsels further contended that trial court has analysed all the facts, evidence and material on record and on its basis has recorded the finding that there is sufficient and cogent evidence against the revisionist-accused and has passed summoning order. The impugned summoning order is reasoned one and there is no illegality or irregularity in it.

8. It is not disputed that revisionist-accused was named in the F.I.R., but during investigation the Investigating Officer found that he was not present in the village at the alleged time of the incident. The Investigating Officer has collected evidence

in respect of it which is part of the case diary. He has also visited Mumbai and has recorded statement of his employer and collected other documents also. The statement of Samar Bahadur PW 2 and Ram Prasad PW 3 before the court are reiteration of their statement as recorded under Section 161 Cr.P.C.

9. The standard of evidence required for exercising powers under Section 319 Cr.P.C. has been prescribed in the case of ***Hardeep Singh Versus State of Punjab (supra)***.The relevant paras 98 and 99 are as follows:

"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 face 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."

10. In ***Brijendra Singh and another Versus State of Rajasthan (2017) 7 SCC 706,*** the Apex Court has made following observations:

"13.In order to answer the question, some of the principles enunciated in Hardeep Singh's case may be recapitulated:Power under Section 319 Cr.P.C. can be exercised by the trial court at any stage during the trial, i.e.,before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some 'evidence' against such a person on the basis ofwhich evidence it can be gathered that he appears to be guilty of offence. The 'evidence' herein means the material that is brought before the Court during trial. Insofar as the material/evidence collected by the IO at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C. No doubt,such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses,can also be taken into consideration. However, since it is a discretionary power given to the Court under Section 319 Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrants. The degree of satisfaction is

more than the degree which is warranted at the time of framing of the charges against others in respect of whom chargesheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.

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 kms. 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 Cr.P.C. 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 appellants plea of alibi was correct.

15.This record was before the trial court. Notwithstanding the same, the trial court went by the deposition of complainant and some other persons in their examination-in-chief, with no other material to support their so- called verbal/ocular version. Thus, the 'evidence' recorded during trial was nothing more than the statements which was already there under Section 161 Cr.P.C. recorded at the time of investigation of the case. No doubt, the trial court would be competent to exercise its power even on the basis of such statements recorded before it in examination-in-chief. However, in a case like the present where plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty bound to look into the same while forming prima facie opinion and to see as to whether 'much stronger evidence than mere possibility of their (i.e. appellants) complicity has come on record. There is no satisfaction of this nature. Even if we presume that the trial court was not apprised of the same at the time when it passed the order (as the appellants were not on the scene at that time), what is more troubling is that even when this material on record was specifically brought to the notice of the High Court in the Revision Petition filed by the appellants, the High Court too blissfully ignored the said material. Except reproducing the discussion contained in the order of the trial court and expressing agreement therewith, nothing more has been done. Such orders cannot stand judicial scrutiny."

11. The facts of present case are almost identical to the facts of ***Brijendra Singh and another Versus State of Rajasthan (supra)***. In this case also the Investigating Officer has collected a plethora of evidence regarding the fact that revisionist was not present at the time of occurrence. His presence was at Mumbai which is far away from the place of occurrence. Further in this case one more important factor is that co-accused, Lallu

Ram Yadav has already been acquitted disbelieving the prosecution evidence. The evidence against the revisionist-accused is the same.

12. The impugned order reveals that learned trial court has assessed only the evidence recorded before it. It has not taken into consideration every facts and material available on record. The impugned order has been passed in a cavalier manner without appreciating entire facts and circumstances of the case. It does not satisfy the test laid down for exercising powers under Section 319 Cr.P.C. So, the impugned order is not sustainable in the eye of law.

13. Accordingly, this criminal revision is allowed. The impugned order dated 15.05.2019 passed by Additional Session Judge/Special Judge (POCSO Act), Court No.8, Allahabad in Session Trial No.793 of 2015 (State Vs. Lallu Ram and others) arising out of Case Crime No. 273 of 2015 under Section 302 I.P.C., Police Station Handiya, District Prayagraj/Allahabad is hereby set aside.

(2023) 3 ILRA 12
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.12.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

First Appeal From Order No. 23 of 2021

Santosh Kumar & Ors. ...Appellants
Versus
Jagat Narayan & Ors. ...Respondents

Counsel for the Appellants:
Sri Anil Kumar Sharma, Sri Ajay Mishra, Sri Kapil Kumar, Sri Krishna Mishra, Sri S.K. Mishra

Counsel for the Respondents:
Sri Sangam Singh, Sri Krishan Mohan Mishra

Civil Law - Civil Procedure Code - Order – 41 - Rule - 17, 19: - Appeal - challenging the order passed by appellate court - whereby court below dismissed the application proffered under Order 41 Rule 17 of CPC moved by Plaintiff Appellants - Suit for permanent injunction - dismissed by trial court - Civil Appeal - dismissed-in-default - Application for restoration - rejected, by Appellate court, on the ground that several dates were fixed by the court which was in the knowledge of counsel of plaintiffs/appellants as well as plaintiffs/appellants, but they were absent and non-appearance was not *bona-fide* and genuine - it is settled law that court should have taken the sympathetic and liberal view to do substantial justice while deciding application instead of taking technical view in the matter while disseminating substantial justice - court, on the interpretation of the word "was prevented by any sufficient cause from appearing" - held that, where any party does not approach the court with the clean hand and with true facts and files an application to get the order of dismissal in the default set aside on a ground which was not made out from the record, and the ground has been set up with an intention to befool or defraud the court, the court should not come in aid to such a party to allow him to reap the fruits of false and frivolous explanation to get the order in favour, as done in present case - in such view of the fact, present appeal is dismissed. (Para - 29, 31, 32)

Appeal Dismissed. (E-11)

List of Cases cited:

Atar Singh & ors. Vs Lotan Singh & ors. AIR 1992 All. 59.

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

1. Heard learned counsel for the appellants and learned counsel for the respondents.

2. The appellants have preferred the present appeal challenging the order dated 15.12.2018 passed by the Additional District Judge/F.T.C., Court No.2, Auraiya, whereby he has dismissed the application under Order 41 Rule 17 of C.P.C. of the plaintiffs/appellants

3. The facts, in brief, are that one Ram Swaroop Shukla had instituted an original suit no.17 of 2004 praying for a decree of permanent injunction restraining the defendants/respondents from interfering in the peaceful possession of the plaintiffs/appellants. It appears that during the pendency of the suit, Ram Swaroop Shukla had died and the plaintiffs/appellants have been substituted as his heirs.

4. As per the plaint case, one Ram Swaroop Shukla purchased a plot situated at Mohalla Hariganj, town and area Achhalda, Pargana Vidhuna, District Auraiya which has been described at the foot of the plaint (hereinafter referred to as 'suit property') from one Heera Lal S/o Bhikari Lal on 25.12.1948 for a sale consideration of Rs.300/- and he got possession over the suit property. Thereafter, he applied for the sanction of the map to the Nagar Panchayat Acchalda which was sanctioned by the Nagar Panchayat as per law.

5. Subsequently, the plaintiffs/ appellants constructed a house for his residence and his name was recorded in Nagar Panchayat. The plaintiffs/appellants started depositing house tax and other taxes. Further case of the plaintiffs/ appellants was that the defendant/ respondent no.1 was his brother and required a house in Acchalda for residence. The plaintiffs/appellants permitted the defendant/respondent no.1 to stay in the suit property. It was the further case of the plaintiffs/appellants that the plaintiffs/appellants used to give money to his brother defendant/respondent no.1 to deposit taxes with the Nagar Panchayat, but his brother in collusion with the clerk of Nagar Panchayat got his name recorded in the Nagar Panchayat. When the plaintiffs/appellants came to know about the illegal act of defendant/respondent no.1, he submitted an application in Nagar Panchayat on 22.02.2000 for removal of the name of the defendant/respondent no.1 from the record and restore his name. As per the plaint case, the plaintiffs/appellants are in possession of the suit property and the defendants/respondents based on the forged sale deed were interfering with the peaceful possession of plaintiffs/appellants which gave rise to the cause of action to the plaintiffs/appellants to institute suit.

6. The said suit was contested by the defendants/respondents denying the allegations of the plaint. The said suit of the plaintiffs/appellants was dismissed by the trial court vide judgement and order dated 01.10.2013.

7. Feeling aggrieved by the judgement and order dated 01.10.2013 passed by the trial court, the plaintiffs/appellants preferred Civil Appeal before the District Judge, Auraiya which was registered as Civil Appeal No.19 of 2013.

8. The aforesaid appeal was dismissed in default by the appellate court vide order dated 24.11.2017. The plaintiffs/appellants filed an application on 12.12.2017 under

Order 41 Rule 17 of C.P.C. (Santosh Kumar and Others Vs. Jagat Narayan) for setting aside the order dated 24.11.2017 in Civil Appeal No.19 of 2013 and re-admit the appeal and hear the appeal on merit.

9. The plaintiffs/appellants stated in the said application that Santosh Kumar was the Pairokar of the case. He met with an accident in July and suffered grievous injury in the accident due to which he underwent surgery. It was further stated that as his operation was not successful, therefore, he was again operated due to which he was unable to move, and for this reason, he could not attend the case. It was further stated that when he came to the civil court on 08.12.2017, he enquired about the status of the appeal and came to know that the appeal has been dismissed in default on 24.11.2017, and immediately, he filed the present application for restoring the case.

10. The defendant/respondent no.1 filed an objection to the application of plaintiffs/appellants under Order 41 Rule 17 of C.P.C. denying the averments made in the said application. It was further stated that there are six plaintiffs/appellants in the appeal and any of them could attend the case on the date fixed i.e. 24.11.2017. It was further stated that Santosh Kumar was fit and fine on the date fixed. The defendants/respondents further stated that the medical certificate filed by Santosh Kumar was not genuine. The averments made in the application are vague inasmuch as Santosh Kumar has not stated in the application the date on which he had been operated upon second time. Consequently, it was prayed that the application under Order 41 Rule 17 of C.P.C. may be dismissed.

11. The appellate court vide order dated 15.12.2018 rejected the application under Order 41 Rule 17 of C.P.C. on the ground that several dates were fixed in the appeal which was in the knowledge of the counsel of the plaintiffs/appellants as well as plaintiffs/appellants. The appellate court recorded that the counsel of the plaintiffs/ appellants had also knowledge about the date fixed i.e. 24.11.2017 in the appeal, and if for any reason, the plaintiffs/appellants were absent, it was the duty of the counsel to attend the court and argue the appeal. The appellate court recorded that the order sheet reveals that on earlier dates also, neither the plaintiffs/ appellants nor their counsel appeared and the case was adjourned in their absence.

12. The appellate court further found that as per the averments in the application under Order 41 Rule 17 of C.P.C., Santosh Kumar met with an accident in July 2017 whereas the prescriptions relating to treatment filed on record was dated 14.06.2017, and the application of Santosh Kumar was silent as to the date on which he had been operated second time. The appellate court further found that the non-appearance of the appellant was not bone fide and genuine, consequently, it dismissed the application under Order 41 Rule 17 of C.P.C.

13. Challenging the order, learned counsel for the plaintiffs/appellants has contended that the non-appearance of the plaintiffs/appellants on the date fixed in the civil appeal was *bona fide* and genuine, and the plaintiffs/appellants have demonstrated that they were prevented by sufficient cause from appearing on the date fixed in the appeal, therefore, the appellate court should have allowed the application of plaintiffs/appellants under Order 41 Rule 17 of C.P.C. and restored the appeal.

14. It is submitted that Santosh Kumar, who was doing the parivi in the case met

with an accident and was operated upon due to which he was incapable to move, therefore, in such circumstances, it was established that non-appearance of plaintiffs/appellants on the date fixed in the appeal was *bona fide*, therefore, the appellate court should have taken the sympathetic and liberal view to do substantial justice in deciding the application instead of taking a pedantic and over technical view in the matter. Thus, it is contended that the appellate court has committed manifest illegality in rejecting the application which needs to be corrected by this Court in appeal. In support of the said submission, learned counsel for the plaintiffs/appellants has placed reliance upon the judgement of this Court in the case of ***Atar Singh and Others Vs. Lotan Singh and Others AIR 1992 All. 59.***

15. Per contra, learned counsel for the respondents has contended that there is no quarrel with the legal proposition advanced by the learned counsel for the plaintiffs/appellants that the court in deciding the application under Order 41 Rule 17 of C.P.C. read with Rule 19 of C.P.C. should take a liberal view and technicalities should not come in the way of court to do substantial justice. He submits that in the instant case, the said principle is not attracted inasmuch as it is evident from the record that a false case in the application under Order 41 Rule 17 had been set up by the plaintiffs/appellants to get the order dated 24.11.2017 set aside.

16. He further submits that in filing the application under 41 Rule 17 of C.P.C., the plaintiffs/appellants should come with clean hand and with true facts whereas in the instant case, grounds stated in the application that Santosh Kumar had suffered injuries in an accident in July 2017 and was operated upon, and since his operation was not successful, therefore, he underwent surgery second time is a false story for two reasons; the application is silent as to the date on which Santosh Kumar was operated upon second time; secondly, all the prescriptions about the treatment of Santosh Kumar filed on record were dated 14.06.2017 and no prescription in respect to the treatment of Santosh Kumar of the month of July was filed nor any document was brought on record indicating that Santosh Kumar underwent surgery second time in the month of July.

17. He further submits that in paragraph 7 of the counter affidavit, it has been specifically averred that the story stated in the application under Order 41 Rule 17 of C.P.C. is false inasmuch as Santosh Kumar had filed an affidavit sworn on 27.10.2017 in the original suit no.189 of 2012, and if the averments made in the application of the plaintiffs/appellants was taken to be true, then how he could file an affidavit dated 27.10.2017 in Original Suit No.189 of 2012. He further stated that the copy of the affidavit of Santosh Kumar dated 27.10.2017 in Original Suit No.189 of 2012 is enclosed as annexure 4 to the counter affidavit. Thus, it is submitted that as the appellants had not approached the court with clean hand and the averments made in the application under Order 41 Rule 17 of C.P.C. are false and had been made only to get the order dated 24.11.2017 set aside, the plaintiffs/appellants have failed to demonstrate that the plaintiffs/appellants were prevented by sufficient cause from appearing on the date fixed in the appeal. Thus, the appellate court has rightly dismissed the appeal.

18. I have considered the rival submissions of the parties and perused the record.

19. The facts as emanate from the record reveal that the suit had been instituted by one Ram Swaroop Shukla against defendants/respondents praying for a decree of a permanent injunction. The suit was dismissed on 01.10.2013. During the pendency of the suit, Ram Swaroop Shukla died and plaintiffs/appellants have been substituted as his heirs.

20. The plaintiffs/appellants preferred Civil Appeal No.19 of 2013 against the order dated 01.10.2013 dismissing the suit. The appeal was dismissed in default on 24.11.2017 for want of the appearance of plaintiffs/appellants. The plaintiffs/appellants filed an application under Order 41 Rule 17 of C.P.C. stating therein that Santosh Kumar plaintiff/appellant no.1 was doing the pairvi in the case and he could not appear on the date fixed i.e. 24.11.2017 as he had met with an accident in July 2017, and in the said accident, he suffered grievous injuries and he was operated, but since his operation was not successful, therefore, he was again operated and as he was unable to move, therefore, he could not attend the court on the date fixed which led the court to pass an order to dismiss the appeal in default.

21. The question as to whether the reasons given in the application under Order 41 Rule 17 of C.P.C. of the plaintiffs/appellants for non-appearance can be said to be the sufficient cause that prevented the plaintiffs/appellants from appearing on the date fixed in the appeal invites the attention of this Court in the instant appeal.

22. *Prima facie* reading of the application depicts a picture that the reasons stated in the application under Order 41 Rule 17 of C.P.C. would fall in the ambit of 'sufficient cause' which prevented plaintiffs/appellants from appearing on the date fixed in the case, but the record speaks otherwise.

23. The plaintiff/appellant no.1 has stated in the application that he had suffered grievous injuries in the accident in the month of July 2017 and he was operated upon, but as his operation was not successful, therefore, he again underwent surgery. There is no averment in the application as to the date on which, he was operated upon second time. Further, the prescriptions filed regarding the treatment of Santosh Kumar were dated 14.06.2017 which were before the month of July 2017, and no prescription of the month of July 2017 was filed on record indicating that he was suffering from injury and was operated upon second time in the month of July.

24. The appellate court while dismissing the application has noted the said fact.

25. In the present appeal, the prescriptions relating to the treatment of Santosh Kumar had been appended from pages 120 to 123 by the plaintiffs/appellants which reveals that all prescriptions are before July 2017.

26. The medical certificate appended on page no.120 to 123 dated 14.06.2017 issued by Dr. D.K. Dubey reveal that Santosh Kumar was advised for three and half months bed rest. The record reveals that the said certificate was not proved. Even otherwise, if the said certificate is taken to be true and correct, Santosh Kumar became fit after three and half months which is the last week of September 2017. It is further pertinent to

note that the defendants/respondents had filed an affidavit of Santosh Kumar dated 27.10.2017 in Original Suit No.189 of 2012 which indicates that Santosh Kumar was hale and hearty in October 2017. Thus, the averments made in the application that Santosh Kumar was not fit due to injuries suffered in the accident on the date fixed in the appeal are false and incorrect.

27. Learned counsel for the plaintiffs/appellants has invited the attention of the Court to paragraph 7 of his reply to the counter affidavit of the defendant/respondent nos.2 to 5 wherein it is stated that Santosh Kumar did not appear on the date fixed i.e. 27.10.2017 in the Original Suit No.189 of 2012. He further placed reliance upon paragraph 8 of the affidavit wherein it has been stated that he (Santosh Kumar) was not aware of the affidavit dated 27.10.2017, whereas, on the other hand, he stated that it appears that it was sworn by somewhere else. It is pertinent to note that the plaintiffs/appellants have not denied categorically that the affidavit dated 27.10.2017 was not sworn by Santosh Kumar in their reply. Paragraph 8 of the reply to the affidavit reads as under:-

"8. That the appellant no.1 is not aware about the affidavit dated 27.10.2017 but it appears as sweared somewhere else and the respondents is not giving the correct facts."

28. The defendants/respondents have enclosed the order sheet of Original Suit No.189 of 2012 instituted by plaintiff/appellant no.1 Santosh Kumar, and the orders dated 25.10.2017, 15.11.2017, and 28.11.2017 reveals that Santosh Kumar was present in the court. Thus, it is evident from the record that a false story has been set up by the plaintiffs/appellants in the application under Order 41 Rule 17 of C.P.C. for setting aside the order dated 24.11.2017.

29. This Court is conscious of the fact that it is settled in law that the words "was prevented by any sufficient cause from appearing" in Order 41 Rule 17 of C.P.C. must be liberally construed to enable the court to do complete justice between the parties. This Court is also aware of its prime duty to do substantial justice and the technicalities should not come in the way of the court in disseminating substantial justice. If in a given case, 'sufficient cause' is made out for the non-appearance of plaintiffs/appellants, the court should take a liberal view and recall the order dismissing the appeal in default. In doing so, the courts have wide discretion in determining the 'sufficient cause' keeping in view the peculiar facts and circumstances.

30. It is also the well-established principle of law that in a case where a party approaches the court immediately and within the statutory time specified for filing the application, the discretion is normally exercised in his favour provided the absence was not *mala fide* or intentional as the absence of a party in case otherwise shall be compensated by heavy cost and a lis be decided on merit.

31. This Court is conscious of the law on the interpretation of the word "was prevented by any sufficient cause from appearing" but it is also settled in law that where a party does not approach the court with the clean hand and with true facts and files an application before the court to get the order of dismissal in the default set aside on a ground which was not made out from the record, and the ground has been

set up with an intention to befool or defraud the court to get the order of dismissal of the appeal in the default set aside, the court should not come in aid to such a party to allow him to reap the fruits of false and frivolous explanation to get the order of dismissal of the appeal in default set aside. The present case is one such case since in the said case, the plaintiffs/appellants had approached the court under Order 41 Rule 17 of C.P.C. on the ground which is false on the face of the record.

32. In such view of the fact, this Court does not find any illegality in the order passed by the court below in rejecting the application of the plaintiffs/appellants under Order 41 Rule 17 of C.P.C.

33. So far as the judgement of this Court in ***Atar Singh (supra)*** relied upon by the learned counsel for the plaintiffs/appellants is concerned, the said judgement is not applicable in the facts of the present case inasmuch as the plaintiffs/appellants had not approached the court with clean hand in filing the application under Order 41 Rule 17 of C.P.C.

34. For the reasons given above, the appeal lacks merit and is hereby ***dismissed*** with no order as to costs.

(2023) 3 ILRA 18
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.01.2023

BEFORE

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

First Appeal From Order No. 1001 of 1993

U.P.S.R.T.C. & Anr. ...Applicants
Versus
Smt. Bhagwati & Ors. ...Respondents

Counsel for the Applicants:
Sri Sunil Kumar

Counsel for the Respondents:

(A) Civil Law – Motor Vehicles Act, 1988 - Section - 173, - Civil Procedure Code, 1908 - Order 41 Rule 17: - Appeals - challenging the Award - Accident - Corporation assailed the award on ground i.e. contributory negligence - quantum of compensation - 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 hit the scooter of deceased - *res ipsa loquitur* - court finds that, bus driver was driving bigger vehicle, he should have been more vigilant - scooterist was riding the scooter on its correct side - evidence adduced by the appellant did not show that the driver of bus was driving the vehicle causational - as such finding of tribunal on the issue of contributory negligence are upheld.
(Para - 9, 13)

(B) Civil Law– Motor Vehicles Act, 1988 - Section - 173 - Civil Procedure Code,1908 - Order 41 Rule 17 - Appeals - challenging the Award - Accident - Corporation assailed the award on the ground the parents (legal representative) of the deceased do not come within the definition of family - maintainability of claim petition - since, the claim petition was filed in year 1990 and accident was took placed on 30.10.1989 namely after the new Act, 1989 was came into force - the issue of legal heirs are no longer *res intergra* in view of decision of Hon'ble Apex court in case of *Smt. Manjuri Bera VS Orinetal Insurance Company Ltd.* - the plea that, claimants are not entitled for compensation, cannot be accepted as they are legal representatives of the deceased - claim petition maintainable.
(Para - 14, 15)

(C)) Civil Law – Motor Vehicles Act, 1988 - Section - 173, - Civil Procedure Code, 1908 - Order 41 Rule 17: - Appeals -

challenging the Award - Accident - Corporation assailed the award also on the ground that incorrect multiplier was applied by the learned tribunal - quantum of compensation - appreciation of evidence - age of deceased was 30 and he left behind him his young widow, parents and unmarried sister who were dependent on him - as such in place of 15 multiplier would be 17 - court finds that, the compensation awarded by the tribunal is not sufficient - however, since steps in the appeal were not taken for more than 30 years - therefore, appeal stands dismissed under order 41 Rule 11 of the CPC. (Para - 16, 17)

Appeal **Dismissed**. (E-11)

List of Cases cited: -

1. UPSRTC Vs Km. Mamta & ors. (AIR 2016 SC 948),

2. Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors. (FAFO No. 1818/2012 decided on dated 19.07.2016),

3. Smt. Manjuria Bera Vs Oriental Insurance Co. Ltd. (AIR 2007 SC 1474),

4. National Insurance Co. Ltd. Lucknow Vs Lavkush & Another (FAFO No. 199/2017 decided on Dt. 21.03.2017),

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

1. This appeal, at the behest of U.P.S.R.T.C. challenges the judgment and award dated 28.5.1993 passed by IXth Additional District Judge/ Motor Accident Claims Tribunal, Kanpur Nagar in Claim Petition No. 55 of 1990 whereby the learned Tribunal has awarded Rs. 1,65,000/- as compensation with interest at the rate of 12% per annum with a direction upon the appellant herein to pay the above.

2. Heard Sri Sunil Kumar, learned counsel for the appellant. For a period of from 1993 till today, steps have not been taken to see that notices be served to the respondents.

3. Be that as it may, as 20 years have elapsed, this Court deems it fit to decide this appeal where the Court had granted stay vide order dated 30.9.1993 which reads as follows :

"Issue notice.

Till further orders, operation of impugned award dated 28.5.1993 passed by Motor Accident Claims Tribunal, Kanpur Nagar, will remain stayed, subject to appellants' depositing Rs. 1,65,000/- minus the amount, which has already been deposited by the appellants in this Court.

Half of the amount may be withdrawn by the claimants without furnishing security and the balance may be withdrawn subject to the furnishing adequate security to the satisfaction of the Tribunal."

4. Brief facts as culled out from the record are that deceased-Nitin Kumar who was aged about 30 years and was working as a Clerk in U.P. Bidi Agency, met with an accident on 30.10.1989 at about 10.30 a.m. He was hit by Bus No. U.H.J. 8106 owned by U.P.S.R.T.C. while he was going on his scooter No. UMF-3643. He was with another employee namely Magal Bhai Patel who was pillion rider on the said scooter. The bus was being driven rashly and negligently. The deceased died out of said vehicular accident. The claimants are the legal heirs of the deceased. The claim petition filed by the claimants were contested by the defendant. The U.P.S.R.T.C. had filed its reply contending that its bus was not involved in the accident. The Tribunal had framed five issues and decided the same in favour of

the claimants and against the appellant-herein.

5. The grounds urged are that the vehicle owned by U.P.S.R.T.C. was not involved in the accident and in the alternative, even if it was involved, it was the scooterist who was negligent and, therefore, no liability can be fastened on the U.P.S.R.T.C. In the other alternative argument, it is submitted that it is a case of contributory negligence and, therefore, holding that the driver of the bus was negligent is against the record.

6. It is further submitted by learned counsel for the appellant that the parents of the deceased do not come within the definition of family and, therefore, the claim was not maintainable. It is further submitted that the deceased was 30 years of age and was newly married and, therefore, multiplier of 15 have been illegally granted and it should have been 7 or 8. There should have been lump sum deduction to the tune of 1/3rd and not 1/6th, therefore, on that count also the impugned award is bad. The award of non pecuniary damages is also bad.

7. The Apex Court in **UPSRTC Vs. Km. Mamta and others, reported in AIR 2016 SC 948,** has held that all the issues raised in the memo of appeal required to be addressed and decided by the first appellate court.

8. While dealing with submission on issue of negligence raised by the learned counsel for the appellant, it would be relevant to discuss the principles for deciding contributory negligence and for that the principles for considering negligence will also have to be looked into.

9. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance or taking action which such a reasonable person would not. Negligence can be both intentional or accidental though it is normally accidental. More particularly, it connotes reckless driving and the injured must always prove that the either side is negligent. If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of *"res ipsa loquitur"* meaning thereby "the things speak for itself" would apply.

10. The principle of contributory negligence has been discussed time and again. A person who either contributes or is co author of the accident would be liable for his contribution to the accident having taken place and that amount will be deducted from the compensation payable to him if he is injured and to legal representatives if he dies in the accident.

11. The Division Bench of this Court in **First Appeal From Order No. 1818 of 2012 (Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And Others)** decided on 19.7.2016 has held as under :

"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term,

but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in ***Rylands V/s. Fletcher, (1868) 3 HL (LR) 330.*** *From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if*

20. These provisions (sec.110A and sec.110B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of the parties. The right of action created by Fatal Accidents Act, 1855 was 'new in its species, new in its quality, new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.

21. In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence

altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits ***(per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840).***

22. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side."

emphasis added

12. The Tribunal while deciding the issue of negligence has held as under :

"I have also perused the panchayatnama and the map prepared by the I.O. and have gone through the files summoned. It has come in the evidence that although the driver applied breaks but could not succeed in averting the accident because the bus was running at a very fast speed. Since, there was a turn at a place of incident, it was the duty of the driver to take more care and remains slow. As indicated above, there were no horns and thus, considering all the facts and circumstances, I am of the opinion that the petitioners have successfully proved that the accident in question took place because of rash and negligent driving of bus No. UHJ 8106 and the driver (deceased) of Scooter of UMF 3634 was not guilty of any contributory negligence."

13. Looking to the factual averments, the principle for deciding negligence has been properly evaluated. The evidence adduced by the appellant did not show that the driver of the bus was driving the vehicle cautiously. The Tribunal while deciding the issue of negligence has held that as deceased was on his scooter and the bus driver was driving the bigger vehicle, the bus driver should have been more vigilant. The evidence of witnesses have also supported the case of claimants. While going through the judgment impugned, it is clear that the scooterist was riding the scooter on its correct side and the driver of the bus being the driver of bigger vehicle should have taken proper care which he had not done. Hence, the finding of the Tribunal as far as negligence is concerned cannot be interfered with.

14. This takes this Court to the other issues. As far as legal heirs are concerned, this issue is no longer res integra in view of the decision in **Smt. Manjuri Bera Vs. Oriental Insurance Company, Limited, AIR 2007 SC 1474.** The said decision has been relied upon by this Court in **FIRST APPEAL FROM ORDER No. - 199 of 2017, National Insurance Company Limited, Lucknow Vs. Lavkush and another decided on 21.3.2017.**

15. The Claim Petition was filed in the year 1990. The accident took place on 30.10.1989 namely after the new Act, of 1989 came into force, hence, the said submission that the claimants are not entitled for compensation, cannot be accepted as they are legal representatives of the deceased.

16. As far as compensation part is concerned, the Tribunal has considered the case of the deceased and has granted compensation of Rs.1,65,000/- with interest at the rate of 12%. The Tribunal while awarding the above compensation has considered the income of the deceased to be Rs. 10,800/- per month, applied multiplier of 15, deduction 1/6th for life uncertainties and granted Rs.30,000/- under non pecuniary heads. The Tribunal accepted that the deceased was 30 years of age and left behind him his young widow, parents and unmarried sister who were dependent on him. In the year of accident i.e. 1989, the multiplier would be 17. Rather the Tribunal has not added any amount towards future loss of income. In all, it can be said that the compensation awarded by the Tribunal is on the lower side. However, grant of 12% interest would be sufficient as it is submitted that only sum of Rs. 1,65,000/- without interest has been deposited. The U.P.S.R.T.C. to deposit the amount within 12 weeks from today. Interim relief stands vacated forthwith.

17. In view of the above, this appeal stands dismissed under Order 41 Rule 11 of the Code of Civil Procedure, 1908 as though notices were ordered, steps were not taken for more than 30 years.

18. This Court is thankful to Sri Sunil Kumar, learned counsel for the appellant for getting this old matter disposed of.

(2023) 3 ILRA 23
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.01.2023

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.

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

Writ Tax No. 847 of 2022

M/s Tanishka International, Rampur U.P. ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Ram M. Kaushik, Sri Pranjal Shukla, Ms. Priyanka Midha

Counsel for the Respondents:
Sri Ankur Agarwal, Standing Counsel

Civil Law - Central Goods and Service Tax Rules, 2017-For initiation of proceedings-a notice u/Rule 142(1A) was not issued-which provided for communication of details of any tax, interest and penalties as ascertained-subsequent reminder will not cure inherent defect in proceedings-impugned order quashed-liberty to initiate frsh inquiry.

W.P. allowed. (E-9)

List of Cases cited:

1. Gulati Enterprises Vs Central Board of Indirect Taxes and Customs & ors., 2022 U.P.T.C. (Vol. 111) – 1271

2. M/s Skyline Automation Industries Vs St. of U.P. & anr., Writ Tax No.1512 of 2022

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

1. Challenge in the present writ petition is to the order dated February 23, 2021 (DRC-07) Annexure-2 to the writ petition passed by respondent No.2 under Section 74(9) of the Central Goods and Service Tax Act, 2017 (hereinafter referred to as the "Act").

2. The argument raised by the learned counsel for the petitioner is that in terms of

the provisions of Rule 142(1A) of the Central Goods and Service Tax Rules, 2017 (hereinafter referred to as "the Rules) as existing at the time of initiation of the proceedings against the petitioner before it was amended on October 15, 2020, before passing any order under Section 74 of the Act, a show cause notice in Part A of FORM GST DRC-01A is required to be issued. It is only thereafter that the jurisdiction is vested with the Competent Authority to pass order. In the case in hand, notice in Part A of FORM GST DRC-01A having not been issued, any subsequent proceeding will be without jurisdiction as the petitioner did not have fair opportunity to respond.

3. In support of the argument, reliance was placed on a Division Bench judgment of Delhi High Court in **Gulati Enterprises v. Central Board of Indirect Taxes and Customs & others,** 2022 U.P.T.C. (Vol. 111) - 1271 and order dated January 2, 2023 passed by this Court in Writ Tax No.1512 of 2022, titled as **M/s Skyline Automation Industries v. State of U.P. and another.**

4. On the other hand, learned counsel for the respondents, while not disputing the fact that notice in Part A of FORM GST DRC-01A was not issued, submitted that subsequent reminders had given fair opportunity of hearing to the petitioner to place his case before the authority concerned, which he failed to avail of. The impugned order now passed is appealable under Section 107 of the Act.

5. After hearing learned counsel for the parties, in our opinion, present writ petition deserves to be allowed, as admittedly for initiation of proceedings against the petitioner a notice as provided for under Rule 142(1A) of the Rules in Part A of FORM GST DRC-01A was not issued, which provided for communication of details of any tax, interest and penalties as ascertained by the officer. Any subsequent reminder will not cure inherent defect in proceedings initiated against the petitioner. Similar view has been expressed by the Delhi High Court in **Gulati Enterprises' case (supra)** and this Court in **M/s Skyline Automation Industries' cases (supra)** wherein also in identical facts pertaining to a case prior to the amendment of Rule 142(1A) of the Rules with effect from October 15, 2020, the impugned show cause notice was set aside and the matter was remitted back to authority concerned to initiate fresh proceedings in accordance with law.

6. For the reasons mentioned above, the writ petition is allowed. The impugned order dated November 10, 2022 is quashed. However, with liberty to the respondents to initiate fresh proceedings against the petitioner in accordance with law.

(2023) 3 ILRA 24
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.02.2023

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIPIN CHANDRA DIXIT, J.

Writ Tax No. 1086 of 2022

Rajeev Bansal ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Abhinav Mehrotra, Sri Satya Vrata Mehrotra, Sri Rahul Agarwal, Sri Ashish Bansal, Sri Shubham Agarwal, Sri Ankur

Agarwal, Sri Suyash Agarwal, Sri V.K.Sabarwal, Sri R.B. Gupta, and Sri Krishna Vyas

Counsel for the Respondents:
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Civil Law - Income Tax Act, 1961-Section 148-A(d)-Impugned order-passed by assessing authority u/s 148-A(d) –reassessment proceedings issued between 01.04.2021 and 30.06.2021-cannot be conducted by giving benefit of relaxation/extention under the TOLA, 2020 upto 30.03.2021-time limit u/s 149 (1)(b) cannot be counted by giving such relaxation from 30.03.2020 onwards to the revenue-Where first proviso to sec.149(1) (b) is attracted-benefit of TOLA, 2020 will not be available to the revenue-Re-assessment notice issued on or after 1.04.2021 for different Assessment years are to be dealt by revenue.

W.P. disposed. (E-9)

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2. U.O.I. Vs Ashish Agarwal, AIR 2022 SC 2781

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11. Gulmuhar Silk Pvt. Ltd Vs Income Tax Officer, W.P. (C) 5787/2022 & CM Appl.17297/2022

12. Gian Casting Pvt. Ltd. Vs Central Board of Direct Taxes, CWP No.9142 of 2022

13. Anshul Jain Vs Pr. Commissioner of Income Tax, CWP No.10219 of 2022

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20. St. of W. B. Vs Kesoram Industries Ltd, 2004 (10) SCC 201

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Vipin Chandra Dixit, J.)

1. Heard Sri Abhinav Mehrotra, Sri Rahul Agarwal, Sri Ashish Bansal, Sri Shubham Agarwal, Sri Ankur Agarwal, Sri Suyash Agarwal, Sri V.K. Sabarwal, Sri R.B. Gupta and Sri Krishna Vyas learned counsels for the petitioners in the bunch cases; Sri Gaurav Mahajan, Sri Krishna Agarwal, Sri Ashish Agarwal, Sri Manu Ghildyal, learned counsels appearing for the respondent-Revenue, Sri Anant Kumar Tiwari, Sri Gopal Verma and Sri N.C. Gupta, learned counsels for the Union of India.

Introduction:-

2. The writ petitions in this bunch are directed against the orders passed by the Assessing Authority under Section *148*-A(d) of the *Income Tax Act*' 1961 (hereinafter referred as Act' 1961) and the consequential notices issued under Section *148* of the Act' 1961. The dispute pertains to the assessment years 2013-14, 2014-15, 2015-16, 2016-17 and 2017-18. The disputed notices having been issued on or after 01.04.2021, the period concerned is between 01.04.2021 to 30.06.2021.

3. At the outset, learned counsels for the parties had agreed to address the Court on two questions framed and discussed jointly, answer to which would decide the fate of the individual notices under challenge, on factual aspects.

4. We have, therefore, not entered into the merits of the individual notices under challenge and heard the learned counsels for the parties on the following two legal issues:-

(i) Whether the reassessment proceedings initiated with the notice under Section *148* (deemed to be notice under Section *148*-A), issued between 01.04.2021 and 30.06.2021, can be conducted by giving benefit of relaxation/extension under the Taxation and Other Laws (Relaxation & Amendment of Certain Provisions) Act' (TOLA)' 2020 upto 30.03.2021, and then the time limit prescribed in Section *149* (1)(b) (as substituted w.e.f. 01.04.2021) is to be counted by giving such relaxation, benefit of TOLA from 30.03.2020 onwards to the revenue.

(ii) Whether in respect of the proceedings where the first proviso to Section *149*(1)(b) is attracted, benefit of TOLA' 2020 will be available to the revenue, or in other words the relaxation law under TOLA' 2020 would govern the time frame prescribed under the first proviso to Section *149* as inserted by the Finance Act' 2021, in such cases?

5. As noted above, the impugned notices have been issued between 01.04.2021 and 30.06.2021. For the assessment year 2013-14 and 2014-15, it was argued by the learned counsels for the assessees that the assessment for these years cannot be reopened, in as much as, maximum period of six years prescribed in pre-amendment provision of Section *149*(1)(b) had expired on 31.03.2021. No notice under Section *148* could be issued in a case for the assessment year 2013-14 and 2014-15 on or after 01.04.2021 being time barred, on account of being beyond the time limit specified under the provisions of Section *149*(1)(b) as they stood immediately before the commencement of the Finance Act' 2021. For the assessment year 2015-16, 2016-17, 2017-18, the contention is that the monetary threshold and other requirements of the *Income Tax Act* in the post-amendment regime, i.e. after the commencement of the Finance Act' 2021 have to be followed. The validity of

the jurisdictional notice under Section *148* is, thus, to be tested on the touchstone of compliances or fulfillment of requirements by the revenue as per Section *149*(1)(b) and the first proviso to Section *149*(1) inserted by the amendment under the Finance Act' 2021, wef 01.04.2021.

6. Before proceeding further, it may be noticed as a clarification at this stage itself, that there is no dispute about the fact that the notices issued under Section *148* after the amendment brought by the Finance Act' 2021 i.e. on or after 01.04.2021 be treated as notices under Section *148*-A as per the amended provisions. It has also been agreed by the counsel for the parties that the date of issuance of notice under Section *148* of the *Income Tax Act* (as per pre-amended provisions) shall be treated as the date of issuance of notice under Section *148*-A (post amendment) and all notices issued under Section *148* of the *Income Tax Act* after 01.04.2021 shall be treated to be the notices under Section *148*-A of the *Income Tax Act*, inserted by the Finance Act 2021, w.e.f. 01.04.2021. The jurisdictional notice under Section *148* after the amendment brought by the Finance Act 2021 will have to be issued after conclusion of the preliminary enquiry required under Section *148*-A.

Legislative Scheme:-

7. To deal with the above noted issues, at the outset, we are required to note the legislative scheme of Section *148* of reopening of assessment pre and post amendment by the Finance Act 2021. The relevant provisions of TOLA 2020 are also to be noted herein:-

8. The pre-amendment Section *148* is quoted as under:-

148. Before making the assessment, reassessment or re-computation under section 147, and subject to the provisions of section 148A, the Assessing Officer shall serve on the assessee a notice, along with a copy of the order passed if required, under clause (d) of section 148A, requiring him to furnish within such period, as may be specified in such notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other be, apply accordingly as if such return were a return required to be furnished under section 139

Provided that no notice under this section shall be issued unless there is information with the Assessing Officer which suggests that the income charge. able to tax has escaped assessment in the case of the assessee for the relevant assessment year and the Assessing Officer has obtained prior approval of the specified authority to issue such notice.

Explanation 1. For the purposes of this section and section 148A, the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means,-

(i) any information flagged in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time;

(ii) any final objection raised by the Comptroller and Auditor General of India to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act.

Explanation 2.-For the purposes of this section, where,

(i) a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 1324, on or after the 1st day of April, 2021, in the case of the assessee; or

(ii) a survey is conducted under section 133A, other than under sub- section (2A) or sub-section (5) of that section, on or after the 1st day of April, 2021, in the case of the assessee; or

(iii) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner, that any money, bullion, jewellery or other valuable article or thing, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or

(iv) the Assessing Officer is satisfied, with the prior approval of Principal Commissioner or Commissioner, that any books of account or documents, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee, the Assessing Officer shall be deemed to have information which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the three assessment years immediately preceding the assessment year relevant to the previous year in which the search is initiated or books of account, other documents or any assets are requisitioned or survey is conducted in the case of the assessee or money, bullion, jewellery or other valuable article or thing or books of account or documents are seized or requisitioned in case of any other person.

Explanation 3.-For the purposes of this section, specified authority means the specified authority referred to in Section 151.

9. Post Amendment Section *148* is quoted as under:-

"*148*. **Issue of notice where income has escaped assessment.-- Before making the assessment,** reassessment or recomputation under section 147, and subject to the provisions of section *148*A, the Assessing Officer shall serve on the assessee a notice, along with a copy of the order passed, if required, under clause (d) of section *148*A, requiring him to furnish within such period, as may be specified in such notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139:

Provided that no notice under this section shall be issued unless there is information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the relevant assessment year and the Assessing Officer has obtained prior approval of the specified authority to issue such notice.

Explanation 1.-- For the purposes of this section and section *148*A, the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means,--

(i) any information flagged in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time;

(ii) any final objection raised by the Comptroller and Auditor General of India to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act.

Explanation 2.-- For the purposes of this section, where,--

(i) a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A, on or after the 1st day of April, 2021, in the case of the assessee; or

(ii) a survey is conducted under section 133A, other than under sub-section (2A) or sub-section (5) of that section, on or after the 1st day of April, 2021, in the case of the assessee; or

(iii) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner, that any money, bullion, jewellery or other valuable article or thing, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or

(iv) the Assessing Officer is satisfied, with the prior approval of Principal Commissioner or Commissioner, that any books of account or documents, seized or requisitioned under section 132 orsection 132A in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee,

the Assessing Officer shall be deemed to have information which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the three assessment years immediately preceding the assessment year relevant to the previous year in which the search is initiated or books of account, other documents or any assets are requisitioned or survey is conducted in the case of the assessee or money, bullion, jewellery or other valuable article or thing or books of account or documents are seized or requisitioned in case of any other person.

Explanation 3.-- For the purposes of this section, specified authority means the specified authority referred to in section 151."

10. Relevant extract of Section 3(1) of TOLA 2020 is to be noted hereunder:-

3. (1) Where, any time limit has been specified in, or prescribed or notified under, the specified Act which falls during the period from the 20th day of March, 2020 to the 31st day of December, 2020, or such other date after the 31st day of December, 2020, as the Central Government may, by notification, specify in this behalf, for the completion or compliance of such action as--

(a) completion of any proceeding or passing of any order or issuance of any notice, intimation, notification, sanction or approval, or such other action, by whatever name called, by any authority, commission or tribunal, by whatever name called, under the provisions of the specified Act; or

(b) filing of any appeal, reply or application or furnishing of any report, document, return or statement or such other record, by whatever name called, under the provisions of the specified Act; or

(c) in case where the specified Act is the Income-tax Act, 1961,--

(i) making of investment, deposit, payment, acquisition, purchase, construction or such other action, by whatever name called, for the purposes of claiming any deduction, exemption or allowance under the provisions contained in--

(I) sections 54 to 54GB, or under any provisions of Chapter VI-A under the heading "B.-Deductions in respect of certain payments" thereof; or

(II) such other provisions of that Act, subject to fulfillment of such conditions, as the Central Government may, by notification, specify; or

(ii) beginning of manufacture or production of articles or things or providing any services referred to in section 10AA of that Act, in a case where the letter of approval, required to be issued in accordance with the provisions of the Special Economic Zones Act, 2005, has been issued on or before the 31st day of March, 2020, and where completion or compliance of such action has not been made within such time, then, the time limit for completion or compliance of such action shall, notwithstanding anything contained in the specified Act, stand extended to the 31st day of March, 2021, or such other date after the 31st day of March, 2021, as the Central Government may, by notification, specify in this behalf:

Provided that the Central Government may specify different dates for completion or compliance of different actions:

11. The relevant notifications issued by Central Government dated 31.03.2021 and 27.04.2021 are quoted hereunder:-

MINISTRY OF FINANCE
(Department of Revenue)

(CENTRAL BOARD OF DIRECT TAXES)
NOTIFICATION
New Delhi, the 31st March, 2021

"S.O. 1432(E).--In exercise of the powers conferred by sub-section (1) of section 3 of the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (38 of 2020) (hereinafter referred to as the said Act), and in partial modification of the notification of the Government of India in the Ministry of Finance, (Department of Revenue) No.93/2020 dated the 31st December, 2020, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii), vide number S.O. 4805(E), dated the 31st December, 2020, the Central Government hereby specifies that-

(A) where the specified Act is the Income-tax Act, 1961 (43 of 1961) (hereinafter referred to as the Income-tax Act) and, --

(a) the completion of any action referred to in clause (a) of sub-section (1) of section 3 of the Act relates to passing of an order under sub-section (13) of section 144C or issuance of notice under section *148* as per time-limit specified in section *149* or sanction under *section 151* of the Income-tax Act, --

(i) the 31 day of March, 2021 shall be the end date of the period during which the time- limit, specified in, or prescribed or notified under, the Income-tax Act falls for the completion of such action; and

(ii) the 30th day of April, 2021 shall be the end date to which the time-limit for the completion of such action shall stand extended..

Explanation.- For the removal of doubts, it is hereby clarified that for the purposes of issuance of notice under

section *148* as per time-limit specified in section *149* or sanction under *section 151* of the Income-tax Act, under this sub-clause, the provisions of section *148*, section *149* and section -*151* of the Income-tax Act, as the case may be, as they stood as on the 31st day of March 2021, before the commencement of the *Finance Act*, 2021, shall apply.

(b) the compliance of any action referred to in clause (b) of sub-section (1) of section 3 of the said Act relates to intimation of Aadhaar number to the prescribed authority under sub-section (2) of section 139AA of the Income-tax Act, the time-limit for compliance of such action shall stand extended to the 30th day of June, 2021.

(B) where the specified Act is the Chapter VIII of the *Finance Act*, 2016 (28 of 2016) (hereinafter referred to as the Finance Act) and the completion of any action referred to in clause (a) of sub-section (1) of section 3 of the said Act relates to sending an intimation under sub-section (1) of section 168 of the Finance Act.

(1) the 31 day of March, 2021 shall be the end date of the period during which the time- limit, specified in, or prescribed or notified under, the Finance Act falls for the completion of such action; and

(ii) the 30th day of April, 2021 shall be the end date to which the time-limit for the completion of such action shall stand extended.

[Notification No. 20/2021/F. No. 370142/35/2020-TPL]

SHEFALI SINGH, Under Secy., Tax Policy and Legislation Division

Note: The principal notification was published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii) vide S.O. No. 4805 dated 31" December, 2020."

.....

"MINISTRY OF FINANCE

(Department of Revenue)

(CENTRAL BOARD OF DIRECT TAXES)

NOTIFICATION

New Delhi, the 27th April, 2021

S.O. 1703(E).- In exercise of the powers conferred by sub-section (1) of section 3 of the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (38 of 2020) (hereinafter referred to as the said Act), and in partial modification of the notifications of the Government of India in the Ministry of Finance, (Department of Revenue) No. 93/2020 dated the 31" December, 2020, No. 10/2021 dated the 27th February, 2021 and No. 20/2021 dated the 31 March, 2021, published in the Gazette of India, Extraordinary, Part-II, Section 3, Sub-section (ii), vide number S.O. 4805(E), dated the 31" December, 2020, vide number S.O. 966(E) dated the 27thFebruary, 2021 and vide number S.O. 1432(E) dated the 31" March, 2021, respectively (hereinafter referred to as the said notifications), the Central Government hereby specifies for the purpose of sub-section (1) of section 3 of the said Act that,

(A) where the specified Act is the Income-tax Act, 1961 (43 of 1961) (hereinafter referred to as the Income-tax Act) and

(a) the completion of any action, referred to in clause (a) of sub-section (1) of section 3 of the said Act, relates to passing of any order for assessment or reassessment under the Income-tax Act, and the time limit for completion of such action under section 153 or section 153B thereof, expires on the 30th day of April, 2021 due to its extension by the said

notifications, such time limit shall further stand extended to the 30th day of June, 2021;

(b) the completion of any action, referred to in clause (a) of sub-section (1) of section 3 of the said Act, relates to passing of an order under sub-section (13) of section 144C of the Income-tax Act or issuance of notice under section *148* as per time-limit specified in section *149* or sanction under *section 151* of the Income-tax Act, and the time limit for completion of such action expires on the 30th day of April, 2021 due to its extension by the said notifications, such time limit shall further stand extended to the 30th day of June, 2021.

Explanation. For the removal of doubts, it is hereby clarified that for the purposes of issuance of notice under section *148* as per time-limit specified in section *149* or sanction under *section 151* of the Income-tax Act, under this sub-clause, the provisions of section *148*, section *149* and *section 151* of the Income-tax Act, as the case may be, as they stood as on the 31" day of March 2021, before the commencement of the *Finance Act*, 2021, shall apply.

(B) where the specified Act is the Chapter VIII of the *Finance Act*, 2016 (28 of 2016) (hereinafter referred to as the Finance Act) and the completion of any action, referred to in clause (a) of sub-section (1) of section 3 of the said Act, relates to sending an intimation under sub-section (1) of section 168 of the *Finance Act*, and the time limit for completion of such action expires on the 30th day of April, 2021 due to its extension by the said notifications, such time limit shall further stand extended to the 30th day of June, 2021.

[Notification No. 38 /2021/ F. No. 370142/35/2020-TPL]

RAJESH KUMAR BHOOT, Jt. Secy. Tax Policy & Legislation Division

Note: The principal notification was published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii) vide S.O. No. 4805 dated 31st December, 2020"

12. These petitions are offshoot of the decision of the Coordinate Bench of this High Court in Writ Tax No.524 of 2021 **Ashok Kumar Agarwal Vs. Union of India1**, affirmed by the Apex Court in the judgement and order dated 04.05.2022 in Civil Appeal No.3005 to 3017, 3019-3020 of 2022 **Union of India Vs. Ashish Agarwal2**.

13. Before proceeding further, we are, thus, require to note the history of litigation *inter-se* parties.

History of Litigation:-

(i) Coordinate Bench Decision in Ashish Agarwal (supra)

14. Upon enforcement of the Finance Act' 2021, the pre-existing *Sections 147* to *151* had been repealed and replaced by new provisions, bringing changes in the entire statutory scheme of initiating, enquiring, conducting and concluding the reassessment proceedings. The validity of the reassessment proceeding initiated against individual assessees, after 01.04.2021, came up for consideration before this Court in **Ashok Kumar Agarwal (Supra)**. The provisions of the *Income Tax Act*' 1961, as they existed prior to the amendment by Finance Act' 2021, read with the provisions of TOLA/Relaxation Act No.38 of 2020 were applied in the reassessment proceedings initiated against the assessees while issuing notices under Section *148* of the *Income*

Tax Act on or after 01.04.2021. The challenge to the notices therein was made on the ground that the pre-existing *Sections 147* to *151* of the Act' 1961 stood repealed and replaced by the Finance Act 2021 and upon enforcement of the amendment, the entire statutory scheme of conducting reassessment proceedings underwent a sea change. With the substitution of old provisions, pre-existing provisions pertaining to reassessment under the Act could not be applied to conduct the proceedings after enforcement of the Finance Act' 2021.

15. The Relaxation Act/Enabling Act/TOLA, 2020 was enacted in March 2020 on account of unforeseen circumstances faced by the country due to onset of the pandemic Covid 19 which has led to enforcement of intermittent lock downs. Normal functioning of the government and its institutions had been put to halt. Because of the obstructions due to spread of the Pandemic Covid-19, the Enabling Act' 2020 was enacted solely to extend the limitation under the provisions of the IT Act' 1961.

16. It was argued therein that the Finance Act 2021, which is a latter Act does not contain any saving clause as may allow the pre-existing provisions an extended life. After the enforcement of the amendment, the pre-existing provisions, thus, could not be pressed into service by the revenue. The Enabling Act does not and could not save the pre-existing *Sections 147*, *148* to *151* of the IT Act, pertaining to reassessment nor overriding effect can arise or be given to the pre-existing reassessment legislative regime by the Enabling Act, since on the date of enactment of the Enabling Act, the Finance Act 2021 was not born. In absence of any saving clause in the Finance Act' 2021, there exists no power either under Section 3(1) of the Enabling Act or any other law as may validate the issuance of the impugned notification by the Central Government to apply pre-existing provisions in the reassessment proceeding initiated on or after 01.04.2021. The Enabling Act, therefore, became wholly unenforceable or unacceptable to the proceedings that would arise under the latter Act, i.e. the substituted provisions of Section 147 to *151* of the *Income Tax Act*' 1961, upon enactment of the Finance Act' 2021 on or after 01.04.2021.

17. The submissions advanced by the learned counsel for the petitioners therein to challenge the validity of the notice under Section *148* of the Act' 1961 after 01.04.2021, have been extracted pointwise in paragraph No.'63' as under:-

"(i) By substituting the provisions of the Act by means of the Finance Act, 2021 with effect from 01.04.2021, the old provisions were omitted from the statute book and replaced by fresh provisions with effect from 01.04.2021. Relying on the principle - substitution omits and thus obliterates the pre-existing provision, it has been further submitted, in absence of any saving clause shown to exist either under the Ordinance or the Enabling Act or the Finance Act 2021, there exists no presumption in favour of the old provision continuing to operate for any purpose, beyond 31.03.2021.

(ii) The Act is a dynamic enactment that sustains through enactment of the Finance Act every year. Therefore, on 1st April every year, it is the Act as amended by the Finance Act, for that year which is applied. In the present case, it is the Act as amended by the Finance Act

2021, that confronted the Enabling Act as was pre-existing. In absence of any legislative intent expressed either under the Finance Act, 2021 or under the Enabling Act, to preserve any part of the pre-existing Act, plainly, reference to provisions of Sections 147 and 148 of the Act and the words 'assessment' and 'reassessment' appearing in the Notifications issued under the Enabling Act may be read to be indicating only at proceedings already commenced prior to 01.04.2021, under the Act (before amendment by the Finance Act, 2021). The delegated action performed under the Enabling Act cannot, itself create an overriding effect in favour of the Enabling Act.

(iii) The Enabling Act read with its Notifications does not validate the initiation of any proceeding that may otherwise be incompetent under the law. That law only affects the time limitation to conduct or conclude any proceeding that may have been or may be validly instituted under the Act, whether prior to or after its amendment by Finance Act, 2021. Insofar as, Section 1(2)(a) unequivocally enforced Sections 2 to 88 of the Finance Act, 2021, w.e.f. 01.04.2021, there can be no dispute if any valid proceeding could be initiated under the pre-existing Section 148 read with Section 147, after 01.04.2021. In support thereof other submission also appear to exist - based upon the enactment of Section 148A (w.e.f. 01.04.2021).

(iv) The delegation made could be exercised within the four corners of the principal legislation and not to overreach it. Insofar as the Enabling Act does not delegate any power to legislate - with respect to enforceability of any provision of the Finance Act, 2021 and those provisions (Sections 2 to 88) had come into force, on their own, on 01.04.2021, any exercise of the delegate under the Enabling Act, to defeat the plain enforcement of that law would be wholly unconstitutional.

(v) It also appears to be the submission of learned counsel for the petitioners that the Parliament being aware of all realities, both as to the fact situation and the laws that were existing, it had consciously enacted the Enabling Act, to extend certain time limitations and to enforce only a partial change to the reassessment procedure, by enacting section 151-A to the Act. It then enacted the Finance Act, 2021 to change the substantive and procedural law governing the reassessment proceedings. That having been done, together with introduction of section 148-A to the Act, legislative field stood occupied, leaving the delegate with no room to manipulate the law except as to the time lines with respect to proceedings that may have been initiated under the Act (both prior to and after enforcement of the Finance Act, 2021). To bolster their submission, learned counsel for the petitioners also rely on the principle - the delegated legislation can never defeat the principal legislation.

(vi) Last, it has also been asserted, the non-obstante clause created under section 3(1) of the Enabling Act must be read in the context and for the purpose or intent for which it is created. It cannot be given a wider meaning or application as may defeat the other laws."

18. On the effect of amendment brought by the Finance Act 2021, it was observed therein that undeniably on 01.04.2021 by virtue of plain/unexcepted effect of Section 1(2)(a) of the Finance Act' 2021, the provisions of *Sections 147*, *148*, *149*, *151* (as they existed upto 31.03.2021), stood substituted and a new provision by way of Section *148*-A was inserted. In absence of any saving clause, to save the

pre-existing (and now substituted) provisions, the revenue authority could only initiate reassessment proceeding on or after 01.04.2021, in accordance with the substituted law and not the pre-existing laws. It was noted that the Enabling provisions, that was pre-existing, is an enactment to extend timelines only. In absence of any express provisions in the latter statute the Finance Act' 2021, to save applicability of the provisions of Section 147 to 151, as they existed upto 31.03.2021, all references to issuance of notice contained in the Enabling Act must be read as reference to the substituted provisions only, from 01.04.2021 onwards. However, there is no difficulty in applying the pre-existing provisions to pending proceeding.

19. The submission of the revenue that the provision of Section 3(1) of the Enabling Act gave overriding effect to that Act and, therefore, saved the provisions as existed under the unamended law has been turned down with the finding that the saving could arise only if jurisdiction had been validly assumed before 01.04.2021. It was observed that reassessment proceeding can be said to be pending before the Assessing Authority only upon jurisdiction being validly assumed by the Assessing Authority. All reassessment notices issued on or after 01.04.2021 cannot be dealt with by applying the pre-existing provisions, as applicable to pending proceedings. No time extension could be given under Section 3(1) of the Enabling Act, read with the Notifications issued thereunder.

20. It was held that the Section 3(1) of the Enabling Act only speaks of saving or protecting certain proceedings from being hit by the rule of limitation. The Enabling Act and the notifications issued thereunder only protected certain proceedings that may have become time barred on 20.03.2020, upto the date 30.06.2021 or till 31.03.2022, in accordance with the Notification No.3814 dated 17.09.2021 issued under Section 3(1) of the Enabling Act. But to allow the Central Government to extend such limitation by virtue of the notifications after 31.03.2021 indefinitely, would be to allow the validity of an enacted law i.e. Finance Act' 2021 to be defeated by a purely colourable exercise of power, by the delegates of the Parliament (Central Government). Hence, no extension could be made under Section 3(1) of the Enabling Act read with the notifications thereunder.

21. It was, thus, concluded in paragraph Nos.72, 73, 75, 76, 79 and 80 by this Court as under:-

72. Reference to reassessment proceedings with respect to pre-existing and now substituted provisions of Sections 147 and 148 of the Act has been introduced only by the later Notifications issued under the Act. Therefore, the validity of those provisions is also required to be examined. We have concluded as above, that the provisions of Sections 147, 148, 148A, 149, 150 and 151 substituted the old/pre-existing provisions of the Act w.e.f. 01.04.2021. We have further concluded, in absence of any proceeding of reassessment having been initiated prior to the date 01.04.2021, it is the amended law alone that would apply. We do not see how the delegate i.e. Central Government or the CBDT could have issued the Notifications, plainly to over reach the principal legislation. Unless harmonized as above, those Notifications would remain invalid.

73. Unless specifically enabled under any law and unless that burden had been discharged by the respondents, we are

unable to accept the further submission advanced by the learned Additional Solicitor General of India that practicality dictates that the reassessment proceedings be protected. Practicality, if any, may lead to legislation. Once the matter reaches Court, it is the legislation and its language, and the interpretation offered to that language as may primarily be decisive to govern the outcome of the proceeding. To read practicality into enacted law is dangerous. Also, it would involve legislation by the Court, an idea and exercise we carefully tread away from.

75. As we see there is no conflict in the application and enforcement of the Enabling Act and the Finance Act, 2021. Juxtaposed, if the Finance Act, 2021 had not made the substitution to the reassessment procedure, the revenue authorities would have been within their rights to claim extension of time, under the Enabling Act. However, upon that sweeping amendment made the Parliament, by necessary implication or implied force, it limited the applicability of the Enabling Act and the power to grant time extensions thereunder, to only such reassessment proceedings as had been initiated till 31.03.2021. Consequently, the impugned Notifications have no applicability to the reassessment proceedings initiated from 01.04.2021 onwards.

76. Upon the Finance Act 2021 enforced w.e.f. 1.4.2021 without any saving of the provisions substituted, there is no room to reach a conclusion as to conflict of laws. It was for the assessing authority to act according to the law as existed on and after 1.4.2021. If the rule of limitation permitted, it could initiate, reassessment proceedings in accordance with the new law, after making adequate compliance of the same. That not done, the reassessment proceedings initiated against the petitioners are without jurisdiction.

79. As to the decision of the Chhattisgarh High Court, with all respect, we are unable to persuade ourselves to that view. According to us, it would be incorrect to look at the delegation legislation i.e. Notification dated 31.03.2021 issued under the Enabling Act, to interpret the principal legislation made by Parliament, being the Finance Act, 2021. A delegated legislation can never overreach any Act of the principal legislature. Second, it would be over simplistic to ignore the provisions of, either the Enabling Act or the Finance Act, 2021 and to read and interpret the provisions of Finance Act, 2021 as inoperative in view of the fact circumstances arising from the spread of the pandemic COVID-19. Practicality of life de hors statutory provisions, may never be a good guiding principle to interpret any taxation law. In absence of any specific clause in Finance Act, 2021, either to save the provisions of the Enabling Act or the Notifications issued thereunder, by no interpretative process can those Notifications be given an extended run of life, beyond 31 March 2020. They may also not infuse any life into a provision that stood obliterated from the statute with effect from 31.03.2021. Inasmuch as the Finance Act, 2021 does not enable the Central Government to issue any notification to reactivate the pre-existing law (which that principal legislature had substituted), the exercise made by the delegate/Central Government would be de hors any statutory basis. In absence of any express saving of the pre-existing laws, the presumption drawn in favour of that saving, is plainly impermissible. Also, no presumption exists that by Notification issued under the Enabling Act, the operation of the pre-existing provision of

the Act had been extended and thereby provisions of Section 148A of the Act (introduced by Finance Act 2021) and other provisions had been deferred. Such Notifications did not insulate or save, the pre-existing provisions pertaining to reassessment under the Act.

80. In view of the above, all the writ petitions must succeed and are allowed. It is declared that the Ordinance, the Enabling Act and Sections 2 to 88 of the Finance Act 2021, as enforced w.e.f. 01.04.2021, are not conflicted. Insofar as the Explanation appended to Clause A(a), A(b), and the impugned Notifications dated 31.03.2021 and 27.04.2021 (respectively) are concerned, we declare that the said Explanations must be read, as applicable to reassessment proceedings as may have been in existence on 31.03.2021 i.e. before the substitution of Sections 147, 148, 148A, 149, 151 & 151A of the Act. Consequently, the reassessment notices in all the writ petitions are quashed. It is left open to the respective assessing authorities to initiate reassessment proceedings in accordance with the provisions of the Act as amended by Finance Act, 2021, after making all compliances, as required by law.

22. By applying the rule of harmonious construction of Statutes, it was held therein that the Explanation appended to Clauses A(a), A(b) of the impugned notifications dated 31.03.2021 and 27.04.2021; respectively, issued under Section 3(1) of the Enabling Act, must be read as applicable to reassessment proceedings as may have been in existence on 31.03.2021, i.e. before the substitution of *Sections 147* to 151A of the I.T. Act' 1961. The reassessment notices issued on or after 01.04.2021 under the pre-existing provisions by applying extension of time with the help of the Enabling Act (TOLA 2020) were quashed leaving it open to the respective Assessing Authorities to initiate assessment proceedings in accordance with the provisions of the Act' 1961 as amended by the Finance Act' 2021 after making all compliances, as required by law.

(ii) **The Apex Court decision:-**

23. The order passed by this Court in Writ Tax No.524 of 2021 connected with other writ petitions was challenged by the revenue before the Apex Court. The Apex Court had taken note of the fact that similar decisions and orders had been passed by various High Courts quashing the reassessment notices issued by the revenue under Section *148* of the Act' 1961, in view of the amendment by the Finance Act' 2021, and that approximately 90,000/- such reassessment notices were issued by the revenue under Section *148* of the unamended *Income Tax Act*' 1961 after 01.04.2021. It was held therein that the order passed in the said appeal, arising out of the common judgement and order passed by this High Court shall govern all other judgements and orders passed by various High Court on the similar issue. The revenue need not to file separate individual appeals which may be more than 90,000/- in number.

24. On the merits of the challenge, the Apex Court had taken note of pre and post amendment regime of *Sections 147* to *151* of the *Income Tax Act* and also the Enabling Act/TOLA 2020. It was observed in paragraph Nos. '6, 6.1 to 6.6' of the judgement as under:-

"6. It cannot be disputed that by substitution of sections 147 to 151 of the Income Tax Act (IT Act) by the Finance Act, 2021, radical and reformative changes are

made governing the procedure for reassessment proceedings. Amended sections 147 to 149 and section 151 of the IT Act prescribe the procedure governing initiation of reassessment proceedings. However, for several reasons, the same gave rise to numerous litigations and the reopening were challenged inter alia, on the grounds such as (1) no valid "reason to believe" (2) no tangible/reliable material/information in possession of the assessing officer leading to formation of belief that income has escaped assessment, (3) no enquiry being conducted by the assessing officer prior to the issuance of notice; and reopening is based on change of opinion of the assessing officer and (4) lastly the mandatory procedure laid down by this Court in the case of GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and ors; (2003) 1 SCC 72, has not been followed.

6.1 Further pre-Finance Act, 2021, the reopening was permissible for a maximum period up to six years and in some cases beyond even six years leading to uncertainty for a considerable time. Therefore, Parliament thought it fit to amend the Income Tax Act to simplify the tax administration, ease compliances and reduce litigation. Therefore, with a view to achieve the said object, by the Finance Act, 2021, sections 147 to 149 and section 151 have been substituted.

6.2 Under the substituted provisions of the IT Act vide Finance Act, 2021, no notice under section 148 of the IT Act can be issued without following the procedure prescribed under section 148A of the IT Act. Along with the notice under section 148 of the IT Act, the assessing officer (AO) is required to serve the order passed under section 148A of the IT Act. section 148A of the IT Act is a new provision which is in the nature of a condition precedent. Introduction of section 148A of the IT Act can thus be said to be a game changer with an aim to achieve the ultimate object of simplifying the tax administration, ease compliance and reduce litigation.

6.3 But prior to preFinance Act, 2021, while reopening an assessment, the procedure of giving the reasons for reopening and an opportunity to the assessee and the decision of the objectives were required to be followed as per the judgment of this Court in the case of GKN Driveshafts (India) Ltd. (supra).

6.4 However, by way of section 148A, the procedure has now been streamlined and simplified. It provides that before issuing any notice under section 148, the assessing officer shall (i) conduct any enquiry, if required, with the approval of specified authority, with respect to the information which suggests that the income chargeable to tax has escaped assessment; (ii) provide an opportunity of being heard to the assessee, with the prior approval of specified authority; (iii) consider the reply of the assessee furnished, if any, in response to the showcause notice referred to in clause (b); and (iv) decide, on the basis of material available on record including reply of the assessee, as to whether or not it is a fit case to issue a notice under section 148 of the IT Act and (v) the AO is required to pass a specific order within the time stipulated.

6.5 Therefore, all safeguards are provided before notice under section 148 of the IT Act is issued. At every stage, the prior approval of the specified authority is required, even for conducting the enquiry as per section 148A(a). Only in a case where, the assessing officer is of the opinion that before any notice is issued under section 148A(b) and an opportunity is to be given to the assessee, there is a

requirement of conducting any enquiry, the assessing officer may do so and conduct any enquiry. Thus if the assessing officer is of the opinion that any enquiry is required, the assessing officer can do so, however, with the prior approval of the specified authority, with respect to the information which suggests that the income chargeable to tax has escaped assessment.

6.6 Substituted section 149 is the provision governing the time limit for issuance of notice under section 148 of the IT Act. The substituted section 149 of the IT Act has reduced the permissible time limit for issuance of such a notice to three years and only in exceptional cases ten years. It also provides further additional safeguards which were absent under the earlier regime pre Finance Act, 2021."

25. It was held that the revenue ought not to have issued notices under Section *148* after the amendment was enforced, w.e.f 01.04.2021 under the unamended Act and the notices ought to have been issued under the substituted proceedings of Section 147 to *151* of the *Income Tax Act* as per the Finance Act 2021. However, in order to strike a balance, noticing that the judgements of the High Courts would result in no reassessment proceeding at all, even if the same are permissible under the **Finance** Act' 2021 as per substituted *Sections 147* to *151* of the *Income Tax Act*, it was directed that the notices issued under the unamended act/provisions of the *Income Tax Act* shall be deemed to have been issued under Section *148*A of the I.T. Act as per the substituted provisions. The act of the revenue in issuing notices under the unamended Section *148* of the *Income Tax Act* after 01.04.2021 was considered to be a bonafide mistake in view of the subsequent extension of time vide notifications issued by the Central Government. The judgement and order dated 30.09.2021 passed by this Court was, thus, modified and substituted as under:-

26. It was, thus, observed in paragraph '9' and '10' by the Apex Court as under:-

9. ***There is a broad consensus on the aforesaid aspects amongst the learned ASG appearing on behalf of the Revenue and the learned Senior Advocates/learned counsel appearing on behalf of the respective assessees.***

We are also of the opinion that if the aforesaid order is passed, it will strike a balance between the rights of the Revenue as well as the respective assesses as because of a bonafide belief of the officers of the Revenue in issuing approximately 90000 such notices, the Revenue may not suffer as ultimately it is the public exchequer which would suffer.....

.....

10. In view of the above and for the reasons stated above, the present Appeals are ALLOWED IN PART. The impugned common judgments and orders passed by the High Court of Judicature at Allahabad in W.T. No. 524/2021 and other allied tax appeals/petitions, is/are hereby modified and substituted as under:

(i) The impugned section 148 notices issued to the respective assessees which were issued under unamended section 148 of the IT Act, which were the subject matter of writ petitions before the various respective High Courts shall be deemed to have been issued under section 148A of the IT Act as substituted by the Finance Act, 2021 and construed or treated to be showcause notices in terms of section 148A(b). The assessing officer shall, within thirty days from today provide to the respective assessees information and

material relied upon by the Revenue, so that the assesees can reply to the show-cause notices within two weeks thereafter;

(ii) The requirement of conducting any enquiry, if required, with the prior approval of specified authority under section 148A(a) is hereby dispensed with as a onetime measure visàvis those notices which have been issued under section 148 of the unamended Act from 01.04.2021 till date, including those which have been quashed by the High Courts. Even otherwise as observed hereinabove holding any enquiry with the prior approval of specified authority is not mandatory but it is for the concerned Assessing Officers to hold any enquiry, if required;

(iii) The assessing officers shall thereafter pass orders in terms of section 148A(d) in respect of each of the concerned assessees; Thereafter after following the procedure as required under section 148A may issue notice under section 148 (as substituted);

(iv) All defences which may be available to the assesses including those available under section 149 of the IT Act and all rights and contentions which may be available to the concerned assessees and Revenue under the Finance Act, 2021 and in law shall continue to be available

27. While exercising the power under Article 142 of the Constitution of India, it was directed by the Apex Court that the above directions shall be applicable PAN INDIA and would govern all such orders passed by different High Courts on the issue where similar notices under Section 148 of the Act issued after 01.04.2021, were quashed. It was observed that the directions issued therein shall govern all the pending matters before various High Courts wherein similar notices were under challenge. It was, thus, concluded in paragraph No.'12' as under:-

"12. The impugned common judgments and orders passed by the High Court of Allahabad and the similar judgments and orders passed by various High Courts, more particularly, the respective judgments and orders passed by the various High Courts particulars of which are mentioned hereinabove, shall stand modified/substituted to the aforesaid extent only."

The CBDT Instructions:-

28. It has been placed before us that Instructions regarding implementation of the judgement of the Apex Court dated 04.05.2022 (Union of India Vs. Ashish Agarwal) (supra), was issued in exercise of the power under Section 119 of the I.T. Act' 1961 by the Central Board of Direct Taxes, namely Instruction No. 1/2022 dated 11.05.2022 issued by the DCIT (OSD), ITJ-1. The Instructions purported to have been issued for implementation of the judgement of the Apex Court provided that the decision of the Apex Court would apply to all such cases where "extended reassessment notices" have been issued, irrespective of the fact whether such notices have been challenged or not.

29. In the opening paragraph of the said Instruction, it is noted that the reassessment notices issued by the Assessing Officers during the period beginning on 01.04.2021 and ending with 30.06.2021, within the time extended by TOLA 2020 and various notification issued thereunder, shall be referred as "extended reassessment notices". It was then directed in paragraph '6' of the Instruction that the operation of the new Section 149 of the Act

where fresh notices under Section *148* of the Act can be issued, may be seen as under:-

"6. Operation of the new section 149 of the Act to identify cases where fresh notice under section 148 of the Act can be issued.

6.1 With respect of operation of new section 149 of the Act, the following may be seen:

Hon'ble Supreme Court has held that the new law shall operate and ***all the defences available to assessees under section 149 of the new law and whatever rights are available to the Assessing Officer under the new law shall continue to be available.***

Sub-section (I) of new section 149 of the Act as amended by the Finance Act, 2021 (before its amendment by the Finance Act, 2022) reads as under:-

149. (1) No notice under section 148 shall be issued for the relevant assessment year,--

(a) if three years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b):

(b) if three years, but not more than ten years, have elapsed from the end of the relevant assessment year unless the Assessing 0fficer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more for that year:

Provided that no notice under section 148 shall be issued at any time in a case for the relevant assessment year beginning on or before 1st day of April, 2021, if such notice could not have been issued at that time on account of being beyond the time limit specified under the provisions of clause (12) of sub-section (1) of this section, as they stood immediately before the commencement of the Finance Act, 2021:

Hon'ble Supreme Court has upheld the views of High Courts that the benefit of new law shall be made available even in respect of proceedings relating to past assessment years. Decision of Hon'ble Supreme Court read with the time extension provided by TOLA will allow extended reassessment notices to travel back in time to their original date when such notices were to be issued and then new section 149 of the Act is to be applied at that point.

6.2 Based on above, the extended reassessment notices are to be dealt with as under:

(i) AY 2013-14, AY 2014-15 and AY 2015-16: Fresh notice under section 148 of the Act can be issued in these cases, with the approval of the specified authority, only if the case falls under clause (b) of sub-section (1) of section 149 as amended by the Finance Act, 2021 and reproduced in paragraph 6.1 above. Specified authority under section 151 of the new law in this case shall be the authority prescribed under clause (ii) of that section.

(ii) AY 16-17, AY 17-18: Fresh notice under section 148 can be issued in these cases, with the approval of the specified authority, under clause (a) of sub-section (1) of new section 149 of the Act, since they are within the period of three years from the end of the relevant assessment year. Specified authority under section 151 of the new law in this case shall be the authority prescribed under clause (i) of that section."

30. In cases where the Assessing Officer is required to provide an information and material relied upon, it was directed in clause 7.1 therein as under:-

"7.1 Hon'ble Supreme Court has directed that information and material is required to be provided in all cases within 30 days. However, it has also been noticed that notices cannot be issued in a case for AY 2013-14, AY 2014-15 and AY 2015-16, if the income escaping assessment, in that case for that year, amounts to or is likely to amount to less than fifty lakh rupees. Hence, in order to reduce the compliance burden of assessees, it is clarified that information and material may not be provided in a case for AY 2013-14, AY 2014-15 and AY 2015-16, if the income escaping assessment, in that case for that year, amounts to or is likely to amount to less than fifty lakh rupees. Separate instruction shall be issued regarding procedure for disposing these cases."

31. The procedure required to be followed by the Assessing Officer in compliance of the order of the Apex Court provided therein as under:-

"The extended reassessment notices are deemed to be show cause notices under clause (b) of 148A of the Act in accordance with the judgment of Flon'ble Supreme Court. Therefore, all requirement of new law prior to that show cause notice shall be deemed to have been complied with.

The Assessing Officer shall exclude cases as per clarification in paragraph 7.1 above. Within 30 days i.e. by 2nd June 2022, the Assessing Officer shall provide to the assessees, in remaining cases, the information and material relied upon for issuance of extended reassessment notices.

The assessee has two weeks to reply as to why a notice under section 148 of the Act should not be issued, on the basis of information which suggests that income chargeable to tax has escaped assessment in his case for the relevant assessment year. The time period of two weeks shall be counted from the date of last communication of information and material by the Assessing Officer to the assessee.

In view of the observation of Hon'ble Supreme Court that all the defences of the new law are available to the assessee, if assessee makes a request by making an application that more time be given to him to file reply to the show cause notice, then such a request shall be considered by the Assessing Officer on merit and time may be extended by the Assessing Officer as provided in clause (b) of new section 148A of the Act.

After receiving the reply, the Assessing Officer shall decide on the basis of material available on record including reply of the assessee, whether or not it is a fit case to issue a notice under section 148 of the Act. The Assessing Officer is required to pass an order under clause (d) of section 148A of the Act to that effect, with the prior approval of the specified authority of the new law. This order is required to be passed within one month from the end of the month in which the reply is received by him from the assessee. In case no such reply is furnished by the assessee, then the order is required to be passed within one month from the end of the month in which time or extended time allowed to furnish a reply expires.

If it is a fit case to issue a notice under section 148 of the Act, the Assessing Officer shall serve on the assessee a notice under section 148 after obtaining the approval of the specified authority under section 151 of the new law. The copy of the order passed under clause (d) of section 148A of the Act shall also be served with the notice u/s 148.

If it is not a fit case to issue a notice under section 148 of the Act, the order passed under clause (d) of section 148A to that effect shall be served on the assessee."

32. Before proceeding further, we may record that in some of the writ petitions, the challenge to the offending clauses of the Instruction dated 11.05.2022 issued by CBDT, in exercise of its power under Section 119 of the Act, has been raised on the ground that the same is in direct conflict/contravention of the observations and directions issued by the Apex Court in the case of **Ashish Agarwal (supra)**.

Arguments of the counsels on behalf of the petitioners:-

33. The arguments of all the learned counsels for the petitioners are being noted, collectively, hereunder:-

(I) After the amendment brought by the Finance Act' 2021, new/amended provisions will apply to reassessment proceedings.

(ii) Enabling Act (TOLA 2020) will not extend the time limit provided for initiation of reassessment proceedings under the unamended *Sections 147* to *151* of the I.T. Act from 01.04.2021 onwards.

(iii) The result is that the revenue has to comply with all the requirements of the substituted/amended provisions of *Sections 147* to 151A in the reassessment proceedings, initiated on or after 01.04.2021. All compliances under the amended provisions will have to be made by the revenue.

(iv) Simultaneously, all defences under the substituted/amended provisions will be available to the assessee.

(v) About the impact of the Enabling Act (TOLA 2020) on the amendment by the Finance Act' 2021, it was argued that no time extension under Section 3(1) of the Enabling Act (TOLA 2020) can be granted in the time limit provided under the substituted unamended provisions. The contention is that Section 3(1) of TOLA 2020 saved only the reassessment proceeding as they existed under the unamended law.

(vi) The scheme of assessment underwent a substantial change with the enforcement of the Finance Act' 2021. The general provisions of the Enabling Act (TOLA 2020) cannot vary the requirements of the Finance Act' 2021, which is a special provision as the special overrides general.

(vii) It was argued that reassessment notice under Section *148* can be issued only upon the jurisdiction being validly assumed by the assessing authority, for which the compliances of substituted provisions of Sections *149* to 151A have to be made by the revenue.

(viii) New/amended provisions are beneficial in nature for the assessee and provide certain pre-requisite conditions/monitory threshold etc. to be adhered to by the revenue to issue jurisdictional notice under Section *148*. The revenue has to meet higher threshold to discharge a positive burden because of the substantive changes made in the new regime.

(ix) The pre-requisite conditions to issue notice under Section *148* in the pre and post amendment regime have been placed before us to demonstrate that for the reassessment notice after elapse of the period of three years but before 10 years from the end of the relevant assessment year, notice under Section *148* cannot be issued unless the Assessing Officer has in his possession books of accounts or other

documents or evidence which reveal that the income chargeable to tax, represented in the form of assets, which has escaped assessment, amount to or is likely to amount to Rs.50 lacs rupees or more for that year.

(x) It was submitted that the monetary threshold for opening of assessment after elapse of three years for the period upto ten years has, thus, been put in place.

(xi) Further, first proviso to sub-section (1) of Section *149* has been placed to assert that the cases wherein notices were not issued within the period of six years as per clause (b) of sub-section (1) of Section *149* under the unamended provision, reassessment notices cannot be issued on or after 01.04.2021 after the commencement of the Finance Act 2021, as such cases have become time barred.

(xii) It was argued that such cases cannot be reopened by giving extension in the time limit by applying the provisions of Enabling Act (TOLA 2020).

(xiii) It was argued that the Finance Act 2021 had limited the applicability of the Enabling Act (TOLA 2020) and after amendment, the compliances/conditions under the amended provisions have to be fulfilled.

34. In the crux, it was argued by the learned counsels for the assessees that the Apex Court in **Ashish Agarwal (supra)** has categorically provided that all defences which may be available to the assessee including those available under Section *149* of I.T. Act and all rights and contentions which may be available to the concerned assessee and revenue under the Finance Act' 2021 and in law, shall continue to be available. The effect of the said observation is that the revenue though may be able to maintain the notices issued under the unamended Section *148* of the I.T. Act, as preliminary notices under Section *148*-A of the I.T. Act as inserted by the Finance Act' 2020, but for issuance of jurisdictional notice under Section *148* of the I.T. Act, the requirements of the amended Section *149* of the I.T. Act under the Finance Act 2021 have to be fulfilled. It was argued that the Enabling Act (TOLA 2020) was enacted by the Parliament to deal with the contingency and the extension of time limit under Section 3(1) of TOLA and was contemplated not to remain in perpetuity, TOLA had only substituted the limitation that was expiring. The extension under TOLA for the assessment year 2015/16, 2016-17, 2017-18 was not permissible as the time limit for reopening of assessment proceedings for the said assessment years even under the unamended Section *149* was not expiring at the time of enforcement of the Enabling Act (TOLA 2020). The findings returned by the Division Bench and the Apex Court as noted above have been reiterated that the relaxation granted by the Apex Court to save Section *148* notices under the unamended Act as Section *148*A preliminary notices inserted under the Finance Act' 2021, was a one time measure treating them as bona fide mistake of the revenue. However, it is evident from the said finding that the provisions of the Finance Act' 2021 have to be given their full effect.

35. It was vehemently urged that in any case, the Enabling Act 2020 cannot infuse life into the pre-existing law to provide extension of time to the revenue in the time limit therein, to reopen cases for the assessment years which have became time barred under the first proviso to Section *149*.

36. As regards the Instruction issued under Section 119 of the I.T. Act' 1961, it was argued that the executive instructions cannot limit or extend the scope of the Act or cannot alter the provisions of the Act. The decision of the Apex Court in **1992 (2) SCC 231** has been placed to assert that an Instructions or Circular cannot impose burden on a tax payer higher than what the Act itself as a true interpretation envisages. However, the departmental circular/Instructions beneficial to the assessee and if it tone down the rigors of the law issued in exercise of the statutory powers under Section 119 of the Act or under corresponding provisions of the Act, are binding on the revenue in the administration of the Act.

37. The offending clauses of the Instruction dated 11.05.2022, have been placed before us to assert that the direction issued in (clause 6.1, in third bullet point) that the decision of the Apex Court read with the time extension provided by TOLA, will allow "extended reassessment notices" to travel back in time to their original date when such notices were to be issued and then new Section *149* of the Act is to be applied at that point, is based on the wrong interpretation of the judgement of the Apex Court and the High Court. In clause 6.2 (i) of the Circular, it is provided that reassessment notices for assessment years 2013-14 and 2014-15 can be issued with the approval of the specified authority, if the case falls under clauses (b) of sub section (1) of Section *149* amended by the Finance Act 2021. The submission is that by issuing such instructions contained in clauses 6.1 and 6.2 of the Circular dated 11.05.2022, the CBDT has deviced a novel method to revive the reassessment proceedings which otherwise became time barred under the amended Section *149*, specifically for the assessment year 2013-14 and 2014-15 being beyond the time limit specified under the provisions of unamended clause (b) of sub section (1) of Section *149*.

38. Reference has been made to the decision of the High Court of Bombay in **Tata Communications Transformation Services Limited Vs. Assistant Commissioner of Income Tax3** by the learned counsels for the assessee to assert that Section 3(1) of the Enabling Act does not provide that any notice issued under Section *148* of the Act after 31.03.2021 will relate back to the original date when it ought to have been issued or that the clock is stopped on 31.03.2021 such that the provisions as existing on said date will be applicable to notices issued thereafter, relying on the provisions of the Enabling Act. It was observed therein that the purpose of Section 3(1) of the Enabling Act is not to postpone or extend the applicability of the unamended provisions of the specified Act (I.T. Act). The observations made by the Bombay High Court therein that the Enabling Act is not applicable for assessment year 2015-16 or any subsequent year as the time limit to issue notice under Section *148* of the *Income Tax Act* for these assessment years was not expiring within the period for which Section 3(1) of the Enabling Act was applicable and hence the Enabling Act could not apply for these assessment years, has been pressed into service. It was, thus, argued that as a consequence, there can be no question of extending the period of limitation for such assessment years, where the revenue could have issued notice of reassessment by complying with the requirements of the unamended provisions. It was urged that in a case where the revenue did not initiate proceedings within

the time limit under the unamended *Income Tax Act* extended by the Enabling Act, further extensions for inaction of the revenue cannot be granted by the notifications issued under the Enabling Act on 31.03.2021 or thereafter, once the amendments have been brought into place on 01.04.2021, to extend the time limit under the unamended provisions.

39. It was vehemently urged that from all angles, the revenue cannot be permitted to argue that after the decision of this Court affirmed by the Apex Court, it can issue notices under the amended section *148* without making compliances of the amended provisions of Section *149* of the I.T. Act. It cannot seek extension of the time limit for taking action under the unamended provision by seeking relaxation under TOLA 2020, in turn, for further extension of the time limit under the amended Section *149* brought by the Finance Act 2021. All notices under Section *148* which were issued on or after 01.04.2021, with respect to the assessment years 2013-14 to 2017-18, therefore, have to comply with the requirements of Section *149* amended by the Finance Act' 2021.

Arguments of the Counsels on behalf of the Revenue:-

40. Sri Gaurav Mahajan learned Advocate for the revenue, in rebuttal, would submit that the Enabling Act 2020 was enacted by the Parliament to grant relaxation in the time limit provided in the 'Specified Act' defined therein, one of which is the *Income Tax Act*' 1961. Sub-section (1) of Section 3 of the Act provide that the time limit specified or prescribed or notified under the Specified Act shall stand extended/relaxed for completion and compliances of such action, issuance of such notice, which fall during the period prescribed therein. Clause (c) of sub section (1) of Section 3 is specific to the *Income Tax Act*' 1961. Section 3(1)(c)(ii) contains a 'Non-Obstante' clause and provides that time limit for completion and compliances of such action shall, notwithstanding anything contained in the Specified Act, shall stand extended to 31st March 2021 or such other date after 31.03.2021, as the Central Government may specify, by notification in this behalf. The notifications dated 27.02.2020, 31.12.2020,, 31.03.2021 and 27.04.2021 have been issued in exercise of the power under the said provision by the Central Government. The end date to which the prescribed time limit for completion and compliances of such action as per sub section (1) of Section 3 of the Enabling Act 2020 was extended upto 31.03.2021 under the notification dated 31.12.2020. In partial modification of the notification dated 31.12.2020, the time limit specified in Section *149* for issuance of notice under Section *148* or sanctions under *Section 151* of the Act' 1961 has been extended upto 30.04.2021. Further, by the notification dated 27.04.2021 issued in partial modification of the previous notifications dated 31.12.2020, 22.02.2021 and 31.03.2021, the time limit was further extended upto 30.06.2021.

41. The submission, thus, is that issuance of notice under Section *148* as per the prescribed time limit in Section *149* was permissible uptil 30.06.2021. The extension of time granted by the subsequent notifications dated 31.03.2021 and 27.04.2021 would save all notices issued by the revenue on after 01.04.2021, by applying the procedure under the amended provisions. The challenge to the validity of notices issued under Section *148*, in the instant case, after rejection of

the objections filed by the petitioners under Section *148*-A, cannot be sustained.

42. It was argued that the Explanation attached to clause A(a) of the notification dated 31.03.2021 and the explanation clause A (b) of notification dated 27.04.2021 though have been read down by this Court in **Ashok Kumar Agarwal (supra)** holding that the said explanations must be read as applicable to reassessment proceedings as may have been in existence on 31.03.2021, i.e. before enforcement of Finance Act' 2021, but it was held that the notice to initiate reassessment proceedings after 01.04.2021 can be issued in accordance with the provisions of the I.T. Act as amended by Finance Act' 2021. It was argued that the notices issued on or after 01.04.2021 under Section *148* of the *Income Tax Act*, for reassessment were issued in accordance with the substituted laws and not as per the pre-existing laws and the Enabling Act (TOLA 2020) was only applied for extension in the timeline. The Enabling Act has overriding effect over the Specified Act namely the *Income tax Act* and has been enacted in the exigencies due to spread of Covid 19, it will extend the time limit for issuance of notice/action under the I.T. Act. The CBDT Instructions dated 11.05.2022 has only clarified the manner in which the implementation of the judgement of the Apex Court is to be made. The extension of time granted by TOLA 2020 uptil 31.03.2021 and the subsequent notifications issued under sub section (1) of Section 3 of the Enabling Act (TOLA 2020) to further extend the timeline upto 31.06.2021 would save all notices issued on or after 01.04.2021.

43. Sri Krishna Agarwal learned Advocate for the revenue adding to the submissions of Sri Gaurav Mahajan would argue that Section 3(1) of the Enabling Act (TOLA 2020) granted extension of time limit provided for any action/compliances/issuance of notices under the I.T. Act' 1961. TOLA 2020, as it stands today, has not been read down. Substantive provisions of the Enabling Act' 2020 which is a parliamentary legislation enacted specifically to extend the limitation under I.T. Act, would extend the time limit by virute of the Notification No.20 of 2021 dated 31.03.2021 and Notification No.38 dated 27.04.2021 upto 31.06.2021 even after reading down the explanations therein. He would submit that as on 31.03.2021, the *Income Tax Act*' 1961 was existing on the statute book. A set of procedure of reassessment provided under the Act had been changed with the amendment brought by the Finance Act 2021 wef 01.04.2021. Only the time limit for various action/compliances/issuance of notices has been changed in the Finance Act' 2021. For instance, the timeline for issuance of notice under the pre-existing Section *148* was 4 years and 6 years, which has now been changed to 3 years and 10 years. In any case, timeline remained there under both the enactments, pre and post amendment. The reassessment notices would have been barred by time had there been no extension of the timelimit under the *Income Tax Act*' 1961 by the Enabling Act (TOLA 2020). The applicability of Explanation to Clause A(a) of the notification dated 31.03.2021 and Explanation to clause A(b) of the notification dated 27.04.2021, may have been restricted to reassessment proceedings as in existence on 31.03.2021 and have been read down as applicable to the pre-existing Section 147 to 151-A of the Act' 1961, but the substantive provisions of extension of time for action/compliances/issuance of notice of

the notifications dated 31.03.2021 and 27.04.2021, still survive.

44. The challenge in **Ashok Kumar Agarwal (Supra)** before the High Court was to the applicability of the pre-amendment provisions to the notices under Section *148* issued after 01.04.2021. The Explanations which provided that for the notices issued after 01.04.2021 the time line under the pre-existing provisions would apply, have been held to be offending provisions, but this Court had left it open to the respective assessing authorities to initiate reassessment proceedings in accordance with the amended provisions by Finance Act 2021. The extension in time uptil 31.06.2021 as granted by the notifications dated 31.03.2021 and 27.04.2021 would, thus, apply to the timeline provided under the amended provisions brought by the Finance Act 2021.

45. It is submitted that when two Parliamentary Acts are on the statute book, one providing substantive provisions and procedure for initiating reassessment proceeding and the other granting extension of time for action/compliances/issuance of notices under the substantive and procedural provisions of the Act' 1961, a harmonious construction of both the provisions has to be made, as has been done by this Court in **Ashok Kumar Agarwal (supra)**. The result would be that whatever time limit is provided under the Principal Act namely the Income Act' 1961 as on 01.04.2021, the same has to be extended uptil 31.06.2021 to enable the revenue to initiate and process the reassessment proceedings under Section *148* of the Act' 1961 amended by the Finance Act' 2021.

46. It was argued that in view of the decision of the Apex Court in saving all notices issued by the revenue PAN INDIA by treating them as notices under Section *148*-A of the amended provisions of the *Income Tax Act*, all actions of the revenue subsequent to the issuance of notices under Section *148*-A in compliance of the directions of the Apex Court would have to be saved. The reference to the date of issuance of Section *148* notices, which were quashed by different High Courts, thus, have to be the date of notices under Section *148*-A of the amended provisions and extension of time, for compliances prescribed under the amended provisions, has to be granted to the revenue, accordingly. As observed by the Apex Court, when all defences remain available to the assessee, all rights of the revenue will have to be preserved/made available.

47. The observations of the Division Bench in paragraph No.'65' and '66' in **Ashok Kumar Agarwal (supra)** have been pressed into service to assert that even the Division Bench in **Ashok Kumar Agarwal (supra)** has recognized that the Enabling Act plainly is an enactment to extend timelines only. Consequently from 01.04.2021 onwards, all references to issuance of notices contained in the Enabling Act must be read as references to the substituted provisions only. This Court has observed that there is no difficulty in applying the pre-existing provisions to pending proceedings and then proceeded to harmonize two laws, i.e. the Enabling Act and the Finance Act 2021.

48. It was, thus, argued that giving this plain and simple meaning to the Enabling Act (TOLA 2020), it has to be seen by the Court that the extensions in time limit which were available to the revenue uptil 31.03.2021 under the Enabling Act, became available to the revenue after 01.04.2021

by the Notification No.20 of 2021 dated 31.03.2021 and the Notification No.38 dated 27.04.2021, which have not been quashed or held invalid by this Court or the Apex Court. The submission, thus, is that extension of three months uptil 30.06.2021 in the time limit provided under the *Income Tax Act* 1961, whether pre or post amendment, has to be granted. The time limit provided in the amended Section *149* of three years and 10 years has to be extended uptil 31.06.2021, by virtue of the notifications issued by the Central Government in exercise of power under Section 3(1) of the Enabling Act. The CBDT Instruction dated 11.05.2022 under Section 119 of the *Income Tax Act* 1961 only clarifies the above stated position of two provisions namely the Enabling Act and the Finance Act 2021, wherein it is provided in para 6.1 of the Instructions that the time extension provided by TOLA' 2020 will allow "extended reassessment notices" to travel back in time to their original date when such notices were to be issued and then the new Section *149* of the Act is to be applied at that point of time.

49. It was submitted that based on the said logic, the "extended reassessment notices" for the assessment year 2013-14, AY 2014-15 and AY 2015-16 are to be dealt with by issuance of fresh notice under amended Section *148*, with the approval of the specified authority, in the cases which fall under clause (b) of sub-section (1) of Section *149* as amended by the Finance Act' 2021. It is further clarified in the CBDT instruction that the specified authority under *Section 151* of the amended provisions shall be the authority prescribed under clause (ii) of that Section. Similarly, for AY 2016-147 and AY 2017-18, fresh notice under Section *148* can be issued with the approval of the specified authority under clause (a) of sub section (1) of amended Section *149* of the Act, as they are within the period of three years from the end of the relevant assessment years because of the extension of time by TOLA' 2020. Specified authority under *Section 151* of the amended provisions, in such cases, shall be the authority prescribed under clause (i) of that Section.

50. It is, thus, submitted by the learned Counsels for the revenue that doubts, if any, may arise about the implementation of the judgement of the Apex Court in **Ashish Agarwal (supra)**, have been clarified by the Instruction No.1 of 2022 dated 11.05.2021 issued by the CBDT.

51. In support of their submissions, learned counsels for the revenue have placed the decision of the High Court of Delhi in **Touchstone Holdings Pvt. Ltd Vs. Income Tax Officer, Delhi & others4** wherein the earlier decision of the Delhi High Court in **Mon Mohan Vs. Assistant Commissioner5** has been relied. It was pointed out that the observation made in **Mon Mohan Kohli** by the Delhi High Court in paragraph No.'98', have been upheld with the decision of the Apex Court in **Ashish Kumar Agarwal (supra)**, wherein reassessment notices issued on or after 01.04.2021 have been saved by treating them as notices under Section *148*-A of the *Income Tax Act*. The relevant observations of **Mon Mohan Kohli** (supra) in para '98' as noted in **Touchstone Holdings (supra)** by the Delhi High Court, relied by the counsel for the revenue, are noted as under:-

"98.It is clarified that the power of reassessment that existed prior to 31st March, 2021 continued to exist till the extended period i.e. till 30th June, 2021,

however, the Finance Act, 2021 has merely changed the procedure to be followed prior to issuance of notice with effect from 1st April, 2021"

52. It was, thus, noted in **Touchstone (supra)** that the Apex Court in **Ashish Agarwal (supra)** has simply held that Section *148* notice issued between 01.04.2021 to 30.06.2021 will be deemed to have been issued under Section *148*-A of the Act and, therefore, Section *148* notice issued on 29.06.2021 therein, stood revived. The result is that the time period for issuance of reassessment notice for Assessment year 2013-14 stood extended until 30.06.2021 and the first proviso of Section *149* brought by the Finance Act' 2021 is not attracted in the facts of that case.

53. It was urged before us that taking note of the first proviso of Section *149* (amended), it was held by the Delhi High Court that the time limit for initiating assessment proceeding for assessment year 2013-14 stood extended till 30.06.2021. Consequently, the reassessment notice dated 29.06.2021 issued therein being well within the extended period of limitation was not time barred. The challenge to paragraph 6.2 (i) of CBDT Instruction No.1/2022 dated 11.05.2022, was turned down therein holding that with the declaration by the Apex Court that the reassessment notice issued on or after 01.04.2021 shall be deemed to be the notice under Section *148*-A of the Act, the revenue was permitted to complete the reassessment proceedings in accordance with the amended provisions of Section *149*. The contention of the petitioner that the assessment for AY 2013-14 became time barred on 31.03.2020 was accordingly, repelled.

54. Reliance has further been placed on the decisions of the Apex Court in **Raymond Woolen Mills Ltd. Vs. Income Tax Officer6, Commissioner in Income Tax & others Vs. Chhabil Das Agarwal7, Coca Cola India Inc. Vs. Additional Commissioner of Income Tax & others8, Gian Casting Private Limited Vs. CBDT9, Anshul Jain Vs. Pr. Commissioner of Income Tax10, the judgement of Delhi High Court in Gulmuhar Silk Pvt. Ltd Vs. Income Tax Officer11**, the judgement of Punjab and Haryana High Court in **Gian Casting Private Limited Vs. Central Board of Direct Taxes12**, in **Anshul Jain Vs. Pr. Commissioner of Income Tax13**, in **Midland Microfin Ltd. Vs. Union of India & others14** and the decision of Mahdya Pradesh High Court in **Harinder Singh Bedi Vs. Union of India & others15** to assert that the writ petitions are directed against the order of rejection of objections raised by the assessees under Section *148*-A of the Act' 1961 and the consequent notice under Section *148* issued to the assessees. The assessees have right to appeal under Section 246 of the Act' 1961 to challenge the orders/notices on the grounds raised herein even with respect to the jurisdiction of the authorities. The reassessment proceedings have not even been concluded by the statutory authority, the writ Court may not interfere at such a premature stage. The correctness of the orders under Section *148*-A (d), being challenged on the factual premise contending that the jurisdiction though vested has wrongly been exercised, cannot be examined at this stage. For rectification of the jurisdictional error and error of law/fact in passing orders by the authority vested with the jurisdiction to pass such orders, statutory remedy has been provided. The writ petitions in this bunch, do not

warrant interference by this Court in exercise of the jurisdiction under Article 226 of the Constitution of India at this intermediary stage and, as such, are liable to be dismissed.

55. At this stage of arguments, a pointed query was made to the learned counsels for the revenue to answer the effect of the first proviso to sub-section (1) of Section *149* of the amended provisions inserted by the Finance Act' 2021 which prohibits issuance of notice under Section *148*, in a case where it has become time barred under the unamended (pre-existing) Section *149* clause (b) of sub section (1) of Section *149*, (as they stood before the commencement of the Finance Act' 2021). The unamended Section *149*(1)(b) provided that no notice under Section *148* shall be issued, if 6 years have been elapsed from the end of the relevant assessment years, which has escaped the assessment amount to one lac rupees or more for that year.

56. The answer of the learned counsels for the revenue was that time limit of 6 years provided in clause (b) of sub section (1) of Section *149* stood extended by virtue of the Enabling Act uptil 31.03.2021, and further extensions in the time limit (of six years) are to be granted under the notifications issued by the Central Government in accordance with Section 3(1) of the Enabling Act uptil 31.06.2021. The result would be that the cases for the Assessment Year 2013-14, AY 2014-15 where the period of six years had expired on 31.03.2020 and 31.03.2021: respectively, would not be hit by the first proviso to sub-section (1) of Section *149* brought by the Finance Act' 2021. The cases for these assessment years have to be evaluated and the reassessment proceedings have to be conducted for them in accordance with clause (b) of sub section (1) of Section *149* as amended by the Finance Act 2021, being beyond the period of three years but within the limitation of ten years. Similarly for the assessment year 2015-16, on the expiry of three years on 31.03.2019, the extension uptil 31.06.2021 is to be granted to bring the reassessment proceedings under amended clause (b) of sub section (1) of Section *149*. For the assessment year 2016-17 and 2017-18, where the period of three years had expired on 31.03.2020 and 31.03.2021; respectively, the extension in the time limit of three years is to be granted under the Enabling Act and these cases would fall under the amended clause (a) of sub section (1) of Section *149* being within the prescribed limit of three years uptil 31.06.2021.

Analysis:-

57. Before analyzing the arguments of counsel for the parties in the light of the decisions of the Division Bench of this Court and the Apex Court in the previous rounds of litigation, interse parties, we may note at this juncture, that we find inherent fallacy in the arguments of the learned counsels for the revenue, in so far as the interpretation/implementation of the first proviso to sub-section (1) of Section *149* inserted by the Finance Act' 2021 which prohibits initiation of reassessment proceedings in cases which have became time barred under the unamended clause (b) of sub-section (1) of Section *149*, where six years have elapsed from the end of the relevant assessment year on 01.04.2021.

58. However, to deal with the arguments of the learned counsel for the parties in detail, we deem it fit to make a comparative table of Section *149* pre and

post amendment by the Finance Act 2020, to have a glance to the said provisions:-

	Section *149* of IT Act,1961	Section*149* (Substituted by the Finance Act 2021) of IT Act,1961
	Time limit for notice-	Time limit for notice-
1.	No notice under section *148* shall be issued for the relevant assessment year,-	No notice under section *148* shall be issued for the relevant assessment year,-
(a)	if four years have elapsed from the end of the relevant assessment year, unless the case falls under sub- clause (b) or clause (c);	(a) if three years have elapsed from the end of the relevant assessment year, unless the case falls under clause
(b)	if four years, but not more than six years, have elapsed from the end of the relevant assessment year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year;	(b) **if three years, but not more than ten years, have elapsed from the end of the relevant assessment year unless the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more for that year:**
(c)	if four years, but not more than sixteen years, have elapsed from the end of the relevant assessment year unless the income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment.	Provided that no notice under section *148* shall be issued at any time in a case for the relevant assessment year beginning on or before 01/04/2021, if such notice could not have been issued at that time on account of being beyond the time limit specified under the provisions of clause (b) of sub-section (1) of this section, as they stood immediately before the commencement of the *Finance Act*, 2021: **Provided further that the provisions of this sub-section shall not apply in a case, where a notice under section 153A, or section 153C read with section 153A, is required to be issued in relation to a search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, on or before 31/03/2021:** Provided also that for the purposes of computing the period of limitation as per this section, the time or extended time allowed to the assessee , as per show-cause notice issued under clause (b) of section *148*A or the period during which the proceeding under section *148*A is stayed by an order or injunction of any court, shall be excluded: Provided also that where immediately after the

	exclusion of the period referred to in the immediately preceding proviso, the period of limitation available to the Assessing Officer for passing an order under clause (d) of section *148*A is less than seven days, such remaining period shall be extended to seven days and the period of limitation under this sub-section shall be deemed to be extended accordingly.	agent of such non- resident, the notice shall not be issued after the expiry of a period of six years from the end of the relevant assessment year.	
Explanation- In determining income chargeable to tax which has escaped assessment for the purpose of this sub-section, the provisions of Explanation 2 of section 147 shall apply as they apply for the purpose of that section.	Explanation- For the purpose of clause (b) of this sub-section, "asset" shall include Immovable Property, being land or building or both, shares and securities, loans and advances, deposits in bank account.	Explanation- For the removal of doubts, it is hereby clarified that the provisions of sub-section (1) and (3), as amended by the *Finance Act,* 2012 shall also be applicable for any assessment year beginning on or before the 1.4.2012.	.....
The provisions of Sub-section (1) as to the issue of notice shall be subjected to the provision of Section 151.	The provision of sub-section (1) as to the issue of notice shall be subject to the provisions of section 151.	Explanation- 1. For the purpose of clause (b) of this sub-section, "asset" shall include Immovable Property, being land or building or both shares and securities, loans and advances, deposits in bank account.	.....
If the person on whom a notice under Section *148* is to be served is a person treated as the agent of a non-resident under section 163 and the assessment, reassessment or recomputation to be made in pursuance of the notice is to be made on him as the	.....	2. The provision of sub-section (1) as to the issue of notice shall be subject to the provisions of *section 151*	.....

59. We are further required to go through the Division Bench judgement of this Court in **Ashok Kumar Agarwal**

(supra) about the effect and applicability of the Enabling Act (TOLA 2020) on the amended provisions of the *Income Tax Act*' 1961 brought on the statute book by the Finance Act 2021, to understand the legal position with regard to the effect of the Enabling Act' 2020 on the pre and post amended provisions of the *Income Tax Act*' 1961.

60. Detailed observations of the Division Bench in **Ashok Kumar Agarwal (supra)** have been noted/extracted in the preceding part of this judgment. It was held, in the crux, as follows:-

(i) By its very nature, once new provision has been put in place of the pre-existing provision, earlier provision cannot survive, except for the things done or already undertaken to be done or things expressly saved to be done.

(ii) In absence of any saving clause to save preexisting provisions, the revenue authorities could only initiate proceeding on or after 01.04.2021, in accordance with the substituted laws and not the pre-existing laws. The Enabling Act, that was pre-existing, confronted the *Income Tax Act* as amended by the *Finance Act,* 2021, as it came into existence on 01.04.2021. In both the provisions, i.e the Enabling Act and the *Finance Act,* 2021, there is absence, both of any express provision in its effort to delegate the function, to save the applicability of provisions of pre-existing *Sections 147* to 151, as they existed upto 31.03.2021.

(iii) Plainly, the Enabling Act is an enactment to extend timelines only from 01.04.2021 onwards. Consequently, from 01.04.2021 onwards all references to issuance of notice contained in the Enabling Act must be read as reference to the substituted provisions only.

(iv) There is no difficulty in applying pre-existing provisions to pending proceedings and, this is how, the laws were harmonized.

(v) For all reassessment notices which had been issued after 01.04.2021, after the enforcement of amendment by the *Finance Act*, 2021, no jurisdiction has been assumed by the assessing authority against the assesses under the unamended law. No time extension could, thus, be made under Section 3(1) of the Enabling Act read with the Notifications issued thereunder.

(vi) Section 3 of the Enabling Act only speaks of saving or protecting certain proceedings from being hit by the rule of limitation. That provision also does not speak of saving any proceeding from any law that may be enacted by the Parliament, in future. The non obstante clause of Section 3(1) of the Enabling Clause Act does not govern the entire scope of the said provision. It is confined to and may be employed only with reference to the second part of Section 3(1) of the Enabling Act, i.e to protect the proceedings already underway. The Act, thus, only protected certain proceedings that may have become time barred on 20.03.2021 upto the date 30.06.2021. Correspondingly, by delegated limitation incorporated by the Central Government (notifications), it may extend that time limit. That timeline alone stood extended upto 30.06.2021.

(vii) Section 3(1) of the Enabling Act does not itself speak of reassessment proceeding or of Section 147 or Section *148* of the Act as it existed prior to 01.04.2021. It only provides a general relaxation of limitation granted on account of general hardship existing upon the spread of pandemic COVID-19. After enforcement of the *Finance Act*, 2021, it applies to the substituted provisions and not the pre-existing provisions.

The reference to reassessment proceedings with respect to pre-existing and new substituted provisions of *Sections 147* and *148* of the Act has been introduced only by the later notifications issued under the Enabling Act. It was concluded that in absence of any proceedings of reassessment having been initiated prior to the date 01.04.2021, it is the amended law alone that would apply. The notifications issued by the Central Government or the CBDT Instructions could not have been issued plainly to overreach the principal legislation. Unless harmonised as such, those notifications would remain invalid.

(viii) On the submission of the revenue that practical difficulties faced by the revenue in initiation of reassessment proceedings due to onset of pandemic COVID-19 dictates that the reassessment proceedings be protected, it was noted that practicality, if any, may lead to legislation. Once the matter reaches the Court, it is the legislation and its language and the interpretation offered to that language as may primarily be decisive to govern the outcome of the proceedings. To read practicality into enacted law is dangerous.

(ix) It would be oversimplistic to ignore the provisions of, either the Enabling Act or the Finance Act 2021 and to read and interpret the provisions of Finance Act 2021 as inoperative in view of the facts and circumstances arising from the spread of the pandemic Covid-19.

(x) In absence of any specific clause in the Finance Act 2021 either to save the provisions of the Enabling Act or the notifications issued thereunder, by no interpretative process can those notifications be given an extended run of life, beyond 31.03.2021.

(xi) The notifications issued under the Enabling Act (TOLA 2020) may also not infuse any life into a provision that stood obliterated from the statute book w.e.f 31.03.2021, in as much as, the Finance Act' 2021 does not enable the Central Government to issue any notification to reactivate the pre-existing law, which has been substituted by the principal legislature. Any such exercise made by the delegate/Central government would be dehors any statutory basis.

(xii) In absence of any express saving of the pre-existing laws, the presumption drawn in favour of that saving, is plainly impermissible.

(xiii) No presumption exists by the notifications issued under the Enabling Act that the operation of the pre-existing provisions of the Act had been extended and thereby provisions of Section *148*A of the I.T. Act (introduced by the Finance Act' 2021) and other provisions had been deferred.

61. It was, thus, declared that the Explanations appended to Clauses A(a), A(b) of the impugned notifications dated 31.03.2021, and 27.4.2021; respectively, must be read applicable to reassessment proceedings as may have been in existence on 31.03.2021 or had been initiated till that date, i.e. before the substitution of *Sections 147* to 151A of the Act. The Notifications have no applicability to the reassessment proceedings initiated from 01.04.2021 onwards.

62. With the above observations, all reassessment notices, subject matter of challenge therein were quashed. It was, however, left open to the respective assessing authorities to initiate reassessment proceedings in accordance with the provisions of the Act as amended by the *Finance Act*, 2021 after making all compliances, as required by law.

63. In the challenge to the aforesaid decision of the Division Bench in Ashok Kumar Agarwal, the Apex Court in **Ashish Agarwal (supra)** has observed that:-

(I) By substitution of *Sections 147* to *151* of the Income Tax by the *Finance Act*, 2021, radical and reformative changes are made governing the procedure for reassessment proceedings. Under pre-*Finance Act*, 2021, the reopening was permissible for a maximum period upto 6 years and in some cases beyond even 6 years leading to uncertainty for considerable time. Therefore, Parliament thought it fit to amend the *Income Tax Act* to simplify the Tax Administration, ease compliances and reduce litigation. With a view to achieve the said object, by the *Finance Act*, 2021, *Sections 147* to *149* and *Section 151* have been substituted.

(II) Section *148*(A) of the I.T. Act is a new provision, which is in the nature of a condition precedent. Introduction of Section *148*A to the IT Act can, thus, be said to be a game changer with an aim to achieve ultimate object of simplifying the tax administration. By way of Section *148*A, the procedure has now been streamlined and simplified. All safeguards are, thus, provided before issuing notice under Section *148* of the IT Act. At every stage, the prior approval of the specified authority is required, even for conducting the inquiry as per Section *148*(A)(a).

(III) Substituted Section *149* is the provision governing the time limit for issuance ofnotice under Section *148* of the I.T. Act. The substituted Section *149* has reduced the permissible time limit for issuance of such a notice to three years and only in exceptional cases in ten years. It also provides further additional safeguards which were absent under the earlier regime pre-*Finance Act*, 2021.

(IV) The new provisions substituted by the *Finance Act*, 2021 being remedial and benevolent in nature and substituted with a specific aim and object to protect the rights and interest of the assesses as well as and the same being in public interest, the respective High Courts have rightly held that the benefit of new provisions shall be made applicable even in respect of the proceedings related to past assessment years, provided Section *148* notice has been issued after 01.04.2021.

64. The Apex Court has, thus, expressed complete agreement with the view taken by the various High Courts in holding so.

65. The reasoning given by the Division Bench of this Court in ***Ashok Agarwal*** (supra) which was subject matter of challenge therein, thus, has been upheld.

66. However, it was further noticed that :-

I) The judgments of several High Courts would result in no assessment proceedings at all, even if the same are permissible under the *Finance Act*, 2021 as per substituted *Sections 147* to *151* of the *Income Tax Act*.

To remedy the situation where revenue became remediless, in order to achieve the object and purpose of reassessment proceedings, it was observed that the notices under Section *148* after the amendment was enforced w.e.f 01.04.2021, were issued under the unamended Section *148*, due to bonafide mistake in view of the subsequent extension of time by various notifications under the Enabling Act (TOLA 2020).

(II) The notices ought not to have been issued under the unamended Act and

ought to have been issued under the substituted provisions of *Sections 147* to *151* of the *Income Tax Act* as per the *Finance Act*, 2021.

(III) There appears to be a genuine non application of the amendments as the officers of the revenue may have been under a bonafide belief that the amendments may not yet have been enforced.

67. It was, thus, concluded that:-

68. Instead of quashing and setting aside the reassessment notices issued under the unamended provisions of IT Act, the High Courts ought to have passed order construing the notices issued under the unamended Act/unamended provision of the IT Act as those deemed to have been issued under Section *148*(A) of the *Income Tax Act*, as per the new provision of Section *148*(A). In that case, the revenue ought to have been permitted to proceed with the reassessment proceedings as per the substituted provisions of *Sections 147* to *151* of the *Income Tax Act* as per the *Finance Act*, 2021, subject to compliance of all the procedural requirements and the defences which may be available to the assessee under the substituted provisions of Section 147 to *151* of the *Income Tax Act*, and which may be available under the *Finance Act*, 2021 and in law.

69. While modifying the judgment and orders passed by the High Courts in view of the observations noted hereinabove, it was noted by the Apex Court that there was a broad consensus on the proposed modification on behalf of the revenue and the counsels appearing on behalf of respective assessees.

70. From a careful reading of the judgment of the Apex Court, there remain no doubt that the view taken by the Division Bench of this Court in ***Ashok Agarwal*** on the legal principles and the reasoning for quashing the notices under Section *148* of the unamended IT Act, issued after 01.04.2021 adopted by the Division Bench had been affirmed in toto.

71. The result is that all notices issued under the unamended IT Act were deemed to have been issued under Section *148*A of the IT Act as substituted by the *Finance Act*, 2021 and construed to be show cause notices in terms of Section *148* A(b) of the *Income Tax Act*.

The inquiry as required under Section *148*(B) was to be completed by the officers and after passing orders in terms of Section *148*A(d) in respect of the assessee, notice under Section *148* could be issued after following the procedure as required under Section *148*A. As one time measure, the requirement of conducting an inquiry with the approval of specified authority at the stage of Section *148* A(a) has been dispensed with.

72. In view of the above discussion, the question raised before us is as to what would be the effect and scope of the Enabling Act (TOLA' 2020) on the notices issued under Section *148* after completion of the inquiry and passing of orders in terms of Section *148* A(d). The question is as to whether the timeline provided in the unamended Section *149* would extend uptil 31.03.2021 under the Enabling Act, 2021, with further extensions by the notifications dated 31.03.2021 and 27.04.2021 issued under TOLA, in the timeline provided under the amended Section *149* of the *Finance Act*, 2021. The arguments of the

learned counsels for the revenue is that the Enabling Act (TOLA' 2020) granted extension in the time limit provided in the pre-existing provisions of the *Income Tax Act*. The period of four years and six years provided in Clause (a) and (b) of the unamended Section *149* of the IT Act stood extended uptil 31.03.2021 by the extensions granted under TOLA 2020, as the reassessment notices, could have been issued, within the extended period of time uptil 31.03.2021. The amendment by the *Finance Act*, 2021 though have substituted the substantive and procedural amendment in the *Income Tax Act* 1961 and old provisions have been recasted and made applicable w.e.f 01.04.2021, but extensions already granted by the Enabling Act in the limitation prescribed under the unamended provisions of the *Income Tax Act* have not been curtailed. Further extensions in the limitation for issuance of reassessment notices have been made by the notifications dated 31.03.2021 and 27.04.2021 issued by the Central Government, in exercise of power conferred by Section 3(1) of the Enabling Act. The result is that the time limit for initiation of reassessment proceedings by issuance of notice under Section *148* of the *Income Tax Act* stood extended uptil 31.06.2021. The limitation of three years in clause (a) and (b) of sub Section (1) of Section *149*, therefore, has to be extended by the extensions granted by the Enabling Act i.e 30.06.2021.

73. With the support of the observations of the Delhi High Court in para-'98' in **Mon Mohan Kohli** (supra), it was argued that the power of reassessment that existed prior to 31.03.2021 continued to exist till the end of the extended period, i.e 30.06.2021 and the *Finance Act*, 2021 has merely changed the procedure to be followed prior to issuance of notice w.e.f 01.04.2021. It was argued that the first proviso to Section *149* (brought by the *Finance Act*, 2021) will have no application in such a situation.

74. To test this submission of the learned counsels for the revenue, we required to reiterate some of the reasoning of the Division Bench of this Court in Ashok Kumar Agarwal in paras-'75' and '76' (as extracted above), herein. We may reiterate that the Division Bench of this Court while considering the scope of application and enforcement of the Enabling Act and the *Finance Act*, 2021, juxtaposed, has held that if the *Finance Act*, 2021 had not made the substitution of the reassessment procedure, revenue authorities would have been within their rights to claim extension of time, under the Enabling Act. The sweeping amendments made by the Parliament by necessary implication or implied force limited applicability of the Enabling Act. The power to grant time extension thereunder was limited to only such reassessment proceedings as had been initiated till 31.03.2021. It was, thus, held that amended notifications have no applicability to the reassessment proceedings initiated from 01.04.2021 without any saving of the provisions substituted, the extensions granted under the Enabling Act (TOLA' 2020). It was incumbent for the assessing officer to act according to law as existed on and after 01.04.2021.

75. It is noted at the cost of repetition that the Division Bench has observed that it would be oversimplistic to ignore the provisions of either the Enabling Act or the *Finance Act*, 2021 and to read and interpret the provisions of *Finance Act*, 2021 as inoperative in view of the facts and circumstances arising from the spread of

the pandemic COVID-19. Practicality of life dehors statutory provisions, may never be a good guiding principle to interpret any taxation law. It was, thus, held that in absence of any specific clause in the *Finance Act*, 2021 either to save the provisions of the Enabling Act or the Notifications issued thereunder, by no interpretative process, the notifications can be said to infuse life into a provision that stood obliterated from the Statute book w.e.f 31.03.2021. It was held that the *Finance Act*, 2021 does not enable the Central Government to issue any notification to reactivate the pre-existing law, the exercises made by the delegate/Central Government would be dehors any statutory basis. It was, thus, categorically held by the Division Bench that the notifications did not insulate or save the pre-existing provisions pertaining to reassessment under the Act or the operation of the pre-existing provisions of the Act cannot be extended.

76. Adopting the above reasoning given by the Coordinate Bench of this Court, which is binding on us, we may further note that the contention of the revenue, if accepted, it will create conflict of laws. The limitation under the pre-existing provisions will have to be kept alive till 30.06.2021 with the aid of the extensions granted by the notifications issued by the Central Government, which have been read down by the Coordinate Bench. The time limit provided in unamended Section *149* of the *Income Tax Act*, as per the Division Bench judgment, cannot be extended beyond 31.03.2021, so as to render the amended provisions of Section *149* ineffective. The stand of the revenue that the Enabling Act simply extended the period of limitation uptil 31.06.2021, due to the disturbances from the spread of pandemic COVID-19, has been categorically turned down by the Division Bench with the observations noted above.

77. It was held therein that the notifications issued under the Enabling Act 2020 may extend time limit provided in the substituted provisions after enforcement of the *Finance Act*, 2021 but it will not extend or defer the applicability of the pre-existing provisions in view of general relaxation of limitation granted under Section 3(1) of the Enabling Act, on account of general hardship existing upon the spread of the pandemic COVID-19.

78. As noted above, sweeping amendments have been made in *Sections 147* to *151* of the *Income Tax Act* by the *Finance Act*, 2021. As held by the Apex Court, the radical and reformative changes governing the procedure for reassessment proceedings in the substituted provisions are remedial and benevolent in nature.

79. To understand the nature of amendments, a comparison of pre and post amendment Section *149* has been noted in the table given above. A perusal thereof indicates that the period of notice for reassessment proceedings in pre-amended Section *149* was four years and six years. Whereas in the post-amendment sub-section (1) of Section *149*, the time limit when notice for reassessment under Section *148* can be issued is three years in clause (a) and can be extended upto ten years after elapse of three years as per clause (b), but there is a substantial change in the threshold/requirements which have to be met by the revenue before issuance of reassessment notice after elapse of three years under clause (b) of sub-section (1). Not only monetary threshold has been

substituted but the requirement of evidence to arrive at the opinion that the income escaped assessment has also been changed substantially. A heavy burden is cast upon the revenue to meet the requirements of clause (b) of sub-section (1) of Section *149* for initiation of reassessment proceedings after lapse of three years. Further four provisos have been inserted to sub-section (1) of Section *149*.

80. The first proviso to sub-section (1) of Section *149* is relevant for our purposes, which provides that notice under Section *148*, in a case for the relevant assessment year beginning on or before 1.4.2021, cannot be issued, if such notice could not have been issued at the relevant point of time, on account of being beyond the time limit specified under the unamended provisions of clause (b) of sub-section (1) of Section *149*, i.e., pre-amended Section *149* prior to the commencement of *Finance Act*, 2021. The time limit in clause (b) of sub-section (1) of unamended Section *149* of six years, thus, cannot be extended upto ten years under clause (b) of sub-section (1) of amended Section *149*, to initiate reassessment proceeding in view of the first proviso to Section (1) of Section *149*. In other words, the case for the relevant assessment year where six years period has elapsed as per unamended clause (b) of Section *149* cannot be reopened, after commencement of the *Finance Act*, 2021 w.e.f. 1.4.2021. The view taken by the Coordinate Bench of this Court in **Ashok Kumar Agarwal (supra)** that the *Finance Act*, 2021 had limited the applicability of the Enabling Act and the power to grant extensions thereunder, was applicable to only such reassessment proceedings as had been initiated till 31.3.2021, has been affirmed by the Apex Court in **Ashish Agarwal (supra)**. It was held by the Coordinate Bench that the impugned notifications granting extensions in time limit provided under the unamended provisions of the *Income Tax Act* have no applicability to the reassessment proceedings initiated from 1.4.2021 onwards. It was held that after 1.4.2021, if the rule of limitation permitted, the revenue could initiate reassessment proceedings in accordance with the new law, after making adequate compliances has also been upheld by the Apex Court.

81. As noted above, there is no specific clause in the *Finance Act*, 2021 to save the provisions of the Enabling Act granting extensions in the time limit under the unamended Act, or the notifications issued thereunder on or before 31.3.2021. The Enabling Act, 2020 and *Finance Act*, 2021 are both parliamentary legislations. On the one hand, the Enabling Act, 2020 was enacted to tide over the hardships being faced both by the assessees and the statutory authorities or their functionaries due to spread of pandemic Covid-19 but, on the other, *Finance Act*, 2021 has been enacted to bring reformative changes to *Sections 147* to *151* of the *Income Tax Act*, 1961 governing reassessment proceedings, with an aim to simplify the tax administration. The amendments brought to Section *149* of the *Income Tax Act*, by insertion of the first proviso to sub-section (1) of Section *149* and clause (b) of said sub-section are substantive amendments which confer right upon the assessee to seek immunity from reopening of the assessment proceedings after the maximum period prescribed in the unamended Section *149*, six years from the end of the relevant assessment year having elapsed on or before 1.4.2021. In a case where three years period have elapsed from the end of the relevant assessment year, as noted

above, higher threshold to meet the requirement of reopening assessment proceedings by the revenue has been provided under clause (b) of sub-section (1) of Section *149* (amended by the *Finance Act*, 2021).

82. In case the arguments of the learned counsels for the revenue are accepted, the benefits provided to the assessee in the substantive provisions of clause (b) of sub-section (1) of Section *149* and the first proviso to Section *149* have to be ignored or deferred. The defences which may be available to the assessee under Section *149* and/or which may be available under *Finance Act*, 2021 have to be denied. The crux of the submission of the learned counsels for the revenue is that the applicability of the amended provisions of *Finance Act*, 2021 will have to be postponed uptill 31.6.2021 because of the extensions granted by the Enabling Act, 2020 upto 31.3.2021 and further extensions in the time limit by the Notifications dated 31.3.2021 and 27.4.2021 thereunder.

83. The submission is that the extensions in the time limit provided under the unamended Section *149*(1)(b) upto 31.3.2021, will be applicable even in those cases where reassessment notices were issued under the amended Section *148* on or after 1.4.2021, by extending the time limit provided in the unamended Section *149* by plain and simple application of the Enabling Act (TOLA)' 2020.

84. At the first blush, this argument of the learned counsels for the revenue seemed convincing by simplistic application of the Enabling Act, treating it as a statute for extension in the limitation provided under the *Income Tax Act*, 1961, but on a deeper scrutiny, in view of the discussion noted above, if the argument of the learned counsels for the revenue is accepted, it would render the first proviso to sub-section (1) of Section *149* ineffective until 31.6.2021. In essence, it would render the first proviso to sub-section (1) of Section *149* otiose. This view, if accepted, it would result in granting extension of time limit under the unamended clause (b) of Section *149*, in cases where reassessment proceedings have not been initiated during the lifetime of the unamended provisions, i.e. on or before 31.3.2021. It would infuse life in the obliterated unamended provisions of clause (b) of sub-section (1) of Section *149*, which is dead and removed from the Statute book w.e.f. 1.4.2021, by extending timeline for actions therein.

85. In absence of any express saving clause, in a case where reassessment proceedings had not been initiated prior to the legislative substitution by the Finance Act 2021, the extended time limit of unamended provisions by virtue of Enabling Act cannot apply. In other words, the obligations upon the revenue under clause (b) of sub-section (1) of amended Section *149* cannot be relaxed. The defences available to the assessee in view of the first proviso to sub-section (1) of Section *149* cannot be taken away. The notifications issued by the delegates/Central Government in exercise of powers under sub-section (1) of Section 3 of the Enabling Act cannot infuse life in the unamended provisions of Section *149* by this way.

86. As held by the Apex Court, all defences which may be available to the assessee including those available under Section *149* of the *Income Tax Act* and all rights and contentions which may be available to the assessee and revenue under

Finance Act, 2021 shall continue to be available to reassessment proceedings initiated from 1.4.2021 onwards.

87. The contention of the learned counsels for the revenue that if such interpretation is given to the applicability of the Enabling Act, 2020, which has not been declared invalid by any Court of law, it would be rendered otiose is found misconceived, inasmuch as, the extensions in the time limit under the unamended Sections of the *Income Tax Act* prior to the amendment by the *Finance Act*, 2021, would still be applicable to the reassessment proceedings as may have been in existence on 31.3.2021. By harmonious construction of two parliamentary legislation, the Enabling Act, 2020 and *Finance Act*, 2021, the Coordinate Bench has explained the scope and limit of the Enabling Act, the *Finance Act*, 2021 and the Notifications issued under the Enabling Act. We are bound by the decision of the Coordinate Bench as affirmed by the Apex Court in **Ashish Agarwal (supra)**.

88. As noted above, the view taken by the Coordinate Bench in **Ashok Kumar Agarwal (supra)** of this Court has been upheld by the Apex Court with the only modification that the notices issued on or after 1.4.2021 under Section *148* shall be treated as notices under Section *148*-A of the *Income Tax Act* as substituted by the *Finance Act*, 2021, treating them to be show cause notices in terms of Section *148*(A)(b) of the *Income Tax Act*.

89. At the cost of repetition, it may be noted here that the Apex Court has permitted the revenue to proceed further with the reassessment proceedings under the substituted provisions of *Sections 147* to *151* of the *Income Tax Act* as per the *Finance Act*, 2021, subject to compliance of all the procedural requirements and the defences, which may be available to the assessee under the substituted provisions of the *Income Tax Act* and which may be available under the *Finance Act*, 2021 and in laws.

90. Now coming to the CBDT Instructions dated 11.5.2022 is concerned, we find that the third bullet to clause (6.1) which states that the Apex Court has allowed time extension provided by TOLA and the "extended reassessment notices" will travel back in time to their original date when such notices were to be issued and then Section *149* of the Act is to be applied at that point, is a surreptitious attempt to circumvent the decision of the Apex Court. The observations in paragraph "7' of the judgment in **Ashish Agarwal (supra)** of the Apex court has been noted in piecemeal in the said bullet point to clause (6.1) of the CBDT instructions dated 11.5.2022 to give it a distorted picture.

91. The directions issued in clause 6.2 to deal with the cases of the assessment years 2013-14 to 2017-18 are based on the misreading of the judgment of the Apex Court in Para 6.1 of the Instructions. Terming reassessment notices issued on or after 1.4.2021 and ending with 30.6.2021 as "extended reassessment notices", within the time extended by the Enabling Act (TOLA 2020) and various notifications issued thereunder, in Para 6.1 is an effort of the revenue to overreach the judgment of this Court in **Ashok Kumar Agarwal (supra)** as affirmed by the Apex court in **Ashish Agarwal (supra)**.

92. In any case, the CBDT Instruction No. 1/2022 dated 11.5.2022, issued in

exercise of its power under Section 119 of the *Income Tax Act*, as per own stand of the revenue, is only a guiding instruction issued for effective implementation of the judgment of the Apex Court in **Ashish Agarwal (supra)**. The instructions issued in the offending clauses (third bullet to clause 6.1) and clause 6.2 (i) and (ii), being in teeth of the decision of the Apex Court have no binding force.

93. As regards the judgment of the Delhi High Court in Touchstone Holding Pvt. Ltd. (supra) wherein it is held that because of the extension in time granted under the Enabling Act and further extensions by the notifications issued thereunder, the first proviso to Section *149* (as amended by the *Finance Act*, 2021) is not attracted for the assessment year 2013-14, with all due respect to the Judges holding the Bench, suffice it to say that the said view is in direct conflict with the view taken by this Court in **Ashok Kumar Agarwal (supra)** affirmed by the Apex Court in **Ashish Agarwal (supra)**. In fact, the observation in **Mon Mohan Kohli** (supra) by the Delhi High Court in paragraph "98' that the power of reassessment that existed prior to 31.3.2021 continue to exist till the extended period, i.e. till 30.6.2021, and the *Finance Act*, 2021 has merely changed the procedure to be followed prior to issuance of notice w.e.f. 1.4.2021, has been misread and misapplied in **Touchstone (supra)** by the Division Bench of the Delhi High Court.

94. Relevant is to note that even in **Mon Mohan Kohli** (supra), the Delhi High Court had quashed the reassessment notices issued on or after 1.4.2021 on the ground that the Relaxation Act (Enabling Act) does not give power to the Central Government to extend the erstwhile *Sections 147* to *151* beyond 31.3.2021 and/or differ the operation of substituted provisions enacted by the *Finance Act*, 2021. The Delhi High Court therein concurring with the view of this Court in **Ashok Kumar Agarwal (supra)** has held the Explanation A(a) and A(b) to the notifications dated 31.3.2021 and 27.4.2021 as ultra vires the Enabling Act, 2020 and declared them as bad in law and null and void. The observations in paragraph '99' in **Mon Mohan Kohli** (supra) are relevant to be extracted hereinunder:-

"99. This Court is of the opinion that Section 3(1) of Relaxation Act empowers the Government/Executive to extend only the time limits and it does not delegate the power to legislate on provisions to be followed for initiation of reassessment proceedings. In fact, the Relaxation Act does not give power to Government to extend the erstwhile Sections 147 to 151 beyond 31st March, 2021 and/or defer the operation of substituted provisions enacted by the Finance Act, 2021. Consequently, the impugned Explanations in the Notifications dated 31st March, 2021 and 27th April, 2021 are not conditional legislation and are beyond the power delegated to the Government as well as ultra vires the parent statute i.e. the Relaxation Act. Accordingly, this Court is respectfully not in agreement with the view of the Chhattisgarh High Court in Palak Khatuja (supra), but with the views of the Allahabad High Court and Rajasthan High Court in ***Ashok Kumar Agarwal (supra)*** *and Bpip Infra Private Limited (supra) respectively."*

95. Learned counsels for the revenue further submitted that the Apex Court has invoked its power under Article 142 of the Constitution of India to save all

reassessment notices issued on or after 1.4.2021 PAN INDIA, noticing that the revenue cannot be rendered remediless and cannot be put in a situation where it is prohibited from initiating reassessment proceedings, even if the same are permissible under *Finance Act*, 2021 as per the substituted *Sections 147* to *151* of the *Income Tax Act* and the object and purpose of reassessment proceedings cannot be frustrated. The direction was, thus, issued to treat all reassessment notices under Section *148* of the amended provision as deemed notices under Section *148*A of *Income Tax Act* (new provision brought by amendment) as a one time measure. The result is that all assessment notices issued on or after 1.4.2021 till the decision of the Apex Court dated 4.5.2022 [in **Ashish Agarwal (supra)**] will have to be saved.

96. To strike a balance, the Apex Court kept all the defences available to the assessee under the amended provision open, while rights available to the assessing officer/revenue under the *Finance Act*, 2021 have been kept alive. The defect in the reassessment notices issued on or after 1.4.2021 had, thus, been removed. The directions issued by the Apex Court under Article 142 of the Constitution of India having a binding force PAN INDIA, will be violated if the extension in time for issuance of reassessment notices under Section *149* of the pre and post amended *Income Tax Act*, is not granted with the aid of the Enabling Act (TOLA 2020).

97. To deal with the said submission, we may note the decision of the Apex Court in Assistant Commissioner (CT) LTU, Kakinada & others vs. Glaxo Smith Kline Consumer Health Care Limited16, wherein the Apex Court was confronted with the exercise of writ jurisdiction under Article 226 of the Constitution of India in a case where the statutory remedy of appeal stood foreclosed by the law of limitation. While making comparison of the powers of the High Court under Article 226 of the Constitution and that of the Apex Court under Article 142, it was observed that though the powers of the High Court under Article 226 of the Constitution are wide, but certainly not wider than the plenary powers bestowed on the Apex Court under Article 142 of the Constitution of India which is a conglomeration and repository of the entire judicial powers under the Constitution, to do complete justice to the parties. But even while exercising that power, the Apex Court is required to bear in mind the legislative intent and not to render the statutory provision otiose. The decision of the Constitution Bench in Union Carbide Corporation and others vs. Union of India and others17 was relied to note therein that in exercising powers under Article 142 and in assessing the needs of 'complete justice' of a cause or matter, the Apex Court will take note of the express prohibitions in any substantive statutory provisions based on some fundamental principles of public policy and regulate the exercise of its power and discretion, accordingly.

98. Moreover, in **Ashish Agarwal (supra)**, the Apex Court has invoked the power under Article 142 of the Constitution of India to the limited extent to direct that the order passed in **Ashish Agarwal (supra)** shall govern and be made applicable to similar judgments and orders passed by the various High Courts across the country, as in the impugned judgments and orders passed by the High Court of Judicature at Allahabad. The order passed by the Apex Court in **Ashish Agarwal (supra)** has been applied to all similar matters in exercise of powers under Article

142 of the Constitution of India. The reassessment notices issued under the unamended Section *148* on or after 1.4.2021, were treated to be show cause notices in terms of Section *148*-A(b) and the revenue was required to conduct enquiry in accordance with the amended provisions under the *Finance Act*, 2021, enforced w.e.f. 1.4.2021. The assessing officers are required to pass orders in accordance with the amended provisions after following the procedure as required under Section *148*A to issue notice under Section *148* (as amended). All defences available to the assessee including those available under Section *149* of the *Income Tax Act* and all rights and contentions available to the assessee have been made available. The right and contentions to the revenue under the *Finance Act*, 2021 and in law are also continued to be available.

99. The said observations of the Apex Court cannot be read to me that extensions in time under the unamended Section *149* has been granted by the Apex court by applying TOLA, 2020 to the reassessment notices in respect of the proceedings relating to the past assessment years, where such notices were not issued uptill 31.3.2021 and they can be treated as "extended reassessment notices" and allowed to travel back in time to their original date when such notices were to be issued and then to apply amended Section *149* as interpreted by the revenue in Para 6.1 of the CBDT Instructions dated 11.5.2022.

100. In case, this argument of the learned counsels for the revenue is accepted it will result in permitting the revenue to initiate reassessment proceedings in a manner which cannot otherwise be done under the Statute.

101. The last submission of the learned counsels for the revenue is based on the observations of the Division Bench in **Ashok Kumar Agarwal (supra)** in paragraph "71' as under:-

"71. Here, it may also be clarified, Section 3(1) of the Enabling Act does not itself speak of reassessment proceeding or of Section 147 or Section 148 of the Act as it existed prior to 01.04.2021. It only provides a general relaxation of limitation granted on account of general hardship existing upon the spread of pandemic COVID -19. After enforcement of the Finance Act, 2021, it applies to the substituted provisions and not the pre-existing provisions."

102. Placing the said observation, it was argued that even the Division Bench therein has held that after enforcement of the *Finance Act*, 2021, the general relaxation of limitation granted on account of general hardship existing upon the spread of pandemic Covid-19 applies to the substituted provisions. The extension of time, thus, can be granted even after amendment by the *Finance Act*, 2021 under Section 3(1) of the Enabling Act (TOLA 2020).

103. To deal with this submission, suffice it to say that extension in time uptill 30.6.2021 can be granted to the time limit provided in the amended Section *149* of the *Income Tax Act* brought by the *Finance Act*, 2021 by plain provisions of clause (A)(a) of the Notification No. 20 of 2021 dated 31.3.2021 ignoring Explanation to the same (quashed by this Court). Similarly extension in time as per the plain provision of clause (A)(a)(b) of the Notification No. 38 dated 27.4.2021 ignoring Explanation to it, may be granted as and when the said

extensions are applicable for issuance of notice under Section *148* as per the time limit specified in Section *149* or sanctions under *Section 151* of the *Income Tax Act* as amended by the *Finance Act*, 2021, after making all compliances, as required under the *Income Tax Act*, 1961 (amended provisions).

104. It may profitably be noted, at this stage, that it is settled law that a taxing statute must be interpreted in the light of what is clearly expressed. It is not permissible to import provisions in a taxing statute so as to supply any assumed deficiency. In interpreting a taxing statute, equitable considerations are out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them; Interpreting taxing statute in the light of what is clearly expressed: it cannot imply anything which is not expressed. Before taxing any person it must be shown that he falls within the ambit of the charging section by clear words used in the section, and if the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject. There is nothing unjust in the taxpayer escaping if the letter of the law fails to catch him on account of the legislature's failure to express itself clearly. (Reference **Union of India & others Ind-Swift Laboratories Ltd18; CIT Vs. Modi Sugar Mills Ltd19; State of West Bengal Vs. Kesoram Industries Ltd20.**

Conclusions:-

105. Our answer to the two questions posed to us are, thus, as under:-

(i) The reassessment proceedings initiated with the notice under Section *148* (deemed to be notice under Section *148*-A), issued between 01.04.2021 and 30.06.2021, cannot be conducted by giving benefit of relaxation/extension under the Taxation and Other Laws (Relaxation And Amendment of Certain Provisions) Act' (TOLA) 2020 upto 30.03.2021, and the time limit prescribed in Section *149* (1)(b) (as substituted w.e.f. 01.04.2021) cannot be counted by giving such relaxation from 30.03.2020 onwards to the revenue.

(ii) In respect of the proceedings where the first proviso to Section *149*(1)(b) is attracted, benefit of TOLA' 2020 will not be available to the revenue, or in other words, the relaxation law under TOLA' 2020 would not govern the time frame prescribed under the first proviso to Section *149* as inserted by the Finance Act' 2021, in such cases.

(iii) The reassessment notices issued to the petitioners in this bunch of writ petitions, on or after 1.4.2021 for different assessment years (A.Y. 2013-14 to 2017-18), are to be dealt with, accordingly, by the revenue.

106. As noted above, we have decided the issue only on the legal principles and the factual aspects of the matter are to be agitated, accordingly, by the petitioners before the appropriate Courts/Forum, based upon the above observations.

107. All the writ petitions in this bunch are, accordingly, disposed of.

108. No order as to costs.

(2023) 3 ILRA 67
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.01.2023
BEFORE

THE HON'BLE MANOJ MISRA J.
THE HON'BLE VIKAS BUDHWAR, J.

Special Appeal No. 1 of 2023

C/M Kanoharlal P.G. Girls College, Brahmapuri, Meerut & Anr. ...Appellants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Sri Abhiuday Mehrotra, Sri Subhanshu, Sri Shailendra (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Avneesh Tripathi, Sri Hemendra Kumar, Sri R.K. Ojha (Sr. Advocate)

A. Service Law – Probation – Termination - Uttar Pradesh Government Department Driver's Service Rules, 1993 - Rule 17(1) - U.P. St. Universities Act, 1973: Section 35(2), 35(3); U.P. Higher Education Services Commission Act, 1980: Section 12, 13, 14, 30 - **A teacher as defined by S. 2(19) of the 1973 Act includes a Principal of an affiliated or associated College.** The first proviso deals with three separate situations as specified in clauses (a), (b) and (c). Clause (a) deals with the case of a teacher of the University; Clause (b) deals with the case of a Principal of an affiliated or associated College of the University; and Clause (c) deals with the case of any other teacher of an affiliated or associated College of the University. The requirement of placing Principal in Clause (b) and any other teacher in Clause (c) is apparent from the fact that in so far as a teacher is concerned before his termination there can be consideration of the report of the Principal and in case the teacher is not the senior most teacher of the subject, also of the senior most teacher of the subject. Such consideration cannot be there in the case of a Principal because in the hierarchy of teachers, the Principal is the highest. Therefore, **by placing Principal in clause (b) and teacher in clause (c) of the first proviso, the use of the word 'teacher' in the second and third provisos does not express a legislative intent to deprive the Principal of the protection of the aforesaid two provisos.** As per the provisions of section 2(19) of the 1973 Act, 'teacher' includes a Principal. (Para 27)

B. The phrase 'or otherwise' is used in sub-section (3) of section 35, cannot be read ejusdem generis to the word punishment - The legislative intent for inserting second and third proviso to sub-section (2) of Section 31 of the 1973 Act was clear to accord protection to teachers against arbitrary termination of their services during or on the expiry of the period of probation. Bearing that in mind by using the phrase "by way of punishment or otherwise" the legislative intent is further strengthened as to indicate that sub-section (3) of Section 35 of the 1973 Act would apply to termination whether it is punitive or simpliciter. In such circumstances the word "otherwise" would have to be given its ordinary meaning which is, in other manner; in other circumstances or in a different manner; in another way; differently in other respects. (Para 37)

Assigning ordinary meaning to the words "or otherwise", makes the position clear that, by virtue of sub section (3) to section 35, the provisions of sub-section (2) of Section 35 of 1973 Act shall apply to any decision to terminate the service of a teacher whether by way of punishment or by way of termination simpliciter. (Para 38)

C. Words and Phrases – (i)'*Teacher*' - Section 2 (19) of the 1973 Act defines 'teacher' as: 'teacher' in relation to the provisions of this Act except Chapter XI-A, means a person employed in a University or in an institute or in a constituent or affiliated or associated college of a University for imparting instructions or guiding or conducting research in any subject or course approved by that University and includes a Principal or Director.

From a plain reading of the definition of teacher in the 1973 Act it is clear that unless the context otherwise requires, wherever the word 'teacher" is used in relation to the provisions of the 1973 Act, it shall, inter-alia, include a Principal of a constituent or affiliated or associated College of a University. (Para 20, 21)

(ii) '*ejusdem generis*' - The latin expression ejusdem generis is a principle of construction whereby when general words in a statutory context are flanked by restricted words, the meaning of the general words are taken to be restricted by implication with the meaning of the restricted words. This ejusdem generis principle is a facet of the principle of Noscitur a sociis. The Latin word `sociis' means `society'. Therefore, when general words are juxtaposed with specific words, general words cannot be read in isolation. Their colour and their contents are to be derived from their context. (Para 32)

The ejusdem generis rule strives to reconcile the incompatibility between specific and general words. This doctrine applies when (i) the statute contains an enumeration of specific words; (ii) the subjects, of the enumeration constitute-a class or category; (iii) that class or category is not exhausted by the enumeration; (iv) the general term follows the enumeration and (v) there is no indication of a different legislative intent.

The ejusdem generis rule is not a rule of law but is merely a rule of construction to aid the courts to find out the true intention of the legislature. If a given provision is plain and unambiguous and the legislative intent is clear, there is no occasion to call into aid that rule. (Para 35, 36)

Therefore, the decision of the management of a College affiliated or associated to the University to terminate the service of a Principal or teacher of the College, during or on expiry of the period of probation, shall not take effect unless it has been approved by the Vice-Chancellor. (Para 39)

Special appeal dismissed. (E-4)

<u>Precedent followed</u>:

1. P.C. Bagla (Post Graduate) College Hathras Vs Vice-Chancellor, Agra University & anr., (1980) 6 ALR 413 (Para 13)

2. Edukanti Kistamma (dead) through Lrs. & ors. Vs S. Venkatareddy (dead) through Lrs. & ors., (2010) 1 SCC 756 (Para 13)

3. Kamlesh Kumar Sharma Vs Yogesh Kumar Gupta & ors., 1998 (3) SCC 45 (Para 13)

4. Dr. A.P. Srivastava Vs The Committee of Management, Laxmi Narain Degree College, Sirsa, Allahabad & anr., 1982 UPLBEC 25 (Para 16)

5. Committee of Management Mahatma Gandhi Shanti Smarak Maha Vidyalaya, Gram Maqsoodpur, District Ghazipur & ors., 1988 UPLBEC 526 (Para 16)

6. Amar Chandra Chakraborty Vs Collector of Excise, 1972 (2) SCC 442 (Para 31)

7. Maharastra University of Health Sciences & ors. Vs Satchikitsa Prasarak Mandal & ors., 2010 (3) SCC 786 (Para 33)

8. Smt. Lila Vati Bai Vs St. of Bombay, AIR 1957 SC 521 (Para 35)

9. Jage Ram & ors. Vs St. of Har. & anr., 1971 (1) SCC 671 (Para 36)

10. P. Ramanatha Aiyar Advanced Law Lexicon Edition 4, Vol. VIII, Page 3443 (Para 37)

11. Avtar Singh Vs U.O.I. & ors., (2016) 8 SCC 471 (Para 9)

12. U.O.I. & ors. Vs Methu Meda, (2022) 1 SCC 1 (Para 9)

13. Pawan Kumar Vs U.O.I. & anr., 2022 SCC OnLine SC 532 (Para 17)

Present special appeal challenges the judgment and order dated 29.11.2022, passed by the learned Single Judge.

(Delivered by Hon'ble Manoj Misra, J.
&

Hon'ble Vikas Budhwar, J.)

1. The short question that arises for our consideration in this appeal is whether an order of termination of service of a Principal of a College affiliated or associated to the University governed by the provisions of U.P. State Universities Act, 1973 (1973 Act), during or on expiry of the period of probation, could take effect without the approval of the Vice-Chancellor of the University concerned.

2. The factual matrix in the context of which the above issue arises is as follows: Kanohar Lal Post Graduate Girls College, Sharda Road, Brahampuri, Meerut (hereinafter referred to as "the College') is affiliated to Chaudhary Charan Singh University, Meerut (hereinafter referred to as "the University'). As the post of Principal in the College was lying vacant, a requisition was sent to the Higher Education Services Commission (for short "the Commission') to recommend a candidate for filling up the post. Pursuant thereto, the Director of Higher Education recommended fifth respondent for appointment on the post. In pursuance thereof, letter of appointment was issued on 22.10.2021 appointing fifth respondent as Principal of the College on probation of one year by stipulating that her service shall be subject to the service conditions prescribed by the University. On strength of the letter of appointment, the fifth respondent joined her duties as Principal of the College on 23.10.2021. On 16.10.2022, the Management of the College (the appellants herein) resolved that services of the fifth respondent would neither be confirmed nor the period of probation shall be extended on expiry of probation period of one year. Consequent to this resolution, by letter dated 21.10.2022, the appellant informed the fifth respondent that her services are not confirmed and they shall stand terminated on expiry of probation period. Against termination of her service, the fifth respondent represented to the University. The In-charge Vice-Chancellor of the University, through its letter / order dated 28.10.2022, directed that the effect and operation of the termination letter dated 21.10.2022 shall remain stayed as prior to issuance of the termination letter the matter was not reported to the University and no approval was sought as is required by section 35 (2) of the 1973 Act. Accordingly, by the said letter, the management of the College was invited to explain the circumstances in which the termination letter was issued. It is this letter/order dated 28.10.2022 which was impugned in Writ A No. 19736 of 2022 filed by the appellants before the learned Single Judge.

3. Before the learned Single Judge, on behalf of the appellants, it was argued that the Vice-Chancellor is not vested with power to stay the effect and operation of the resolution, or the consequential order of termination, passed by the Committee of Management and, therefore, the order is void. Whereas, on behalf of fifth respondent it was argued that by virtue of Section 35 (2) of the 1973 Act, there could be no dispensation of service without the prior approval of the Vice-Chancellor therefore, the order terminating the services, without prior approval, was void. Thus, the order of the Vice-Chancellor impugned in the writ petition required no interference.

4. By impugned judgment and order dated 29.11.2022, the learned single Judge disposed off Writ A No. 19736 of 2022 by observing that there is no patent error in the

order of the In-charge Vice-Chancellor. However, a direction was issued that if the writ petitioner files an objection to the proceedings pending before the Vice-Chancellor, the Vice-Chancellor shall proceed to pass an appropriate reasoned order, in accordance with law, within a specified period, after hearing both sides.

5. Aggrieved by the order of the learned Single Judge dated 29.11.2022, the Management of the College (i.e. the writ petitioner) has filed this intra court appeal.

6. We have heard Sri Shailendra, learned senior counsel, assisted by Sri Subhanshu and Sri Abhiuday Mehrotra, for the appellants; Sri Avneesh Tripathi for the University; the learned Standing Counsel for the State of U.P.; and Sri R. K. Ojha, learned senior counsel, assisted by Sri Hemendra Kumar, for the respondent no.1. counsel for the parties in support of their respective cases, it would be apposite for us to notice the relevant statutory provisions in the context of which those submissions have been made before us.

Relevant Statutory Provisions

8. The U.P. Higher Education Services Commission Act, 1980 (for short 1980 Act) was enacted to establish a service commission for the selection of teacher for appointment to the Colleges affiliated to or recognised by a University and for matters connected therewith or incidental thereto. Section 30 of the 1980 Act provides that the provisions of this Act, shall have effect notwithstanding anything to the contrary contained in the Uttar Pradesh State Universities Act, 1973 or the Statutes or Ordinances made thereunder. Section 12 of the 1980 Act provides that every appointment as a teacher of any college shall be made by the management in accordance with the provisions of this Act and every appointment made in contravention thereof shall be void. Sub-section (2) of section 12 provides that the management shall intimate the existing vacancies and the vacancies, likely to be caused during the course of the ensuing academic year, to the Director at such time and in such manner, as may be prescribed. Sub-section (3) of section 12 provides that the Director shall notify to the Commission at such time and in such manner as may be prescribed a subject wise consolidated list of vacancies intimated to him from all colleges. Sub-section (4) of section 12 provides that 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. Section 13 (1) provides that the Commission shall, as soon as possible, after the notification of vacancies to it under sub-section (3) of Section 12, hold 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 as practicable, twenty five per cent more than the number of vacancies in that subject. Sub-section (2) of section 13 provides that the list sent by the Commission shall be valid till the receipt of a new list from the Commission. Sub-section (3) of section 13 provides that 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. Section 14 casts a duty on the management to issue appointment letter to the person whose

name has been intimated within a period of one month from the date of receipt of intimation under sub-section (3) or sub-section (4) or sub-section (5) of Section 13. Sub-section (2) of section 14 provides that where the person referred to in sub-section (1) fails to join the post within the time allowed in the appointment letter or within such extended time as the management may allow in this behalf, or where such person is otherwise not available for appointment, the Director, shall on the request of the management intimate fresh name from the list sent by the Commission under sub-section (1) of Section 13 in the manner prescribed.

9. The provisions of the 1980 Act therefore deal with the selection of teachers for appointment to the Colleges affiliated to or recognised by the University, and for matters connected therewith or incidental thereto. They do not specifically provide for the terms and conditions of appointment of such teacher or the service conditions of the teachers. As a result thereof, the terms and conditions of appointment including termination of the services continue to be governed by the provisions of 1973 Act. Chapter VI of 1973 Act provides for appointment and condition of service of teachers and officers. The relevant provisions of section 31 of the 1973 Act with which we are concerned in this appeal read as under:-

"31. **Appointment of Teachers**. - (1) Subject to the provisions of this Act, the teachers of the University and the teacher of an affiliated or associated college (other than a college maintained exclusively by the State Government) shall be appointed by the Executive Council or the management of the affiliated or associated college, as the case may be, on the recommendation of a Selection Committee in the manner hereinafter provided.

(2) The appointment of every such teacher, Director and Principal not being an appointment under sub-section (3), shall in the first instance be on probation for one year which may be extended for a period not exceeding one year;

Provided that no order of termination of service during or on the expiry of the period of probation shall be passed -

(a) in the case of a teacher of the University, except by order of the Executive Council made after considering the report of the Vice-Chancellor and (unless the teacher is himself the Head of the Department), the Head of the Department concerned;

(b) in the case of Principal of an affiliated or associated college, except by order of the Management; and

(c) in the case of any other teacher of an affiliated or associated college, except by order of the Management made after considering the report of the Principal and (unless such teacher is the senior-most teacher of the subject), also of the senior most teacher of the subject :

[Provided further that no such order of termination shall be passed except after notice to the teacher concerned giving him an opportunity of explanation in respect of the grounds on which his services are proposed to be terminated:

Provided also that if a notice is given before the expiry of the period of probation or the extended period of probation, as the case may be, the period of probation shall stand extended until the final order of the Executive Council under clause (a) of the first proviso or, as the case may be, until the approval of the Vice-

Chancellor under Section 35 is communicated to the teacher concerned.] "

10. Section 35 of the 1973 Act of which reference is there in the third proviso to sub section (2) of section 31 is reproduced below:-

"35. Conditions of service of teachers of affiliated or associated colleges other than those maintained by Government or local authority. - (1) Every teacher in an affiliated or associated college (other than a college maintained exclusively by the State Government) shall be appointed under a written contract which shall contain such terms and conditions as may be prescribed. The contract shall be lodged with the University and a copy thereof shall be given to the teacher concerned, and another copy thereof shall be retained by the college concerned.

(2) Every decision of the Management of such college to dismiss or remove a teacher or to reduce him in rank or to punish him in any other manner shall before it is communicated to him, be reported to the Vice-Chancellor and shall not take effect unless it has been approved by the Vice-Chancellor:

Provided that in the case of colleges established and administered by a minority referred to in clause (1) of Article 30 of the Constitution of India, the decision of the Management dismissing removing or reducing in rank or punishing in any other manner any teacher shall not require the approval of the Vice-Chancellor, but, shall be reported to him and unless he is satisfied that the procedure prescribed in this behalf has been followed, the decision shall not be given effect to.

(3) The provisions of sub-section (2) shall also apply to any decision to terminate the services of a teacher, whether by way of punishment **or otherwise** but shall not apply to any termination of service on the expiry of the period for which the teacher was appointed:

Provided that in the case of colleges established and administered by a minority referred to in clause (1) of Article 30 of the Constitution of India, the decision of the Management terminating the service of any teacher shall not require the approval of the Vice-Chancellor, but shall be reported to him and unless he is satisfied that the procedure prescribed in this behalf has been followed, the decision shall not be given effect to.

(4) Nothing in sub-section (2) shall be deemed to apply to an order of suspension pending inquiry, but any such order may be stayed, revoked or modified by the Vice-Chancellor;

Provided that in the case of colleges established and administered by a minority referred to in clause (1) of Article 30 of the Constitution of India, such order may be stayed, revoked or modified by the Vice-Chancellor only if the conditions prescribed for such suspension are not satisfied.

(5) Other conditions of service of teachers of such colleges shall be such as may be prescribed."

Submissions on behalf of Appellants

11. The learned counsel for the appellant contended that sub-section (2) of Section 31 specifically provides that the appointment of a teacher, Director and Principal in the first instance shall be on probation for one year which may be extended for a period not exceeding one year. The first proviso to sub-section (2) has three clauses. Each clause deals with a separate class of teacher. Clause (a) deals with teacher of the University; clause (b)

deals with the case of a Principal of an affiliated or associated College; and clause (c) deals with the case of any other teacher of an affiliated or associated College. As the three clauses of the first proviso deal with three separate class of persons, namely, (i) a teacher of the University; (ii) Principal of an affiliated or associated College; and (iii) any other teacher of an affiliated or associated College, the provisions of the second proviso that no such order of termination shall be passed except after notice to the teacher concerned giving him an opportunity of explanation in respect of the grounds on which his services are proposed to be terminated would relate to a teacher other than the Principal. Likewise, the provisions of the third proviso would apply to a teacher other than the Principal of an affiliated or an associated College. In respect of applicability of the provisions of sub-section (2) read with sub section (3) of Section 35 of the 1973 Act it was argued that the same would apply only where the termination of service is by way of punishment and not termination simplicitor, because the words ***''or otherwise'*** used after the word punishment would have to be interpreted *ejusdem generis* the word punishment. In addition to above, it was argued that the provisions of sub-section (2) of Section 35 read with sub section (3) of section 35 of the 1973 Act would not in any case apply to the case of a Principal because sub-section (3) speaks of a teacher and not a Principal.

12. In light of the above submissions, the learned counsel for the appellant contended that there was no requirement of a prior approval before terminating the services of a Principal on probation, particularly, when the termination is simplicitor and not punitive. It was also argued that there being no specific provision in the 1973 Act empowering the Vice-Chancellor to stay the effect and operation of an order of termination, the order of Vice-Chancellor is void and was therefore liable to be set aside. It was argued that the learned Single Judge fell in error while holding that there was no patent error in the order of the Incharge Vice-Chancellor.

13. In addition to above, the learned counsel for the appellant contended that the Vice-Chancellor (In-charge) has stayed the effect and operation of the communication letter which was a consequence of a resolution therefore, as there is no stay on the resolution, the consequential order would remain effective. In support of his submissions, the learned counsel for the appellant placed reliance on a Full Bench decision of this Court in ***P. C. Bagla (Post Graduate) College, Hathras vs. Vice-Chancellor, Agra University and another, (1980) 6 ALR 413*** wherein it was held that the probationer has no right to hold a post and therefore the termination of his employment made in accordance with the terms of the contract or rules of his service does not per se amount to punishment unlike the case of a permanent and confirmed employee. Reliance has also been placed on a decision of the Apex Court in ***Edukanti Kistamma (dead) through Lrs. And others Vs. S. Venkatareddy (dead) through Lrs. And others, (2010) 1 SCC 756*** so as to contend that where the basic order has not been questioned, the validity of consequential order is not to be examined. This decision was cited to contend that without putting a stay on the resolution, the Vice-Chancellor had no right to put in abeyance the termination letter. To buttress the submission that the words ***''or otherwise'***

used in sub-section (3) of Section 35 of the 1973 Act were to be read *ejusdem generis* to the preceding word punishment, the learned counsel for the appellant cited a decision of the Apex Court in ***Kamlesh Kumar Sharma vs. Yogesh Kumar Gupta and others, 1998 (3) SCC 45.***

Submissions on behalf of respondents

14. **Per contra**, the learned counsel for the respondents contended that section 2 (19) of the 1973 Act defines "teacher' as follows:-

"In this Act, unless the context otherwise requires **''teacher'** in relation to the provisions of this Act except Chapter XI-A, means a person employed in a University or in an institute or in a constituent or affiliated or associated college of a University for imparting instructions or guiding or conducting research in any subject or course approved by that University and **includes a Principal** or Director."

15. By relying on the above definition of the word "teacher', the learned counsel for the respondents contended that section 35 falls in Chapter VI of the 1973 Act and therefore, the word "teacher' used in sub-section (3) of section 35 including sub-section (2) of section 35 of the 1973 Act would include a Principal on probation hence the protection thereunder would be available to a Principal as well. It was contended on behalf of the respondents that there is no general principle that the phrase ***''or otherwise'*** is to be read *ejusdem generis* to the preceding words. It is argued that interpretation of the words ***''or otherwise'*** has to be accorded a wider meaning so as to cover all cases, whatever might be the reason, of termination.

16. In addition to above, the learned counsel for the respondents submitted that under Section 13(1)(a) of the 1973 Act, the Vice-Chancellor being the Principal executive and academic officer of the University is empowered to exercise general supervision and control over the affairs of the University including the constituent colleges, the Institutes maintained by the University and colleges affiliated and associated to it. Sub-section (4) of section 13 casts a duty on the Vice-Chancellor to ensure the faithful observance of the provisions of the Act, the Statutes and Ordinance and provides that without prejudice to the powers of the Chancellor under Sections 10 and 68, he may exercise all such powers as may be necessary in that behalf. It was contended that by conferring general power of supervision and control on the Vice-Chancellor over the affairs of the University including constituent Colleges, the institutes maintained by the University and colleges affiliated or associated to it, the legislative intent is clear that the Vice-Chancellor shall ensure the faithful observance of the Act, the Statutes or the Ordinances. In light thereof, the provisions of section 35 of the 1973 Act have to be accorded wider interpretation so as to serve the purpose for which it is placed in the Act. Hence, the context in which the phrase ***''or otherwise'*** is used in sub-section (3) of section 35, the same cannot be read *ejusdem generis* to the word punishment. Learned counsel for the respondents placed reliance on two Division Bench decisions of this Court, namely:- *(a) Dr. A.P. Srivastava vs. The Committee of Management, Laxmi Narain Degree College, Sirsa, Allahabad and another, 1982 UPLBEC 25;* and (b) Committee of Management Mahatama Gandhi Shanti Smarak Maha Vidyalaya, Gram

Maqsoodpur, District Ghazipur Vs. Vice-Chancellor, Gorakhpur University, Gorakhpur and others, 1988 UPLBEC 526.

17. In the aforesaid two decisions, the phrase *''whether by way of punishment or otherwise*' used in sub-section (3) of Section 35 of the 1973 Act has been accorded wider interpretation as to include cases of termination of service of a teacher within the period of probation on the ground that service work and conduct was not satisfactory. The Court held that termination of services of teacher appointed on probation, without obtaining approval of the Vice-Chancellor, would be illegal.

Submissions in Rejoinder

18. In his rejoinder arguments, the learned counsel for the appellant submitted that the above two division bench decisions relied upon by the learned counsel for the respondents are *per incuriam* as they fail to notice the true import of the provisions of section 31 of the 1973 Act.

DISCUSSION AND ANALYSIS

19. Before we proceed to weigh the rival submissions, the argument of the learned counsel for the appellants that there is no specific power conferred on the Vice-Chancellor to stay the effect and operation of the order of termination need not detain us because, if we conclude that there can be no termination of the services of a Principal without the approval of the Vice-Chancellor, the order terminating the services would not operate till it is approved. Therefore, it would be immaterial whether the Vice-Chancellor had the power to stay its effect or not. We have, therefore, to examine, in light of the relevant provisions noticed above, whether the termination of service of a Principal of a College affiliated or associated to the University governed by the provisions of U.P. State Universities Act, 1973 (1973 Act) could take effect without the approval of the Vice-Chancellor of the University to which the College is affiliated or associated.

20. Section 2 (19) of the 1973 Act defines "teacher' as follows:-

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

(19) 'teacher' in relation to the provisions of this Act except Chapter XI-A, means a person employed in a University or in an institute or in a constituent or affiliated or associated college of a University for imparting instructions or guiding or conducting research in any subject or course approved by that University and includes a Principal or Director."

21. From a plain reading of the definition of teacher in the 1973 Act it is clear that unless the context otherwise requires, wherever the word "teacher" is used in relation to the provisions of the 1973 Act, it shall, inter-alia, include a Principal of a constituent or affiliated or associated College of a University.

22. When we carefully read the provisions of section 31 of the 1973 Act, we notice that sub-section (1) of section 31 uses the word "teacher' and refrains from using the word "principal'. It is a general provision which speaks of appointment of the teachers of the University and the teachers of an affiliated or associated college other than a college maintained exclusively by the State Government. Sub-section (2) of section 31 clarifies that the appointment of every such

teacher, Director and Principal not being an appointment under sub-section (3) *(note: we are not concerned with appointments under sub section (3) of section 31 as they deal with appointments on a leave or short term vacancy)*, shall in the first instance be on probation for one year which may be extended for a period not exceeding one year. The first proviso to sub-section (2) of Section 31 of the 1973 Act specifies the authority and the manner in which an order of termination of service, during or on the expiry of the period of probation, is to be passed. The proviso has three clauses (a) , (b) and (c). Clause (a) specifies the authority and the manner in which the services of a teacher of the University, during or on the expiry of the period of probation, could be terminated. Clause (b) specifies the authority which could terminate the services of a Principal of an affiliated or associated College whereas Clause (c) not only specifies the authority which could terminate the services of a teacher other than the Principal of an affiliated or associated College but also suggests that no such order of termination is to be made by the management except after considering the report of the Principal and unless such teacher is the senior most teacher of the subject, also of the senior most teacher of the subject.

23. The second proviso to sub-section (2) of Section 31 provides a rider to the exercise of power of termination by stating that no such order of termination shall be passed except after notice to the teacher concerned giving him an opportunity of explanation in respect of the grounds on which his services are proposed to be terminated.

24. The third proviso clarifies that as and when a notice as contemplated by the second proviso is given before the expiry of the period of probation or the extended period of probation, the period of probation shall stand extended until the final order of the Executive Council as contemplated by Clause (a) of the first proviso or, as the case may be, until the approval of the Vice-Chancellor under Section 35 is communicated to the teacher concerned.

25. A plain construction of the aforesaid provisions would reveal that Clause (a) of the first proviso of sub-section (2) relates to a teacher of the University as per which no order of termination of service of such teacher can be passed during or on the expiry of the period except by order of the Executive Council made after considering the report of the Vice-Chancellor and, unless the teacher is himself the Head of the Department, the Head of the Department concerned. This implies that the service of a teacher of the University other than the Head of the Department, during or on the expiry of period of probation, can be terminated by an order of the Executive Council after considering the report of the Vice-Chancellor and the Head of the Department concerned. Whereas the services of such a teacher who is himself the Head of the Department, can be terminated by order of the Executive Council made after considering the report of the Vice-Chancellor. On a plain reading of clauses (b) and (c) of the first proviso we would notice that whether it is the case of a Principal or of any other teacher of an associated or affiliated College, the services can be terminated, during or on the expiry of the period of probation, by order of the management. The only distinction between the two clauses (i.e. (b) and (c)) is that when it relates to termination of a teacher other than the Principal of an affiliated or associated College, the order of the

management must be after considering the report of the Principal and, if the teacher concerned is not the senior most teacher of the subject, also the report of the senior most teacher of the subject. The second proviso provides that no such order of termination shall be passed except after notice to the teacher concerned giving him an opportunity of explanation in respect of the grounds on which his services are proposed to be terminated. The third proviso clarifies that if a notice as contemplated by the second proviso is given before the expiry of the period of probation or the extended period of probation, as the case may be, the period of probation shall extend until the final order is passed by the Executive Council under clause (a) or, as the case may be, until the approval of the Vice-Chancellor under Section 35 is communicated to the teacher concerned. The use of phrase *"as the case may be"* in the third proviso is to indicate that where the notice as contemplated in the clause (b) of the second proviso is served on a teacher of an affiliated or associated College, the period of probation shall stand extended until the approval of the Vice-Chancellor under section 35 is communicated to the teacher concerned. Any other interpretation would render the phrase *"until the approval of the Vice-Chancellor under Section 35"* otiose as section 35 of the 1973 Act deals only with the conditions of service of teachers of affiliated or associated colleges other than those maintained by the Government or local authority.

26. At this stage we may note that the second and third proviso to sub-section (2) of Section 31 of the 1973 Act have been inserted by U.P. Act No. 5 of 1977. In the prefatory note - Statement of Objects and Reasons - it is stated as follows:-

"With a view to removing certain difficulties experienced in the working of the provisions of the Uttar Pradesh State Universities Act, 1973, it has been considered expedient to make, inter alia, the following amendments in the aforesaid Act-

(1).....

(2) It has been provided that where the services of a teacher on probation are to be terminated, he should be given an opportunity of explanation in respect of the grounds on which such action is proposed to be taken

(3) .....

(4).....

(5) The Vice-Chancellor has been empowered to direct the management to reinstate and to pay the amount of salary to the teacher of a Degree College in case a decision of the management to dismiss or remove him or to terminate his services is not approved by the Vice-Chancellor. Such order shall be executable like a decree of the Civil Court and the amount of salary shall be recoverable as arrears of land revenue."

Thus, by insertion of the second and third proviso to sub-section (2) of the U.P. State Universities Act, 1973, the legislature has clearly exhibited its intent to control arbitrary termination of service of a teacher on probation.

27. The contention of the learned counsel for the appellant that the second and third provisos will only relate to a teacher of an affiliated or associated College and not to the Principal thereof is not acceptable for the reason that a teacher as defined by section 2(19) of the 1973 Act includes a Principal of an affiliated or associated College. According to the learned counsel for the appellant since the second and third provisos are placed below

clause (c) therefore they would apply only with reference to a teacher other than a Principal is not acceptable because the first proviso deals with three separate situations as specified in clauses (a), (b) and (c). Clause (a) deals with the case of a teacher of the University; Clause (b) deals with the case of a Principal of an affiliated or associated College of the University; and Clause (c) deals with the case of any other teacher of an affiliated or associated College of the University. The requirement of placing Principal in Clause (b) and any other teacher in Clause (c) is apparent from the fact that in so far as a teacher is concerned before his termination there can be consideration of the report of the Principal and in case the teacher is not the senior most teacher of the subject, also of the senior most teacher of the subject. Such consideration cannot be there in the case of a Principal because in the hierarchy of teachers, the Principal is the highest. Therefore, by placing Principal in clause (b) and teacher in clause (c) of the first proviso, the use of the word "teacher' in the second and third provisos does not express a legislative intent to deprive the Principal of the protection of the aforesaid two provisos. We, therefore, find no merit in the submission of the learned counsel for the appellant that second and third provisos of sub-section (2) would not apply to the case of a Principal of an affiliated or associated College, particularly, when, as per the provisions

28. We shall now deal with the issue as to whether the prior approval of the Vice-Chancellor is required for an order of termination of service to take effect even if the termination is simpliciter. Sub-section (2) of section 35 provides that every decision of the management of an affiliated or associated College other than a College maintained exclusively by the State Government to dismiss or remove a teacher or to reduce him in rank or to punish him in any other manner shall before it is communicated to him, be reported to the Vice-Chancellor and shall not take effect unless it has been approved by the Vice-Chancellor. The requirement of prior approval is not there in the case of colleges established and administered by a minority referred to in clause (1) of Article 30 of the Constitution of India. Sub-section (3) of section 35 provides that the provisions of sub-section (2) shall also apply to any decision to terminate the services of a teacher, whether by way of punishment or otherwise but shall not apply to any termination of service on the expiry of the period for which the teacher was appointed. The proviso attached thereto states that the provisions of sub-section (3) shall not be applicable in the case of colleges established and administered by a minority referred to in clause (1) of Article 30 of the Constitution of India.

29. The argument of the learned counsel for the appellant is that in the instant case the order of termination of services is non punitive and has been passed while the incumbent was on probation therefore, the provisions of sub-section (2) of Section 35 would not get attracted and in so far as the provisions of sub-section (3) are concerned they would apply only to a case where the termination of the services is by way of punishment because the phrase ***''or otherwise'*** should be read "*ejusdem generis*' to the word punishment. According to him, section 31 of the 1973 Act envisages two types of termination of service during or on the expiry of the period of probation. The first is termination simpliciter where no ground need be specified and the second is

termination on certain grounds wherein a notice is required to be served upon the teacher for giving him opportunity of submitting an explanation as contemplated by the second proviso to sub-section (2) of section 31. To support the above submission, the learned counsel for the appellant has placed a number of decisions wherein the law has been settled that the services of a probationer can be terminated without specifying grounds of termination and without providing him an opportunity of hearing if he is not found suitable for the job and that an opportunity of hearing is to be offered only when the termination is punitive.

30. There can be no dispute to the legal proposition canvassed above but the general legal principles are always subject to statutory provisions and the rules applicable governing the service conditions. In the instant case, we have noticed the legislative intent in insertion of the second and third provisos to sub section (2) of section 31 of the 1973 Act which is to protect the teachers against arbitrary termination of their services by the management of an affiliated or associated colleges of the University. It is with that object in mind that the second and third provisos were inserted in section 31 of the 1973 Act so as to provide, vide the second proviso, that no order of termination could be passed except after notice to the teacher concerned giving him an opportunity of explanation in respect of the grounds on which his services are proposed to be terminated and, vide the third proviso, it is added that if a notice is given before the expiry of the period of probation or the extended period of probation, as the case may be, the period of probation shall stand extended until the approval of the Vice-Chancellor under Section 35 is communicated to the teacher concerned. This clearly implies that by using the phrase *"by way of punishment or otherwise"* section 35 (3) deals with termination simpliciter as well as punitive.

31. The argument of the learned counsel for the appellant that the phrase ***''or otherwise'*** used in sub-section (3) would have to read *ejusdem generis* to the word "punishment' is not acceptable. The reasons are as follows:

32. The latin expression *ejusdem generis* is a principle of construction whereby when general words in a statutory context are flanked by restricted words, the meaning of the general words are taken to be restricted by implication with the meaning of the restricted words. This *ejusdem generis* principle is a facet of the principle of Noscitur a sociis. The Latin word `sociis' means `society'. Therefore, when general words are juxtaposed with specific words, general words cannot be read in isolation. Their colour and their contents are to be derived from their context. In ***Amar Chandra Chakraborty v. Collector of Excise, 1972 (2) SCC 442,*** in paragraph 9, it was held as follows:-

"The ejusdem generis rule strives to reconcile the incompatibility between specific and general words. This doctrine applies when (i) the statute contains an enumeration of specific words; (ii) the subjects, of the enumeration constitute- a class or category; (iii) that class or category is not exhausted by the enumeration; (iv) the general term follows the enumeration and (v) there is no indication of a different legislative intent."

33. In ***Maharastra University of Health Sciences & others v. Satchikitsa***

Prasarak Mandal & others, 2010 (3) SCC 786, the Apex Court had to decide whether in respect of unapproved teachers also the Grievances Committee constituted under Section 53 of the Maharashtra University of Health Sciences Act, 1998 would have jurisdiction to entertain complaint and undertake the statutory exercise conferred on it under Section 53 of the said Act. Section 53 of the said Act provided as follows:

"53. (1) There shall be a Grievances Committee in the University to deal with the grievances of teachers and other employees of the University, Colleges, institutions and recognised institutions and to hear and settle grievances as far as may be practicable within six months, and the committee shall make a report to the Management Council.

(2) It shall be lawful for the Grievances Committee to entertain and consider grievances or complaints and report to the Management Council for taking such action as it deems fit and the decisions of the Management Council on such report shall be final.

(3) The Grievances Committee shall consist of the following members, namely:

(a) The Pro-Vice Chancellor, - Chairperson

(b) Four members of the management council nominated by the Management Council from amongst themselves - Members

(c) The Registrar - Member Secretary (4) The Registrar shall not have a right to vote."

The provisions of section 53 was thus an enabling provision wherein the Grievances Committee in the University was empowered to deal with the grievance of the teachers and other employees of University, Colleges and recognized institutions. Interpretation of the definition clause of teacher as defined in Section 2 (35) of the above noted Act was subject matter of consideration before the Apex Court in the above case, where teachers were defined as follows:-

"17. Section 2(35) of the said Act runs as under:-

"2(35) "teachers" means full time approved Demonstrators, Tutors, Assistant Lecturers, Lecturers, Readers, Associate Professors, Professors and other persons teaching or giving instructions on full time basis in affiliated colleges or approved institutions in the university;"

The High Court by construing the aforesaid two sections following the principle of *ejusdem generis* held that unapproved teachers would not be entitled to invoke the jurisdiction of the Grievances Committee.

Rejecting the above view, in paragraph 21, the Apex Court held as follows:-

"19. If the definition of teachers, as quoted above, is properly perused it would appear that within the definition of teachers not only full time approved Demonstrators, Tutors, Assistant Lecturers, etc., are included but the definition is wide enough to include "and other persons teaching or giving instructions on full time basis in affiliated colleges or approved institutions in the university." Similarly, the Grievance Committee which is established under Section 53 of the said Act has also been given wide powers to deal with not only the grievances of teachers but also of other employees of the University, college, institution and to settle their grievances as far as may be practicable within a certain time-frame. Sub-section (2) of Section 53 of the said Act provides for consequential steps which the Grievance Committee may

take after entertaining the grievances of the category of persons named in Section 53(1). Section 53(3) provides for the constitution of the Grievance Committee and Section 53(4) is procedural in nature."

34. While holding as above, the Apex Court had the occasion to deal with the applicability of the principle of *ejusdem generis*. Following the decision of the Constitution Bench of the Supreme Court in ***Amar Chandra Chakraborty's case (supra)***, in paragraph 33 of the judgment, it was held as follows:-

".....where there is statutory indication to the contrary the definition of teacher under Section 2(35) cannot be read on the basis of ejusdem generis nor can the definition be confined to only approved teachers. If that is done, then a substantial part of the definition under Section 2(35) would become redundant. That is against the very essence of the doctrine of ejusdem generis. The purpose of this doctrine is to reconcile any incompatibility between specific and general words so that all words in a Statute can be given effect and no word becomes superfluous"

35. In ***Smt. Lila Vati Bai vs. State of Bombay, AIR 1957 SC 521***, a Constitutional Bench of the Supreme Court while rejecting the rule of *ejusdem generis* to interpret the words ***"or otherwise'*** observed as follows:-

"The rule of ejusdem generis is intended to be applied where general words have been used following particular and specific words of the same nature on the established rule of construction that the legislature presumed to use the general words in a restricted sense; that is to say, as belonging to the same genus as the particular and specific words. Such a restricted meaning has to be given to words of general import only where the context of the whole scheme of legislation requires it. But where the context and the object and mischief of the enactment do not require such restricted meaning to be attached to words of general import, it becomes the duty of the courts to give those words their plain and ordinary meaning"

36. Similarly, in ***Jage Ram & Ors vs State Of Haryana & Anr, 1971 (1) SCC 671*** while interpreting the provisions of sub-section (2) of Section 17 of the Land Acquisition Act, 1894, the Apex Court, in paragraph 13 of its judgment, held:-

"The ejusdem generis rule is not a rule of law but is merely a rule of construction to aid the courts to find out the true intention of the legislature. If a given provision is plain and unambiguous and the legislative intent is clear, there is no occasion to call into aid that rule."

37. Applying the aforesaid legal principles we are of the considered view that the legislative intent for inserting second and third proviso to sub-section (2) of Section 31 of the 1973 Act was clear to accord protection to teachers against arbitrary termination of their services during or on the expiry of the period of probation. Bearing that in mind by using the phrase *"by way of punishment or otherwise"* the legislative intent is further strengthened as to indicate that sub-section (3) of Section 35 of the 1973 Act would apply to termination whether it is punitive or simplicier. In such circumstances the word "otherwise" would have to be given its ordinary meaning which is, *in other manner; in other circumstances or in a different manner; in another way;*

differently in other respects ***(vide P. Ramanatha Aiyar Advanced Law Lexicon Edition 4, Vol. III, Page 3443).***

38. Once, we assign ordinary meaning to the words *"or otherwise"*, the position would be clear that, by virtue of sub section (3) to section 35, the provisions of sub-section (2) of Section 35 of 1973 Act shall apply to any decision to terminate the service of a teacher whether by way of punishment or by way of termination simpliciter. We, therefore, find no good reason to take a different view than what was taken by this court in ***Dr. A.P. Srivastava's case (supra) and Committee of Management Mahatama Gandhi Shanti Smarak Maha Vidyalaya's case (supra).***

39. In light of the discussion above, we come to the conclusion that the decision of the management of a College affiliated or associated to the University to terminate the service of a Principal or teacher of the College, during or on expiry of the period of probation, shall not take effect unless it has been approved by the Vice-Chancellor. Having held so, as we find that in the instant case the termination of the services of respondent no. 5 was communicated without approval of the Vice-Chancellor, the same could not have taken effect therefore, we do not find any good reason to interfere with the order of the Vice-Chancellor. The appeal is **dismissed.**

(2023) 3 ILRA 82
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.03.2023

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Special Appeal Defective No. 49 of 2023

Mission Director/ Convener Exe. Committee, National Health Mission Mandi Bhawan Lko. & Anr. ...Appellants
Versus
Dr. Ram Suresh Rai & Ors. ...Respondents

Counsel for the Appellants:
Neerav Chitravanshi

Counsel for the Respondents:
Amrendra Nath Tripathi, A.S.G.I., C.S.C.

A. Special Law - Allahabad High Court Rules, 1952-Ch. VIII Rule 5-Claim-Equal pay for Equal work-B.A.M.S./ B.U.M.S./ B.H.M.S. (Aayush) Doctors engaged as Ayush Doctors on contractual basis-Held, cannot claim honorarium equal to M.B.B.S. Doctors- Working condition of doctors engaged on contractual basis are not same as those of M.B.B.S. Doctors for reasons that their duty is for six hours a day, they are not given any physical charge, they are not required to deal with medico legal cases and to conduct post-mortem examinations, there not required to administer I.V. injections and they do not perform surgeries other than only Ayurvedic/Yunani surgeries.

The appeal is allowed. (E-6)

List of Cases cited:

1. Kunhayammed Vs St. of Ker. (2000) 6 SCC 359

2. Escorts Ltd. Vs CCE (2004) 8 SCC 335

3. Bhavnagar Univ. Vs Palitana Sugar Mill (P) Ltd. (2003) 2 SCC 111

4. North Delhi Munc. Corp.Vs Ram Naresh Sharma (2021) SCC OnLine SC 540

5. Sanjay Singh Chauhan & ors. Vs St. of U.K. & ors. ,WP No. 484 of 2014

6. St. of U.K. Vs Sanjay Singh Chauhan SLP(C) No. 33645/2018

7. Dr. Om Prakash Gupta & anr.. Vs St. of U.P., WRIT A No.-83666/2017

8. Indian Drugs & Pharm. Ltd. Vs Workmen (2007) 1 SCC 408

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

Order on C.M. Application No.2 of 2023:

1. Heard Shri Anil Tiwari, Senior Advocate assisted by Shri Neerav Chitravanshi, learned counsel for appellants, Dr. L.P. Mishra along with Shri Amrendra Nath Tripathi, learned counsel for respondent nos.1 to 28, Shri S.B. Pandey, Assistant Solicitor General of India, appearing on behalf of respondent No.29-Union of India and Shri Indrajeet Shukla, learned Standing Counsel for State/respondent No.30.

2. This is an application for condonation of delay in filing special appeal.

3. The application is supported with an affidavit, in which the reasons for delay have been explained sufficiently.

4. Accordingly, application is *allowed*. Delay, if any, in moving this special appeal is hereby condoned.

Order on memo of special appeal:

5. The instant special appeal under Chapter VIII rule 5 of the Allahabad High Court rules has been filed against the judgment and order dated 12.12.2022 passed by Hon'ble single Judge allowing Civil Misc. Review Application No.187 of 2022 reviewing the judgment and order dated 20.10.2022 passed in Writ-A No. 23479 of 2019 and a further prayer has been made for dismissal of the writ petition.

6. The aforesaid writ petition was filed by the respondent nos.1 to 29 to this Special Appeal, who will be referred to as the petitioners. Briefly stated, facts pleaded in the writ petition are that the petitioners are B.A.M.S./B.U.M.S./B.H.M.S. (Aayush) Doctors and they are engaged as Ayush Doctors across the state on contractual basis. The petitioners are aggrieved by the difference in honourarium paid to them and that paid to allopathic Doctors and they claim that the M.B.B.S. Doctors and B.D.S. Doctors are not superior to the Ayush Doctors.

7. Earlier some of the petitioners had filed Writ Petition No.738 (S/B) of 2014, which was dismissed by means of an order dated 12.04.2017. Some of the petitioners filed Special Leave Petitions before the Hon'ble Supreme Court and Hon'ble Supreme Court disposed of the petitions with liberty to the petitioners to make representation for the State government. When no decision was taken on the representations, the petitioners no. 1 to 3 had filed Writ Petition No. 22529 (S/B) of 2018, which was disposed of by means of an order dated 08.08.2018 with a direction to the state workmen to take a decision on the representation. The representation was rejected by means of an order dated 16.11.2018 passed by the Mission Director, National Health Mission.

8. Some of the petitioners had challenged the order dated 16.11.2018 by filing Writ Petition No. 5633 (S/S) of 2019, which was *allowed* by means of an order dated 7th March 2019 and a direction was issued to the State government to take a

decision on the petitioners' claim regarding parity of honourarium. The claim was rejected by means of an order dated 29th March 2019, passed by the Principal Secretary, Health and Family Welfare.

9. It has been stated in the order dated 29th March 2019 passed by the Principal Secretary that the services of Ayush doctors under the mainstreaming of Ayush program under the National Health Mission in U.P. do not fall within the purview of emergency services. Honourarium is payable to them on the basis of their duties for six hours a day and there is a provision that no physical charge is to be given to the Ayush Doctors and no medicolegal case is to be conducted by them. The M.B.B.S. lady doctors are assigned 24 hours emergency duty for operating the first referral units and when and E.M.O. is not available the contractual M.B.B.S. lady doctors are posted as E.M.O. By means of a Government Order dated 9th October 2015, it has been provided that Ayurved and Yunani doctors will not perform medicolegal cases, post-mortem examination, I.V. injection and surgeries other than pure Ayurvedic/Yunani surgeries like Ksharsootra. The order further states that the appointment of Ayush Doctors under National Health Mission is made against posts sanctioned by the Government of India in record of proceedings under any program/scheme and these appointments are not made against any regular sanctioned posts of the State. Moreover, the honourarium paid to contractual Ayush Doctors in the State of Uttar Pradesh is equal to or higher than the honourarium paid to the Ayush Doctors of 26 States of the Union Territories. As per the directions and guidelines issued by the National Health Mission, the prescribed qualification, field of work and duties of contractual Ayush Doctors are not the same as those of contractual M.B.B.S. Doctors stop therefore, it would not be proper to pay any Ayush doctors equal to that paid to the MBBS Doctors.

10. The petitioners challenged the aforesaid order dated 29th March 2019 by filing Writ Petition No. 23479 (S/S) of 2019. The writ petition was *allowed* by an Hon'ble single Judge means of a judgment and order dated 19th October 2022. The Hon'ble Single Judge proceeded to decide the writ petition on the premise that:

"The instant petition is directed against the order dated 28.02.2017, passed by the first respondent, Principal Secretary, Department of Finance, Civil Secretariat, Lucknow, whereby, the representation of the first petitioner claiming the benefit of Dynamic/Special Assured Career Progression (for short "SACP') Scheme made admissible to the Medical Officers of the Provincial Medical Health Services (for short "PMHS'), has been rejected. Further, a direction has been sought to grant the Medical Officers (Ayurvedic) the benefits of SACP w.e.f. the date it has been allowed to the Medical Officers of PMHS.

18. The facts, inter se parties, are not disputed.

19. The Medical Officers PMHS practice Allopathy stream of medicine. It appears that Medical Officers PMHS made a representation to the State Government for implementation of Dynamic ACP Scheme as made admissible to the Medical Officers under the Central Government. On considering their representation, the State Government vide order dated 14.11.2014, framed a scheme on the recommendation of the Committee. The SACP, primarily, provides that the Medical Officers PMHS would be entitled to upgradation of pay on

completing 4, 11, 17 and 24 years of satisfactory service. The scheme was made applicable w.e.f. 01.12.2008.

* * *

31. The issue in the given facts is not with regard to equal pay for equal work, but the Scheme formulated for Career Progression to tide over stagnation on a post."

11. The Hon'ble Single Judge concluded by holding that: -

"42. The State Government is justified in not accepting the Dynamic ACP formulated by the Central Government for its Medical Officers, instead formulated the SACP scheme falling within the realm of administrative policy. But the question is whether such a policy upon being provided can discriminate amongst different streams of medicine practiced by Medical Officers. Admittedly, the Medical Officers, irrespective of the stream of medicine (Allopathy or conventional) treat the patients which is the core underlying similarity. The comparison with regard to qualification, course of study/syllabus, nature of duty, responsibility etc. as is being pressed by the State 28 Government to carve out a class of Medical Officers i.e. PHMS being superior to other Medical Officers is misconceived and unfounded insofar it relates to conferment of SACP. The administrative policy is invariably discriminatory in keeping the Medical Officers (Ayurvedic) and other streams out of the scheme having regard to the concept of ACP as discussed earlier.

43. Accordingly, the writ petition is allowed.

44. The impugned order dated 29.03.2019, passed by the Principal Secretary, Medical and Health Department, Government of U.P., Lucknow, is hereby quashed. It is provided that the Special ACP Scheme (SACP) implemented vide Government Order dated 14 November 2014, shall be applicable to the Medical Officers of other streams also."

12. As the writ petition had been filed claiming parity in payment of honourarium to Ayush Doctors with that paid to Ayush Doctors and not claiming A.C.P. benefits, the petitioners themselves filed an application for review of the judgment passed in their favour. The review application was *allowed* by means of the judgment and order dated 12.12.2022. Even while allowing the review application the Hon'ble single Judge held that: -

"18. The High Court of Uttrakhand allowed the writ petition and held the AYUSH doctors should be treated at par with the Allopathic doctors and are entitled for the same honorarium. The said judgment was challenged before the Hon'ble Apex Court in Special Leave to Appeal (Civil) No. 33645 of 2018, which was dismissed by means of order dated 24.03.2022. ***Same issue has been raised before this Court where the AYUSH doctors have been denied the benefit of ACP, which was made admissible to the medical officers of Provincial Medical Services, there also the State Government had tried discriminate between medical officers (Ayurvedic) from AYUSH and Allopathic doctors.***

19. In view of the aforesaid discussions, the writ petitions is allowed. The impugned order dated 29.03.2019, passed by the Principal Secretary, Medical and Health Department, Government of U.P., Lucknow, is hereby quashed.

20. The respondents are directed to pay honorarium to the petitioners who are working on the post of Ayush Medical

Officers at par with the payments made to the Allopathic Medical Officers and Dental Medical Officers and the arrears of honorarium be paid to the petitioners from the date they were 25 discriminated in making payments of honorarium to the Allopathic Medical Officers and Dental Medical Officers."

(Emphasis supplied)

13. While Assailing the Aforesaid Judgment passed by the Hon'ble Single Judge, Shri Anil Tiwari Senior Advocate has submitted that the issue raised by the petitioners in the Writ Petition was payment of honourarium to Ayush Doctors equal to that which is paid to the M.B.B.S. Doctors and the issue of assured career progression was not involved in the writ petition as the petitioners are working on contractual basis and the scheme of grant of assured career progression is not applicable to persons working on contract. However, the learned Single Judge has decided the writ petition as well as the review application on the premise that the issue raised before him was denial of benefit of A.C.P. to the Ayush doctors.

14. The learned counsel for the petitioners has submitted that the issue regarding payment of honourarium to Ayush Doctors under the National health Mission was duly considered by a Division Bench of this Court while dismissing the Writ Petition No. 738 (S/B) of 2018 and other connected writ petitions by means of judgment and order dated 12 April 2017. The aforesaid judgment was challenged by filing a special leave petition before the Hon'ble Supreme Court and the Hon'ble Supreme Court had merely permitted the petitioner is to move representation, without setting aside the findings given by the High Court.

15. The learned counsel for the appellants has submitted that the petitioners have been engaged on contractual basis by a society under a program called National health Mission and they have not been appointed against any regular post under the State government or under the Central government. The honourarium payable to the persons engaged on contract under the program is approved by the government of India and not by the State government. It has further been submitted by the learned counsel for the appellant that the petitioners are working under a contract and are being paid honourarium as per the terms and conditions of the contract, which are binding on them and which has rightly not been challenged by them, as the conditions of contract cannot be challenged in writ petition filed under article 226 of the Constitution of India.

16. Per contra, Dr. L.P. Mishra, the learned counsel appearing for the respondents no.1 to 28 (petitioners in the writ petition) has submitted that the mere fact that the Hon'ble Supreme Court had given the petitioners liberty to file a fresh representation implies that the order passed by this Court in Writ Petition No.738 (S/B) of 2018 was set aside and the representation ought to have been considered afresh without being influenced by the findings recorded in the judgment passed in the aforesaid writ petition.

17. In the judgment dated 12.04.2017 passed by this Court in Writ Petition Number 738 (S/B) of 2018 and several other connected writ petitions, this Court had held as follows: -

"19. Considering the qualification and duties as shown in the chart and advertisement, we are of the view

that the work and qualification of the Ayush doctors are different from other MBBS or BDS doctors. The mere fact that they were doing work similar to other doctors cannot be treated as sufficient for applying the principal of equal pay for equal work. Any direction by the Court with the aid of Article 226 of the Constitution of India would burden the exchequer relating to financial and policy matter and interference in the policy decisions though the order in question does not suffer from any legal or constitutional infirmity and it is not possible to entertain the plea of the petitioners for payment of pay or honorarium or other monetary benefits at par with other employees of other cadre having separate eligibility criteria for appointment by complying the principle of equal pay for equal work.

33. After noticing the judicial precedents on the subject, we are of the view that the petitioners cannot invoke the theory of legitimate expectation for compelling the respondents to pay the honorarium which is paid to other doctors having different qualification and different duties.

34. Learned counsel for the petitioners has relied upon (1989) 2 SCC 235- Mewa Ram Kanojia v. All India Institute of Medical Sciences and others but the citation does not favour the petitioners. It has been stated in the above noted case that in judging the equality of work for the purposes of equal pay, regard must be had not only to the duties and functions but also to the educational qualifications, qualitative difference and the measures of responsibility prescribed for the respective posts. Even it the duties and functions are of similar nature but if the educational qualifications prescribed for the two posts are different and there is difference in measure of responsibilities, the principle of 'Equal pay for equal work' would not apply. There is a reasonable classification on the basis of qualification and duties and if qualification has reasonable nexus with the objective sought to be achieved, efficiency in the administration, the State would be justified in prescribing different pay scale but if the 21 classification does not stand the test of reasonable nexus and the classification is founded on unreal and unreasonable basis it would be violative of Articles 14 and 16 of the Constitution of India. Similarly in (1989) 3 SCC 191- V. Markendeya and others v. State of Andhra Pradesh and others, which has been relied upon by the learned counsel for the petitioners, does not favour the petitioners on the ground that the citation provides that the question what scale should be provided to a particular class of service must be left to the executive and only when discrimination is practised amongst the equals, the Court should intervene to undo the wrong and to ensure equality among the similarly placed employees. The Court however cannot prescribed equal scales of pay for different class of employees."

18. The petitioners had challenged the aforesaid judgment dated 12.04.2017 by filing Special Leave Petition (Civil) No. 26625 of 2017 and Hon'ble Supreme Court disposed of the petition on 03.10.2017 by means of the following order: -

"Delay condoned.

Learned senior counsel appearing for the petitioners submits that the view of the High Court that the permission is required from the Central government for enhancement of honourarium is not correct. The petitioners are appointed by the State government. If that be so, we make it clear that it will be open to the petitioners to approach the

State government for enhancement of honourarium, in which case, it will be open to the State government to consider the representation and the impugned judgment shall not stand in the way of the government taking appropriate decision.

With the aforesaid observation and directions, the special leave petitions are disposed off."

19. A bare perusal of the aforesaid order indicates that the Hon'ble Supreme Court disposed of the special leave petition without granting leave to appeal and without setting aside the judgment dated 12.04.2017 passed by this Court or the findings recorded therein. The Hon'ble Supreme Court had merely granted liberty to the petitioners to approach the State government for enhancement of honourarium and it was left open to the State were meant to consider the representation without being influenced by the judgment dated 12.04.2017. There was not even any passing reference of the claim of parity with the M.B.B.S. doctors in payment of honourarium, what to say about any finding in this regard. Therefore, we are of the view that the findings recorded by this Court in the judgment dated 12.04.2017 have not been disturbed by the Hon'ble Supreme Court and the same have attained finality.

20. Dr. L. P. Mishra, the learned counsel for the respondents, has submitted that the order dated 12.04.2017 passed by this Court in writ petition No. 738 of 2015 and other connected writ petitions, stood merged in the order dated 3 October 2017 passed by the Hon'ble Supreme Court. The doctrine of merger vis-à-vis rejection of S.L.P. was summarized by the Hon'ble Supreme Court in **Kunhayammed v. State of Kerala,** (2000) 6 SCC 359, in the following words: -

"44. To sum up, our conclusions are:

(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of the law.

(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal.

(iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. ***Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment, decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of the petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.***

(iv) ***An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger.*** *An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.*

(v) If the order refusing leave to appeal is a speaking order i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of the Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of the High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Order 47 Rule 1 CPC."

21. Order dated 03.10.2017 was passed by the Hon'ble Supreme Court disposing of the special leave petition without granting leave to appeal to the petitioners and without setting aside the findings of the High Court and recording any findings of its own, we are of the view that in light of the law summarized by the Hon'ble Supreme Court in the case of **Kunhayammed** (Supra), the order dated 12.04.2017 passed by this Court did not get merged in the order dated 03.10.2017 passed by the owner will Supreme Court. Therefore, the findings recorded by this Court in its previous judgment dated 12.04.2017 continues to bind the parties and the effect of the order passed by the Hon'ble Supreme Court is that the State government is free to take a decision for enhancing the honourarium paid to the petitioners, although it is not bound to grant parity to the petitioners with M.B.B.S. doctors.

22. The Hon'ble Single Judge has *allowed* the writ petition and the review petition by extensively quoting and relying upon the judgment in the case of Dr. Om Prakash Gupta and another versus State of UP and another, Writ A No. 8366 of 2017 decided on 06/05/2022 , which was a case filed by confirmed class to officers working on the post of medical officers (Ayurvedic) challenging an order passed by the government denying the benefit of dynamic/special assured career progression scheme which was made admissible to the medical officers of the provincial medical health services. The issue of payment of honourarium doctors engaged on contractual basis was not involved in aforesaid case.

23. It is settled law that judgments are not to be read as statutes and the *ratio decidendi* of judgment is to be read along with the context in which the case was decided.

24. In ***Escorts Ltd. v. CCE, (2004) 8 SCC 335***, 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. Horton2 (AC at p. 761), 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.3 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."

25. In **Bhavnagar University v. Palitana Sugar Mill (P) Ltd.,** (2003) 2 SCC 111, the Hon'ble Supreme Court held that: -

"59. 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."

26. Therefore, we are of the view that the case of Dr. Om Prakash Gupta, which does not deal with the subject of payment of honourarium to doctors engaged on contract, has no application while deciding the claim of parity in payment of honourarium between Ayush doctors and M.B.B.S. doctors.

27. The learned Counsel for the respondents has relied upon the judgment in the case of ***North Delhi Municipal Corporation v. Ram Naresh Sharma, 2021 SCC OnLine SC 540***, in which the Hon'ble Supreme Court held that: -

"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.*

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.*

In light of the above discussion, ***the appellant's actions in not paying the respondent doctors their due salary and benefits, while their counterparts in CHS system received salary and benefits in full, must be seen as discriminatory.*** *Hence, we have no hesitation in holding that the respondent-doctors are entitled to their full salary arrears and the same is ordered to be disbursed, within 8 weeks from today. Belated payment beyond the stipulated period will carry interest, at the rate of 6% from the date of this order until the date of payment. It is ordered accordin*gly. The appeals are disposed of in above terms without any order on cost."

28. Dr. Mishra has also relied upon the decision in **Sanjay Singh Chauhan and Ors. vs. State of Uttarakhand and Ors.,** Writ Petition No. 484 (S/B) of 2014, decided on 03.04.2018, wherein the High Court of Uttrakhand held that:-

"6. There is no intelligible differentia so as to distinguish the Ayurvedic and Homeopathic Medical Officers viz-a-viz. Allopathic and Dental Medical Officers. ***There is no rational why the similar situate persons have been discriminated against. The petitioners as well as Allopathic and Dental Medical Officers constitute homogenous class.***

10. ***In the instant case, the duties discharged by the petitioners viz-a-viz. Allopathic Medical Officers and Dental Medical Officers are of equal sensitivity and quality, even the responsibility and reliability are the same.*** *The classification*

made by the State Government is irrational."

29. In The **State Of Uttarakhand vs Sanjay Singh Chauhan SLP (C) No.33645/2018,** the Hon'ble Supreme Court was pleased to provide that: -

*"... the respondents who are **Ayurvedic doctors will be entitled to be treated at par with Allopathic Medical Officers and Dental Medical Officers under the National Rural Health Mission (NRHM/NHM) Scheme.** After the order was passed, learned counsel for the petitioners made a statement that petitioners would like to file a review petition before the High Court. It is not for this Court to issue any such direction. It is always open to the petitioners to pursue such remedy as may be available to them in law.*

30. In WRIT-A No.-8366of 2017, **Dr.Om Prakash Gupta And Anr.Versus State Of U.P.** it has been held that under: -

"It goes without saying that the Western medicine (Allopathy) is integral to our current health care system, but so are other alternative and complementary health care modalities that are available for the people to choose. Western medicine is sometimes at a loss when it comes to treating the patients holistically. The submission of the learned State Counsel that the classification of Medical Officer (Ayurvedic) and Medical Officers PMHS is reasonable for the purposes of SACP having regard to their qualification and the nature of duties is not convincing. The classification is discriminatory and unreasonable since Medical Officers of both the segments are primarily performing the same function i.e. treating the patients. The difference is that one stream of doctors are using indigenous system of medicine and the other stream Allopathy for treating their patients. The mode of treatment, by itself does not qualify as an intelligible differentia. At the root is treatment of patients. The Medical Officers, both Ayurvedic and Allopathy render medical service to the patients and on this aspect, there is nothing to distinguish them. Treatment of patients is the core function common to the Medical Officers of different streams, therefore, no rational justification is seen to having different ACP scheme of bestowing the benefit of career progression to Medical Officers. As discussed earlier, the ACP scheme is personal to the government servant suffering stagnation and the pay upgradation does not rest upon any other (10) consideration viz. status of post, qualification, nature of duty or seniority. The scheme is purely compensatory. In the circumstances the Medical Officers of the State cannot be discriminated against by providing different period of service to earn the benefit of career progression. Therefore, the classification on face value is discriminatory and violative of Article 14 of the Constitution of India.

The State Government is justified in not accepting the Dynamic ACP formulated by the Central Government for its Medical Officers, instead formulated the SACP scheme falling within the realme of administrative policy. But the question is whether such a policy upon being provided can discriminate amongst different streams of medicine practised by Medical Officers. Admittedly, the Medical Officers, irrespective of the stream of medicine (Allopathy or conventional) treat the patients which is the core underlying similarity. The comparison with regard to qualification, course of study/syllabus,

nature of duty, responsibility etc. as is being pressed by the State Government to carve (11) out a class of Medical Officers i.e. PHMS being superior to other Medical Officers is misconceived and unfounded insofar it relates to conferment of SACP. The administrative policy is invariably discriminatory in keeping the Medical Officers (Ayurvedic) and other streams out of the scheme having regard to the concept of ACP as discussed earlier."

31. In the case of **Indian Drugs & Pharmaceuticals Ltd. v. Workmen,** (2007) 1 SCC 408, the Hon'ble Supreme Court clarified that *"a mere direction of the Supreme Court without laying down any principle of law is not a precedent. It is only where the Supreme Court lays down a principle of law that it will amount to a precedent."*

32. The reasons recorded in the order dated 29/03/2019 passed on the representation of the petitioners, that the working conditions of Ayush doctors engaged on contractual basis are not the same as those of M.B.B.S. Doctors for the reasons that their duty is for six hours today, they are not given any physical charge, they are not required to deal with medicolegal cases and to conduct post-mortem examinations, there not required to administer I.V. injections and they do not perform surgeries other than only Ayurvedic/Yunani surgeries like ksharsutra, has not been found to be perverse or unsustainable. Therefore, the law laid down in the aforesaid cases referred by the learned Counsel for the respondents would not apply to the present case.

33. In view of the aforesaid discussion, we are of the considered opinion that the order dated 29/03/2019 passed by the government rejecting the representation of the petitioners does not suffer from any such error or illegality, as warranted and interference by this Court in exercise of its extraordinary jurisdiction under article 226 of the Constitution of India.

34. The Hon'ble Single Judge has *allowed* the writ petition and the review petition under mistaken belief that the benefit of assured career progression was being denied to the petitioners and that they were entitled to the same whereas the petitioners having been engaged on contractual basis, are not entitled to assured career progression and they had not raised any such claim. In view of the discussion made above, we do not find ourselves in agreement with the view taken by the Hon'ble single Judge while allowing the writ petition and the review petition.

35. Accordingly, the instant special appeal is ***allowed.*** The judgment and order dated 12.12.2022 passed by the Hon'ble single Judge in Civil Miscellaneous Review Application Number 187 of 2022 as well as the judgment and order dated 20/10/2022 passed in Writ A No. 23479 of 2019 are hereby set aside and Writ A No. 23479 of 2019 is dismissed.

(2023) 3 ILRA 93
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.03.2023
BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Writ A No. 91 of 2023

C/M, Alpsankhyak Shiksha Vikas Samiti, Kanpur & Anr. ...Appellants

Versus

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

Counsel for the Appellants:
Rajat Rajan Singh, Vidhu Bhushan Kalia

Counsel for the Respondents:
C.S.C., A.S.G.I., Devak Vardhan

A. Education Law – Reduction in percentile criteria for admission - National Commission for Indian System of Medicine Act, 2020: Section 10, 55(1); National Commission for Indian System of Medicine Act, 2020 (Act No. 14 of 2020); National Commission for Indian System of Medicines (Minimum Standards of Undergraduate Ayurvedic Education) Regulations, 2022; National Commission for Indian System of Medicines (Minimum Standards of Undergraduate Unani Education) Regulations, 2022 - **The issue of reducing cut-off marks is a matter of academic policy and it is not possible for the Court to entertain such requests by directing reduction in the percentile. Fixing of cut-off marks etc. for the purposes of making admission in the undergraduate course, decision in respect of fixation or reducing or enhancing minimum percentile, is a matter of policy that is one of the primary functions and duties of the Commission, which is an autonomous statutory body created by an Act of parliament.** (Para 27)

B. Proviso appended to Regulation 5(2) of the Regulations, is to be construed in the light of the entire scheme of the Act, 2020 and the Regulations framed thereunder - No doubt, the proviso envisages a situation where the Commission has to exercise its discretion for lowering the minimum marks required for admission, where sufficient number of students in the respective category fail to secure minimum marks in NEET, however, such provision is to be considered and construed in the light of the provisions of the Act, 2020.

The very purpose of enacting Act No. 14 of 2020 was to improve access to quality medical education and to ensure availability of adequate and high quality medical professionals of Indian System of medicines in all parts of the country. Thus, if the Commission takes into account any factor which is relevant for the purposes of improving access to quality medical education and which would ensure availability of high quality medical professionals of Indian system of medicine, the said factors will not be irrelevant even while exercising the discretion vested in the Commission under the proviso appended to Regulation 5(2) of the Regulations. But consideration of such factors will be germane to the purpose for which the Commission has been created under the 2020 Act.

In the present case, the Commission while rejecting the prayer of the appellants-petitioners has assigned the reason that the eligibility criteria was fixed to maintain the quality of education and to give opportunity to well qualified and skillful students to become professionals in the field of Indian system of Medicine. Further reason assigned therein is that such **doctors have to deal with the patients' life and thus merit cannot be disregarded.** (Para 28 to 30)

The reason given by the Commission in the order dated 02.03.2023 in the light of undisputed fact that though **NEET UG carries 715 maximum marks and the cut-off marks for general category candidates has been fixed at 117 and those for reserved category has been fixed to be 93, there is no reason to disagree with the Commission's view that further lowering the cut-off marks will not be conducive for the purpose for which NEET is organized** i.e. to select the best of the candidates to pursue medical courses in Indian systems of medicine. (Para 31)

C. The possibility of available candidates who are credited with more percentile than the cut-off percentile having not opted for the institutes run by the appellant-petitioners, cannot be denied. The submission that there exists non-availability of the candidates and because of their non-availability, seats in the institutions remained unfilled does not stand its ground as **the total available candidates on the basis of existing cut of percentile are 9,93,069 whereas the total number of seats to be filled in all streams of the undergraduate courses is only 2 lakhs.** (Para 32)

D. Observations about the manner in which the decision by the Commission embodied in the letter/order/circular dated 02.03.2023 has been arrived at – (i) The Commission has not followed the mandate of the proviso appended to the Regulation 5(2) of the Regulations by not consulting the Central Government. (Para 34 to 38)

(ii) Ambiguity in the proviso appended to Regulation 5(2) of the Regulations. The earlier part of the proviso St.s that the Commission will take a decision in its discretion to lower the minimum marks in consultation with the Central Government, however, the later part of the said proviso itself St.s that marks so lowered by the Central Government shall be applicable. Thus the ambiguous language in which the proviso is couched has the potential of creating confusion in as much as it is not clear as to in the matter of lowering the cut-off marks for admission which is the final authority, the Commission or the Government of India. (Para 39)

Special appeal dismissed. (E-4)

Precedent followed:

1. U.O.I. Vs Federation of Self-Financed Ayurvedic Colleges Punjab & ors., Civil Appeal No. 603 of 2020) (Para 12)

2. NIMS University Vs U.O.I. & ors., 2022 SCC OnLine 644 (Para 14)

Precedent distinguished:

1. Harshit Agarwal & ors. Vs U.O.I. & ors., Writ Petition (C) No. 54 of 2021 (Para 12)

2. Kunal & ors. Vs U.O.I. & ors., Writ Petition (Civil) No. 290 of 2022, decided on 29.04.2022 (Para 12)

Present special appeal questions the legality and validity of the order dated 03.03.2023, passed by learned Single Judge in Writ C No. 1747 of 2023, which was filed with a prayer for quashing the order passed by the National Commission for Indian System of Medicine, dated 02.03.2023 whereby the prayer of the appellants-petitioners for reducing the percentile criteria for admission to undergraduate B.U.M.S. and B.A.M.S. courses based on NEET 2022 has been refused and further, the request for extending the date of counseling for the purposes of said admission has also not been acceded to.

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.
&
Hon'ble Subhash Vidyarthi, J.)

1. Our jurisdiction under Chapter VIII Rule 5 of the Allahabad High Court Rules has been invoked to question the legality and validity of the order dated 03.03.2023 passed by learned Single Judge in Writ C No. 1747 of 2023. By the said order learned Single Judge has dismissed the writ petition which was filed with a prayer for quashing the order passed by the National Commission for Indian System of Medicine (hereinafter referred to as the "Commission'), dated 02.03.2023 whereby the prayer of the appellants-petitioners for reducing the percentile criteria for admission to undergraduate B.U.M.S. and B.A.M.S. courses based on NEET 2022 has been refused and further, the request for extending the date of counseling for the purposes of said admission has also not been acceded to.

2. Heard Sri Rajat Rajan Singh, Sri Vidhu Bhushan Kalia and Sri. Adarsh Saxena Advocates, the learned counsel representing the appellants-petitioners and Sri Asit Chaturvedi, learned Senior Advocate assisted by Sri Devak Vardhan Advocate for the Commission, Sri Shailendra Kumar Singh, learned Chief Standing Counsel assisted by Sri Nishant Shukla, learned Standing Counsel

representing the State of UP, Sri Anand Dwivedi, learned counsel representing the Union of India.

3. In deference to our order passed on 04.03.2023 Dr. S. Sreenivasa Prasad Beduru, President, Board of Ayurveda, National Commission for Indian System of Medicines is present in person in the Court. He has also been heard in support of the case put forth before us by the Commission.

4. We have also perused the records available before us on this special appeal.

5. The appellant no. 1 is a society which runs a medical college offering undergraduate/bachelor's degree courses in Unani system of medicine, whereas the appellant no. 2 is also a society which runs a medical college offering undergraduate course in Ayurvedic system of medicine.

6. The central legislature enacted the Natioinal Commission for Indian System of Medicine Act, 2020 (Act No. 14 of 2020) for providing an appropriate medical education system that improves access to quality and affordable medical education and further ensures availability of adequate and high quality medical professionals of Indian system of medicine in all parts of the country. The functions of the said Commission, as described in Section 10 of the Act, 2020, are *inter alia* to lay down policies for maintaining high quality and high standards in education in Indian system of medicine and to make necessary regulations therefor. Section 55(1) of the 2020 Act empowers the Commission to make regulations to carry out the provisions of the said Act. In exercise of its powers vested in it under sub section (2) of Section 55 of 2020 Act, two separate sets of Regulations have been framed by the Commission which are known as (i) National Commission for Indian System of Medicines (Minimum Standards of Undergraduate Ayurvedic Education) Regulations, 2022 and National Commission for Indian System of Medicines (Minimum Standards of Undergraduate Unani Education) Regulations, 2022, notified respectively on 16.02.2022 and 28.02.2022. As per the scheme for making admissions available in these two regulations, admissions to undergraduate courses in Ayurvedic and Unani systems of medicine are made through National Eligibility-cum-Entrance Test (NEET) which is to be conducted by an authority to be designated for the said purpose by the Commission. The authority designated for conducting the NEET by the Commission is National Board of Examination in Medical Science, New Delhi.

7. National Eligibility-cum-Entrance Test, Undergraduate (NEET UG) was held in the month of April, 2022 for making admissions in the academic session 2022-23. On the basis of the result of NEET UG 2022, online counseling was to be held in five rounds, namely the first round, the second round, mop-up/3rd round, special mop-up round and stray vacancy round. Last date of counseling as determined by the Commission was 18.02.2023 which was extended till 04.03.2023.

8. The appellants-petitioners instituted the proceedings of Writ C No. 1313 of 2023 before this Court with the prayer that the minimum marks required for admission to the undergraduate courses in question be ordered to be reduced for the reason that sufficient number of candidates with minimum marks determined by the

Commission, were not available. In terms of the provisions contained in Regulation 5(2) of the Regulations it is the Commission in consultation with the Central Government which is empowered in its discretion to lower the minimum marks required for admission to undergraduate courses where sufficient number of candidates in the respective category failed to secure the minimum marks in NEET.

9. This Court disposed of Writ C No. 1313 of 2023 by means of the order dated 17.02.2023 directing the Commission to take a decision on the representation which was preferred by the appellants. The said direction appears to have been given by the learned Single Judge keeping in view the provisions contained in Regulation 5(2) of the Regulations.

10. In compliance of the order dated 17.02.2023 the Commission took the decision which is embodied in the letter / order / circular dated 02.03.2023 whereby the prayer of the appellants-petitioners was refused.

11. Writ C No. 1747 of 2023 was filed by the appellants-petitioners on 28.04.2023 with the prayers to direct the Union of India to further extend the last date of admission up to 31.03.2023 and further, to lower the minimum percentile in NEET UG 2023 for making admissions to the courses in question. Another prayer made in the writ petition was that the respondents be directed to conduct stray round of counseling for filling up the vacant seats in the institutions run by the appellants-petitioners and for the said purpose, to conduct counseling of All India Quota seats. The writ petition has however been dismissed by the order dated 03.03.2023 passed by learned Single, Judge which is under challenge before us in this special appeal. During pendency of the writ petition, the order dated 02.03.2023 passed by the Commission was communicated to the appellants-petitioners. Accordingly, the writ petition was amended and a challenge to the said order dated 02.03.2023 with the prayer to quash the same was also made by way of amending the writ petition.

12. Sri Rajat Rajan Singh making submissions on behalf of the appellants-petitioners, has submitted that the reasons indicate by the Commission in its order dated 02.03.2023 refusing the prayer of the appellants-petitioners are not germane in as much as the reasons indicated therein are not available to the Commission to deny their prayer. He has also submitted that reliance placed by the Commission on the judgment rendered by Hon'ble Supreme Court on 20.02.2020 in the case of ***Union of India v. Federation of Self-Financed Ayurvedic Colleges Punjab & Ors.*** (Civil Appeal No. 603 of 2020) is misplaced in as much as considering the dictum of the said judgment, the Hon'ble Supreme Court in a later judgment rendered on 08.02.2021 in the case of ***Harshit Agarwal & Ors. v. Union of India & Ors*** (Writ Petition (C) No. 54 of 2021) has held that the only relevant factor to be considered by the Commission while exercising its discretion under the Proviso appended to Regulation 5(2) of the Regulations is the non-availability of eligible students and further that consideration of factors other than the said factor would be the result of influence by irrelevant or extraneous matters. Sri Rajat Rajan Singh has drawn our attention to another judgment dated 29.04.2022 of the Hon'ble Supreme Court in the case of ***Kunal & Ors. v. Union of India & Ors.*** (Writ Petition (Civil) No. 290 of 2022

decided on 29.04.2022) and has submitted that noticing the judgment in the case of ***Harshit Agarwal (supra)*** the Supreme Court in ***Kunal & Ors. (supra)*** has agreed with the dictum of ***Harshit Agarwal (supra)***.

13. Several other arguments have also been made by the learned counsel appearing for the appellants-petitioners by submitting that the State Government did not conduct the counseling so far as the privately run unaided institutions in the State of U.P. are concerned for all India quota seats to the extent of 15% as is permissible under the relevant Regulations. On the aforesaid count, submission of the learned counsel for the appellants is that learned Single Judge has completely ignored the aforesaid relevant aspects of the matter and has thus erred in dismissing the writ petition filed by the appellants-petitioner. He thus prays that the special appeal may be allowed with the direction to the Commission to lower down the minimum percentile for making admission in the institutions run by the appellants-petitioners.

14. On the other hand, the learned Senior Advocate representing the Commission and the learned counsel appearing on behalf of the Union of India have submitted that relevant factors were considered by the Commission while rejecting the prayer of the appellants-petitioners and as a matter of fact in case the minimum percentile is reduced, the same may result in producing half-baked doctors and that in the facts of the present case alleged non availability of the eligible candidates for admission to the courses in question cannot be a reason to lower down the standards prescribed by the Commission. On behalf of the respondent-Commission it has been argued that the judgment in the case of ***Harshit Agarwal and Kunal*** were rendered in the facts of the case and in fact these judgments do not lay down any ratio as a binding precedence. Reliance has been placed by the learned Senior Advocate representing the Commission on the judgment of the Hon'ble Supreme Court rendered on 09.05.2022 in the case of ***NIMS University v. Union of India & Ors,*** reported in ***2022 SCC OnLine 644*** for submitting that the issue as to whether percentile should be reduced, is a matter of academic policy and the reasons which might have weighed with the Commission for declining to reduced percentile, cannot be said to be arbitrary or extraneous.

15. Our attention on behalf of the Commission and the Union of India has also been drawn to two letters- (i) the letter dated 17.02.2023 written by the Special Secretary in the Ministry of Ayush, Government of India to the Additional Chief Secretary (Health and Family Welfare Department, Government of Gujarat) and (ii) the letter dated 24.02.2023 written by the Director, Ministry of Ayush, Government of India to the Central Government Standing Counsel representing the Government of India before the Hon'ble High Court of Madras in a related matter. Sri Chaturvedi has submitted that in fact the Government of India in the aforesaid two letters gave adequate reasons which weighed with the Commission while passing the order dated 02.03.2023 refusing the prayer of the appellants-petitioners to lower the percentile for the purposes of making admission to the courses in question. According to him, one reason indicated in the said letters is that since the Central Counseling Committee had already conducted 5 rounds of counseling till

15.02.2023, as such even if the cut-off percentile is reduced, additional eligible candidates on account of reduced cut-off percentile will not get a chance to participate in the counseling. It has also been argued that the Government of India is of the opinion that the conversion algorithm has already been applied on the all India quota seats which were not opted by any candidate and hence even on account of the reduced percentile cut-off, additionally eligible candidates will not get the reserved seats as the said seats have already been occupied on the basis of such conversion algorithm. The third reason, as argued by Mr. Chaturvedi on the basis of the aforesaid two letters, is that approximately 52,274 Ayush seats were available for the current academic year as against which 9,93,069 candidates have qualified and hence there does not appear to be any shortage of qualified candidates. Sri Chaturvedi has further argued that NEET-UG is conducted not only for making admissions to the undergraduate courses in Indian systems of medicines but also to undergraduate courses in Allopathic system of medicine (M.B.B.S.) and also to the undergraduate courses in Dental Science (B.D.S.). He has further stated that as against the total seats of about 2 lakh in these courses, the candidates who were declared to have obtained the minimum cut-off percentile in NEET-2023 are 9,93,069. His further submission is that out of these 9,93,069 candidates, only two lakh seats are to be filled in. Thus about 8 lakh candidates declared successful on the basis of cut-off percentile have not taken admission anywhere and accordingly it is not a case where the candidates are not available rather it is a case where the available candidates have exercised their option not to seek admission in the institutions being run by the appellants-petitioners.

16. Further submission on behalf of the Commission is that NEET 2022 carried 715 marks and the cut-off marks for the general category candidates to qualify is 117 whereas for reserved category of Scheduled Casts, Scheduled Tribes and Other Backward Classes it is 93. The submission is that the minimum cut-off marks for admission to undergraduate courses as prescribed by the Commission itself are considerably low for the different categories of candidates and further lowering of such marks will ultimately result in compromising with the merit, which will not be in public interest also.

17. On the aforesaid counts, the submission on behalf of the Union of India and the Commission, is that the order passed by the learned Single Judge in this case need not be interfered with.

18. So far as the State of UP is concerned, our attention has been drawn to the Government Order dated 19.12.2022 according to which the State Government conducted counseling for 85% state quota seats in the Government Ayurvedic/ Unani and Homeopathic colleges and it also conducted counseling for 100% seats, which included 85% State Quota seats and 15% all India quota seats, in private colleges. It has thus been argued by the learned Chief Standing Counsel Sri Shailendra Singh that the submission of the learned counsel for the appellants-petitioners that no counseling by the State was conducted against 15% all India quota seats, is factually incorrect. Apart from the aforesaid, learned counsel representing the State has submitted that rest of the issues do not concern the State Government.

19. We have given our thoughtful consideration to the rival submissions made

by the learned counsel representing respective parties. The sheet anchor of the arguments advanced by the learned counsel for the appellants-petitioners is the judgment in the case of ***Harshit Agarwal (supra)***. So far as the assertion that State Government had not conducted counselling for 15% all India quota seats is concerned, in view of the statement made by the learned Chief Standing Counsel appearing for the State as also having regard to the Government Order dated 19.12.2022, this submission appears to be incorrect which is thus not acceptable.

20. As noticed above, heavy reliance has been placed by learned counsel representing the appellants-petitioners on the judgment in the case of ***Harshit Agarwal (supra)*** where the earlier judgment in the case of ***Federation of Self-financed Ayurvedic Colleges (supra)*** has been noticed and it has been stated that consideration of factors other than availability of eligible students would be the result of the Commission being influenced by irrelevant or extraneous matters.

21. Reliance has also been placed by the learned counsel representing the appellants on ***Kunal & Ors. (supra)*** wherein a reference to ***Harshit Agarwal (supra)*** has been made. Reference to yet another judgment by Supreme Court in the case of ***NIMS (supra)*** has been made by the learned counsel representing the commission to refute the submission made on behalf of the appellants-petitioners on the basis of ***Harshit Agarwal (supra)***.

22. We now proceed to note the facts under which the aforesaid judgments in the case of ***Federation of Self-financed Ayurvedic Colleges (supra)***, ***Harshit Agarwal (supra)*** and ***Kunal & Ors. (supra)*** have been rendered.

23. The subject matter in the case of ***Federation of Self-financed Ayurvedic Colleges (supra)*** was the notification issued by the then existing Central Council of Indian Medicine (the Predecessor of the Commission) and the minimum qualifying marks prescribed therein. Hon'ble Supreme Court, while noticing the submissions made in the said case on behalf of the Council and the Government of India that minimum standards cannot be lowered even for Ayush courses, observed that doctors who are qualified in Ayurvedic, Unani and Homeopathic systems also treat patients and lack of minimum standards in education would result in half-baked doctors being turned out of professional colleges. Hon'ble Supreme Court further observed that non-availability of eligible candidates for admission to Ayush undergraduate courses cannot be a reason to lower the prescribed standards.

24. Thus Hon'ble Supreme Court did not interfere in the prescribed standards on the ground that there was non-availability of eligible candidates for admission.

25. So far as ***Harshit Agarwal (supra)*** is concerned, the said case was filed by those who had appeared in NEET 2020 for admission to BDS course and had not obtained the minimum marks prescribed by the Dental Council of India in the regulations. In the said case, in terms of the extant regulations which were in vogue at the relevant point of time, the Dental Council of India had recommended for lowering the cut-off percentile and as per the regulations consideration for lowering the minimum cut-off marks was to be made by the Government of India in consultation

with the Dental Council of India. It is in this fact situation where the expert body namely Dental Council of India had recommended to the Central Government for lowering down the cut-off marks, that the judgment in the case of Harshit Agarwal was rendered by Hon'ble Supreme Court wherein the reasons given by the Central Government for not accepting the recommendation of the Dental Council of India were not found sound.

26. So far as the judgment in the case of Kunal ***(supra)*** is concerned, in the said case also the Executive Committee of the Dental Council of India had recommended to the Central Government to lower down the qualifying cut-off percentile for NEET UG. However, since the Government of India had not taken any decision on the recommendation made by the Dental Council of India, a writ petition was filed before the Supreme Court under Article 32 of the Constitution of India. During the course of pendency of the said case, it was informed to Hon'ble Supreme Court that a decision was taken by the Union of India not to reduce the minimum percentile fixed for eligibility. It is in these circumstances that referring to the judgment in the case of Harshit Agarwal, Hon'ble Court while disposing of the said matter by means of the order dated 29.04.2022, directed the Central Government to reconsider the issue relating to re-fixation of the cut-off percentile. Thus so far as the judgments in the case of ***Harshit Agarwal and Kunal (supra)*** are concerned, it is noticeable that in both the cases, the body of experts, namely Dental Council of India, had already found it appropriate to lower down the cut-off percentile for the purpose of facilitating the admission in BDS course, whereas in the present case, such a prayer has been rejected by the experts' body i.e. the Commission.

27. We may now refer to the judgment relied upon by learned counsel for the Commission in the case of ***NIMS University (supra)***. In the said judgment Hon'ble Supreme Court has clearly held that the issue as to whether cut-off marks should be reduced or not is a matter of academic policy and that it is not possible for the Court to entertain such requests by directing reduction in the percentile. Though the matter in the case of ***NIMS University (supra)*** related to admission in Super Specialty courses, however, so far as fixing of cut-off marks etc. for the purposes of making admission even in the undergraduate courses is concerned, decision in respect of fixation or reducing or enhancing minimum percentile, in our opinion, is a matter of policy that is one of the primary functions and duties of the Commission, which is an autonomous statutory body created by an Act of parliament.

28. As regards the submission of the learned counsel for the appellant that insufficiency of number of candidates is the only relevant consideration for determining as to whether the minimum marks for admission are to be lowered or not is concerned, we may deal with the said issue in the light of the provisions contained not only in the proviso appended to Regulation 5 (2) of the Regulations, but also keeping in view the entire scheme of the Act, 2020 and the Regulations framed thereunder.

29. Proviso appended to Regulation 5(2) of the Regulations runs as under:-

"Provided further that where sufficient number of candidates in the respective category fail to secure minimum marks in the National Eligibility- cum-entrance Test held for any academic year

for admission to undergraduate programme, the National Commission for Indian System of Medicine in consultation with the Central Government may at its discretion lower the minimum in consultation with the Central Government may as its discretion lower the minimum marks required for admission to undergraduate programme for candidates belonging to respective category and marks so lowered by the Central Government shall be applicable for that academic year only."

30. No doubt, the said proviso envisages a situation where the Commission has to exercise its discretion for lowering the minimum marks required for admission, where sufficient number of students in the respective category fail to secure minimum marks in NEET, however, such provision is to be considered and construed in the light of the provisions of the Act, 2020. As noticed above, the very purpose of enacting Act No. 14 of 2020 was to improve access to quality medical education and to ensure availability of adequate and high quality medical professionals of Indian System of medicines in all parts of the country. Thus, if the Commission takes into account any factor which is relevant for the purposes of improving access to quality medical education and which would ensure availability of high quality medical professionals of Indian system of medicine, in our considered opinion the said factors will not be irrelevant even while exercising the discretion vested in the Commission under the proviso appended to Regulation 5(2) of the Regulations. But consideration of such factors will be germane to the purpose for which the Commission has been created under the 2020 Act. If we, thus, examine the submissions of the learned Counsel for the petitioners in the light of what we have noticed above, what we find is that the Commission while rejecting the prayer of the appellants-petitioners has assigned the reason that the eligibility criteria was fixed to maintain the quality of education and to give opportunity to well qualified and skillful students to become professionals in the field of Indian system of Medicine. Further reason assigned therein is that such doctors have to deal with the patients' life and thus merit cannot be disregarded.

31. If we further examine the reason given by the Commission in the order dated 02.03.2023 in the light of undisputed fact that though NEET UG carries 715 maximum marks and the cut-off marks for general category candidates has been fixed at 117 and those for reserved category has been fixed to be 93, though this Court is not expert in such matters, however, we have no reason to disagree with the Commission's view that further lowering the cut-off marks will not be conducive for the purpose for which NEET is organized i.e. to select the best of the candidates to pursue medical courses in Indian systems of medicine.

32. The submission made on behalf of the appellants-petitioners that there exists non-availability of the candidates and because of their non-availability seats in their institutions remained unfilled also does not impress us for the simple reason that the total available candidates on the basis of existing cut of percentile are 9,93,069 whereas the total number of seats to be filled in all streams of the undergraduate courses is only 2 lakhs. Accordingly, the possibility of available candidates who are credited with more percentile than the cut-off percentile having

not opted for the institutes run by the appellant-petitioners, cannot be denied.

33. For the discussion made and the reasons given above we do not find any good ground to interfere with the order passed by the learned Single Judge. Resultantly special appeal is ***dismissed.***

34. However, before parting with the case we may make certain observations about the manner in which the decision by the Commission embodied in the letter/order/circular dated 02.03.2023 has been arrived at.

35. We have quoted the proviso appended to Regulation 5(2) of the Regulations which vests the authority in the Commission to take a decision in its discretion for lowering the minimum marks required for admission to undergraduate programmes for the candidates belonging to respective categories. According to the said provision, the Commission has to take a decision in consultation with the Central Government in a situation where sufficient number of candidates in respective categories are not available because of the fact that they could not secure the minimum marks in NEET. However, the order dated 02.03.2023 does not make any mention of the Commission having consulted the Central Government. Even the learned Senior Advocate representing the Commission has fairly admitted that no consultation in writing was held with the Central Government, rather before taking the decision dated 02.03.2022 verbal telephonic conversation took place between the authorities of the Commission and the officers of the Central Government wherein the Commission was apprised of the Central Government stand as is contained in the two letters mentioned above, namely the letter dated 17.02.2023 from the Ministry of Ayush, Government of India addressed to the State of Gujarat and the letter dated 24.02.2023 written by the Director, Ministry of Ayush to the learned Standing Counsel representing the Central Government before the Hon'ble High Court of Madras.

36. It is to be noticed that except the proviso appended to Regulation 5(2) of the Regulations, there is no other provision which empowers the Commission to take a decision regarding lowering of cut-off marks. It is also to be noticed that it is under the directions issued by this Court vide its order dated 17.02.2023 in Writ Petition (C) No.1313 of 2023 that the Commission was to consider the issue relating to lowering of the cut-off percentile.

37. Once the proviso mandates the decision to be taken by the Commission only after consultation with the Central Government, it was mandatory and binding on the Commission to have properly and appropriately consulted the Central Government before passing the order dated 02.03.2023. Even if the Central Government had expressed its views in the letters as aforesaid, dated 17.02.2023 and 24.02.2023, that in itself would not amount to consultation for the reason that none of the letters were addressed to the Commission and even their copies were not endorsed to the Commission. While making the decision, the verbal information said to have been provided by the Central Government to the Commission regarding these two letters could have been noticed and noted.

38. In the aforesaid view of the matter it appears that the Commission has not

followed the mandate of the proviso appended to the Regulation 5(2) of the Regulations by not consulting the Central Government.

39. There is yet another issue which we notice and that is in relation to the ambiguity which exists in the proviso appended to Regulation 5(2) of the Regulations. If we peruse the said proviso with care and precision, what we find is that the earlier part of the proviso states that the Commission will take a decision in its discretion to lower the minimum marks in consultation with the Central Government, however, the later part of the said proviso itself states that marks so lowered by the Central Government shall be applicable. Thus the ambiguous language in which the proviso is couched has the potential of creating confusion in as much as it is not clear as to in the matter of lowering the cut-off marks for admission which is the final authority, the Commission or the Government of India.

40. We thus call upon the Commission and the Government of India in the concerned department and ministry to look into the aforesaid aspect of the matter and take corrective measures so that ambiguity which we have noticed in the proviso appended to Regulation 5(2) of the Regulations and its earlier and later parts may be reconciled.

41. There will be no orders as to costs.

(2023) 3 ILRA 104
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.02.2023

BEFORE

THE HON'BLE RAMESH SINHA, J.

HON'BLE SUBHASH VIDYARTHI, J.

Special Appeal No. 328 of 2014

Santosh Kumar Shukla 3531 S/S2000 ...Appellant

Versus

Syndicate Bank & Ors. ...Respondents

Counsel for the Appellant:
Mahendra Pratap Singh, Anuj Dayal, Mahendra Bahadur Singh

Counsel for the Respondents:
Gopal Kumar Srivastava

A. Service Law – Dismissal - If the rules for granting the advance themselves provided the consequence of the breach of conditions, it would be idle to go in search of any other consequence by initiating any disciplinary action in that behalf unless the 1975 Rules specifically incorporate a rule that the breach of House Building Advance Rules would by itself constitute a misconduct. Seeking advance and granting the same under relevant rules, is at best a loan transaction. The transaction may itself provide for repayment and the consequence of failure to repay or to abide by the rules. Any attempt to go in search of a possible other consequence of breach of contract itself appears to be arbitrary and even motivated. (Para 20)

In the present case, the appellant had taken a Housing Loan from the Bank under which he was employed as an Attendant which is a Class-IV post. The loan was granted in the year 1988. The rate of interest payable by the appellant was 5% per annum. The loan of Rs.75,000/- was payable in 24 years in monthly installment of Rs.357.15/-, which installments continued to be deducted from the appellant's salary or from his subsistence allowance during the period of his suspension and the entire loan amount has been repaid. (Para 21)

- The entire Housing Loan has been repaid by the appellant, no loss has been occasioned to the Bank by the appellant having sold away the house and, therefore, the finding

- that a serious loss was caused to the Bank by the conduct of the appellant in selling away the property, is not supported by the material available on record and is not sustainable.
- The observation that the property had been sold without permission of the Bank is correct, but the observation that the same was done without knowledge of the Bank, is incorrect as from the letter dated 27.10.1989, the appellant had informed the Assistant General Manager of the Bank confessing his guilt of making embezzlement of Rs.3,40,700/- and that he would repay the aforesaid amount of the Bank by selling away the house constructed by him and by collecting money from other sources as well. (Para 22, 25)
- Appellant's conduct has been alleged to be in violation of Clause 19.5(J) of the Bipartite Agreement amounting to misconduct. The alleged Bipartite Agreement has not been placed on record and there is nothing on record to indicate that the appellant was a party to the agreement or the conditions of the agreement were otherwise binding on the applicant. Moreover, assuming the conditions of the Bipartite Agreement were binding on the appellant, the breach of the conditions of the agreement cannot amount to a misconduct warranting disciplinary action as an agreement cannot be equated as Disciplinary Rules or Regulations through which penal consequences may be imposed upon an employee. (Para 24)
- The charge sheet did not contain a charge that any loss was caused to the Bank by the conduct of the appellant. (Para 25)

Special appeal allowed. (E-4)

Precedent followed:

1. Divisional Controller, KSRTC (NWKRTC) Vs A.T. Mane, (2005) 3 SCC 254 (Para 17)

2. A.L. Kalara Vs The Project & Equipment Corp. of India Ltd., (1994) 3 SCC 316 (Para 20)

Precedent distinguished:

S.B.I. & anr. Vs Bela Bagchi & ors., (2005) 7 SCC 435 (Para 15)

Present special appeal challenges the judgment and order dated 04.06.2014, passed by learned Single Judge, dismissing the Writ Petition No.3531 of 2000, which was filed by the appellant challenging his dismissal from services by means of an order dated 30.09.1999, as also the Appellate order dated 20.03.2000.

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

(1) Heard Shri Anuj Dayal, learned counsel for the appellant and Shri Gopal Kumar Srivastava, learned counsel for respondent.

(2) The instant Special Appeal has been filed by the appellant against the judgment and order dated 04.06.2014 passed by learned Single Judge, dismissing the Writ Petition No.3531 of 2000, which was filed by the appellant challenging his dismissal from services by means of an order dated 30.09.1999, as also the Appellate order dated 20.03.2000.

(3) Briefly stated, the facts of the case are that the appellant was appointed as an Attendant in Syndicate Bank on a Class-IV post on 01.05.1982 and after successfully completing the period of probation, his services were confirmed. The appellant had applied for a Staff Housing Loan of Rs.75,000/-, which was granted to him and the loan amount was payable along with interest of 5% per year in 24 years by paying monthly installment of Rs.357.15/-. The appellant had purchased a plot from Lucknow Development Authority for a consideration of Rs.35,000/- and the appellant was delivered the physical possession of the plot on 18.01.1989. Thereafter, the appellant submitted a building plan to construct a house over the

said plot and the permission was granted to him vide order dated 10.03.1989. The appellant then was placed under suspension by means of an order dated 31.10.1989.

(4) On 06.08.1998 a charge sheet was issued to the appellant stating that he had sold away the property that was purchased by him after taking a Housing Loan from the Bank, without repaying the loan amount and without seeking permission from the Bank, in violation of the Employee Housing Loan Scheme. The charge sheet alleged that the aforesaid act of the appellant violated the Clause 19.5 of the Bipartite Agreement. The appellant submitted a reply denying the charges. The Enquiry Officer found the charges levelled against the appellant as conclusively proved and thereafter on 30.09.1999, an order was passed dismissing the appellant from the Bank's services.

(5) The appellant filed an appeal against the dismissal order dated 30.09.1999 which was dismissed by means of an order dated 20.03.2000.

(6) The aforesaid order has been challenged by filing Writ Petition No.3531 (S/S) of 2000 and on 13.07.2000, an interim order was passed whereby the dismissal order dated 30.09.1999 and the Appellate order dated 20.03.2000 were stayed.

(7) The respondent- Bank filed Special Appeal No.227 of 2000 against the interim order dated 13.07.2000 and in appeal, the interim order was modified to the effect that as the appellant had been convicted in a criminal case, he shall not be reinstated, but he shall be paid his salary regularly.

(8) Shri Anuj Dayal, learned counsel for the appellant has submitted that the appellant had taken a Housing Loan and he had purchased a residential plot from Lucknow Development Authority and possession of the plot was delivered to him. The appellant thereafter submitted a building plan to the Lucknow Development Authority and the Authority sanctioned the plan by means of an order dated 10.03.1989. He constructed a house on the plot from the said loan. On 31.10.1989, the petitioner was placed under suspension and on 09.03.1990, he had met with an accident causing grievous head injuries to him. The appellant was then admitted in the Civil Hospital, Lucknow and thereafter he was shifted to Sanjay Gandhi Postgraduate Institute of Medical Sciences, Lucknow, where he had to undergo a major surgical operation and he had to incur expenses for his treatment. For meeting out his medical expenses, the appellant had to borrow Rs.20,000/- from one Mr. Abdul Sageer Siddiqee and when the appellant could not repay the loan taken from Mr. Siddiqee, he pressurized the appellant to sell the plot and the house in favour of Smt. Sireen Rahman for a sale consideration of Rs.1,25,000/-. Mr. Siddiqee had handed over post-dated cheques towards the sale consideration of the property. However, the cheques were dishonoured. The appellant had to file a Regular Suit No.27 of 1991 in the Court of Civil Judge, Lucknow and ultimately, a compromise took place between them. It has been pleaded in the writ petition that the appellant had sold the property in compelling circumstances.

(9) Shri Dayal has drawn attention of this Court to the pleadings made in the appeal to the effect that the appellant had been suspended in a different matter by means of order dated 31.10.1981 and his

suspension was revoked by means of an order dated 03.06.1998 and the appellant was reinstated in service and during the entire period the monthly installment towards the repayment of loan continued to be deducted from the salary of the appellant or from the subsistence allowance paid to him. After his reinstatement the appellant filed a representation claiming payment of arrears of salary as well as revision and fixation of his pay and, it was only thereafter that the appellant was issued a charge sheet dated 06.08.1998 stating that he had sold away the property that had been purchased after taking the Housing Loan from the Bank and he had earned profit at the cost of the Bank.

(10) Thus, it is evident that no loss was occasioned to the Bank by any act of the appellant as he had not misappropriated the loan amount. The loan was to be repaid in monthly installment in 24 years of Rs.357.15, which amount continued to be deducted regularly from the salary of the appellant and within the entire year loan amount has been repaid by the appellant.

(11) The learned Single Judge dismissed the Writ Petition filed by the appellant holding that the appellant had misutilized the funds of the Bank for personal gain as he had not created equitable mortgage in the property purchased out of the funds lent to him and the property was sold by him without permission and knowledge of the Bank. The learned Single Judge held that the conduct of the appellant in selling the property and making profit, amounted to mis-utilization of the Bank's funds causing serious loss to the Bank.

(12) While challenging the aforesaid order passed by the learned Single Judge, Shri Anuj Dayal, the learned counsel for the appellant has submitted that there was no allegation that any loss had been caused to the Bank by any act of the appellant and there was no material placed on record to prove any loss having been occasioned to the Bank. He has submitted that the findings of learned Single Judge, that serious loss had been caused to the Bank by the alleged conduct of the appellant, was not supported by any material.

(13) He has further submitted that he does not dispute the fact that selling away the property, which had been purchased from the Housing Loan given by the Bank, was not an appropriate conduct, but still, the consequence of this impropriety could be as per the conditions of the loan agreement only and such an act could not have been a foundation for the disciplinary proceedings leading to the appellant's dismissal from the services.

(14) Per contra, Shri Gopal Kumar Srivastava, learned counsel for the respondent has vehemently opposed the Special Appeal and he has submitted that the appellant was an employee of the Bank and any misconduct committed by a Bank's employee having adverse financial implications on the Bank, has to be dealt with seriousness. He has submitted that being a Bank employee the Housing Loan was granted to the appellant at a low interest of 2-2.5% and the appellant had availed the Housing Loan with an intention of selling away the house to earn profit and by this conduct of the appellant, the Bank has suffered loss.

(15) He has relied upon a decision of the Apex Court in the case of **State Bank of India and Anr. vs. Bela Bagchi and Ors.;** *(2005) 7 SCC 435*, which arose out

of an order of dismissal of an employee of a Bank on the allegations that the employee had received money from an account holder for depositing in his Savings Bank Account, but she did not do so and made a fictitious credit entry in the pass-book of the account holder. Similar misconduct was repeated by a Bank employee on several other occasions. In the aforesaid factual backdrops, the Apex Court has held that *"A Bank officer is required to exercise higher standards of honesty and integrity. He deals with money of the depositors and the customers. Every officer/employee of the Bank is required to take all possible steps to protect the interests of the Bank and to discharge his duties with utmost integrity, honesty, devotion and diligence and to do nothing which is unbecoming of a Bank officer. Good conduct and discipline are inseparable from the functioning of every officer/employee of the Bank. As was observed by this Court in Disciplinary Authority-cum-Regional Manager v. Nikunja Bihari Patnaik, [1996] 9 SCC 68, it is no defence available to say that there was no loss or profit resulted in case, when the officer/employee acted without authority. The very discipline of an organization more particularly a bank is dependent upon of its officers and officers acting and operating within their allotted sphere. Acting beyond one's authority is by itself a breach of discipline and is a misconduct. The charge against the employee were not casual in nature and were serious."*

(16) However, the aforesaid dictum of the Apex Court is not applicable to the present case, as there is no allegation of misconduct having been committed by the appellant while discharging his duties as an employee of the Bank. There is no allegation of any embezzlement committed by the appellant. The sole allegation against the appellant is that he took a Housing Loan from the Bank, in which he was employed, and he sold away the house without prior permission of the Bank. There is even no allegation of non-payment of the money borrowed by the appellant from the Bank. The loan has been repaid as per the schedule and the Bank did not even an occasion to issue a demand notice for repayment of the loan, what to say about initiating any proceedings against the appellant for recovery of the loan amount. Therefore, the aforesaid decision of **Bela Bagchi (supra)** is of no avail to the respondent/ Bank in the present case.

(17) Shri Srivastava has next relied upon the judgment of Supreme Court in the case of **Divisional Controller, KSRTC (NWKRTC) vs. A.T. Mane;** *(2005) 3 SCC 254,* wherein the Apex Court upheld dismissal of a bus conductor on the ground that *on a surprise check he was found to be in possession of unaccounted money of Rs.93/- over and above the amount of equivalent to the tickets issued by him.* This decision also has no application to the facts of the present case.

(18) A copy of the loan agreement executed between the appellant and the respondent/ Bank indicates that it contained a condition that *"The employee shall not sell the house without the previous permission of the Bank. If he/she sells the house, with or without the permission of the Bank or allows or suffer the house to be sold in execution of any decree against him/her the entire loan or so much thereof as may than remain unpaid shall become immediately payable on the date on which the sale is completed."*

(19) From the aforesaid condition it appears that although there was a condition that the borrower will not sell the property without prior permission of the respondent, the consequences of sale without permission was also provided in the loan agreement and, therefore, it was open for the respondent to have proceeded against the appellant for breach of conditions of loan agreement in accordance with the provisions of the agreement itself.

(20) Shri Anuj Dayal, the learned counsel for the appellant has placed before us a judgment of the Apex Court in the case of **A.L. Kalara vs. The Project & Equipment Corporation of India Limited;** *(1984) 3 SCC 316,* wherein the Apex Court held that *"If the rules for granting the advance themselves provided the consequence of the breach of conditions, it would be idle to go in search of any other consequence by initiating any disciplinary action in that behalf unless the 1975 Rules specifically incorporate a rule that the breach of House Building Advance Rules would by itself constitute a misconduct. That is not the case here as will be presently pointed out. Seeking advance and granting the same under relevant rules, is at best a loan transaction. The transaction may itself provide for repayment and the consequence of failure to repay or to abide by the rules. That has been done in this case. Any attempt to go in search of a possible other consequence of breach of contract itself appears to be arbitrary and even motivated."*

(21) When we examine the facts and circumstances of the present case in light of the aforesaid law laid down by the Apex Court, we find that the appellant had taken a Housing Loan from the Bank under which he was employed as an Attendant which is a Class-IV post. The loan was granted in the year 1988. The rate of interest payable by the appellant was 5% per annum, and not 2-2.5% per annum as submitted by Shri Gopal Kumar Srivastava, the learned counsel for respondent-Bank. The loan of Rs.75,000/- was payable in 24 years in monthly installment of Rs.357.15/- , which installments continued to be deducted from the appellant's salary or from his subsistence allowance during the period of his suspension and the entire loan amount has been repaid.

(22) Shri Gopal Kumar Srivastava, learned counsel for the respondent/ Bank has drawn attention to a letter dated 27.10.1989, which was sent by the appellant to the Assistant General Manager of the Bank confessing his guilt of making embezzlement of Rs.3,40,700/- and the appellant had written that he would repay the aforesaid amount of the Bank by selling away the house constructed by him and by collecting money from other sources as well, through which he has tried to impress upon this Court that the appellant had intended to sell away the house even in the year 1989. However, from the perusal of the aforesaid letter indicates that the appellant had brought it to the knowledge of the Bank by means of his letter dated 27.10.1989 that he intended to sell his house and, therefore, the observation of the learned Single Judge that *"the property was sold to third party without permission and* ***knowledge*** *of the Bank"* is incorrect.

(23) Although Shri Srivastava has vehemently argued that the appellant's conduct has resulted in financial loss to the respondent/ Bank, but neither the charge sheet issued to the appellant contains any such charge, nor has any other material been brought on record before this Court to substantiate the submission of Shri

Srivastava that the Bank has suffered any financial loss due to the conduct of the appellant. The Bank had created a Housing Loan, also on certain terms and conditions evident from the loan agreement. At the most, by selling the house purchased / constructed by the money borrowed from the Bank, the appellant has committed a breach of the conditions of the loan agreement but the Bank chose not to take any action for enforcement of the conditions of the agreement. The Bank continued to receive repayment of the loan by making deductions of the amount of monthly installment towards the repayment of the loan from the salary or the subsistence allowance paid to the appellant, for the entire duration of 24 years till the complete loan amount was repaid to the Bank.

(24) Shri Srivastava has submitted that the appellant's conduct is in violation of Clause 19.5 of the Bipartite Agreement and it amounts to a misconduct as per Clause 19.5(J) of the Bipartite Agreement. The alleged Bipartite Agreement has not been placed on record and there is nothing on record to indicate that the appellant was a party to the agreement or the conditions of the agreement were otherwise binding on the applicant. Moreover, assuming the conditions of the Bipartite Agreement were binding on the appellant, the breach of the conditions of the agreement cannot amount to a misconduct warranting disciplinary action as an agreement cannot be equated as Disciplinary Rules or Regulations through which penal consequences may be imposed upon an employee.

(25) In view of the aforesaid discussions, we are of the view that the entire Housing Loan has been repaid by the appellant, no loss has been occasioned to the Bank by the appellant having sold away the house and, therefore, the finding of the Hon'ble Single Judge that a serious loss was caused to the Bank by the conduct of the appellant in selling away the property, is not supported by the material available on record and is not sustainable. The observation of the Hon'ble Single Judge that the property had been sold without permission of the Bank is correct, but the observation that the same was done without **knowledge** of the Bank, is incorrect as from the letter dated 27.10.1989, the appellant had informed the Bank that he would repay the Bank's money after selling away the house. Moreover, the charge sheet did not contain a charge that any loss was caused to the Bank by the conduct of the appellant and there is nothing on record to support the finding of the Hon'ble Single Judge that serious loss was caused to the Bank by the conduct of the petitioner.

(26) In view of the aforesaid discussions the instant Special Appeal is **allowed**. The judgment and order dated 04.06.2014 is hereby set aside and the Writ Petition No.3531 of 2000 is allowed. The dismissal order dated 30.09.1999 and the Appellate order dated 20.03.2000 is hereby quashed.

(27) All the necessary consequences shall follow. However, there will be no order as to costs.

(2023) 3 ILRA 110
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.03.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Writ A No. 577 of 2011

Durga Prasad Pathak ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Vivek Tripathi

Counsel for the Respondent:
C.S.C.

A. Service Law – Non-payment of post retiral dues – Criminal/judicial proceedings – Unless departmental proceedings have been initiated or some judicial or administrative proceedings have been initiated for the purpose of determining the guilt of the government servant during the course of his service, mere pendency of a criminal proceedings cannot be a ground for taking any action against the petitioner w.r.t. payment of his post retiral dues. (Para 9)

Perusal to the GO dated 28.10.1980 shows that respondents have misread the GO which relates only to the departmental judicial proceedings or the vigilance proceedings or the other proceedings, however, in the case in hand, it is clear from the record that no charge sheet has been filed against the petitioner, although the matter is of 1997. **Speedy trial is the fundamental right of the accused and St.should promote that in concluding the criminal proceedings, if at all, initiated against the government servant. Merely by lodging an F.I.R. without there being any charge sheet, it cannot be said that judicial criminal proceedings are pending against the petitioner.** The criminal case of such nature should not be allowed to linger for decades. (Para 10)

B. No provision has been cited before this Court to show that mere lodging an F.I.R. against the petitioner way back in the year 1997 without there being any progress in the investigation, the petitioner can be debarred from his pensionary benefits. There is no legal impediment in any service rules to debar the petitioner from releasing the remaining post retiral dues. Accordingly, a writ of mandamus is issued directing the opposite parties to release the remaining post retiral dues of the petitioner such as gratuity, regular pension etc. within a period of three months from the date of certified copy of this order. (Para 11)

Till the payment of post retiral dues to him, the petitioner is allowed to get the benefit of provisional pension within the aforesaid period. (Para 12)

Writ petition allowed. (E-4)

Precedent followed:

Harnam Singh Yadav Vs St.of U.P., 2012 SCC OnLine All 3646 (Para 7)

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

1. Heard Shri Vivek Tripathi, learned counsel for the petitioner and learned Standing Counsel for the State.

2. Through this petition, the petitioner has sought a writ of mandamus commanding the opposite parties to release the regular pension, gratuity and insurance in favour of the petitioner along with interest.

3. Brief facts of the case is that the petitioner was initially appointed on 19.08.1970 in PAC and after training he was posted in 30th Battalion P.A.C., Gonda. The petitioner has retired on 31.05.2010 after completing the age of superannuation, however, after retirement only GPF, Leave Encashment and Interim Pension have been paid to the petitioner and regular pension, gratuity and insurance have not been paid to the petitioner.

4. Learned counsel for the petitioner further submits that non-payment of the post retiral dues by the State Government is arbitrary and violative of Article 21 of the Constitution of India.

5. Per contra, Shri Vinod Singh, learned Standing Counsel has submitted that there was legal impediment in finalizing the pension as well as gratuity as an F.I.R. was lodged against the petitioner which was registered as case crime No. 774/1997 under Sections 223/224/290/294/406 I.P.C. alleging escaping of the accused persons from police custody along with other persons.

6. It has been further submitted by the learned Standing Counsel that since the investigation in that case qua the petitioner is pending, therefore, due to this legal impediment, the remaining post retiral dues could not be paid to the petitioner. In support of his submissions, he has relied on the government order 3-1679/10-80-909-79 dated 28.10.1980 which provides that during pendency of the criminal/judicial proceedings against the delinquent employee, payment of gratuity shall not be made unless the final decision is not taken upon the inquiry against the delinquent employee.

7. Learned counsel for the petitioner while rebutting the argument has relied on the judgment of the Coordinate Bench of this Court passed in the case of ***"Harnam Singh Yadav v. State of U.P., 2012 SCC OnLine All 3646"***, and in the case of "Bhagwat Prasad Yadav Vs. State of U.P", Writ Petition No. 3150 (S/S) of 2011, and has submitted that pendency of mere criminal proceedings would not constitute a bar to release the post retiral dues of the petitioner.

8. Perusal of the report submitted by the District Judge, Gonda dated 17.12.2022 shows that on the complaint of the complainant Sageer Ahmad against the accused persons namely Shiv Pujan Tiwari, Durga Prasad Pathak, Abhay Nath Singh and Smt. Maya Devi, case crime No. 774/1997, under Sections 222/223/224 I.P.C., P.S. Kotwali Nagar, District Gonda was registered and after completion of investigation, charge sheet was filed on 07.11.1997 only against Shiv Pujan tiwari whereas investigation continued against the other accused persons including the petitioner. It is not disputed between the parties that no charge sheet has been filed against the petitioner.

9. In the case of ***"Harnam Singh Yadav v. State of U.P., 2012 SCC OnLine All 3646"***, this Court in para 4 to 9 has held that:-

"3. The submission of the learned Counsel for petitioner is that the aforementioned G.O. has been misread by the authorities concerned. The aforesaid G.O. relates only to the departmental judicial proceeding, or vigilance proceeding or service tribunal proceeding and it does not cover the criminal proceedings, which are not connected with the department.

4. It is further argued on behalf of the petitioner that mere pendency of criminal proceeding, cannot be a ground to withheld the retiremental dues because if in the trial, the case is proved against the petitioner then he shall be punished in accordance with law. He cannot be punished by withholding his retiremental dues.

5. Learned Counsel for opposite party laid emphasis upon the G.O. dated 28.10.1980 in which in para 2 provisions have been made regarding payment of interim pension. A bare perusal of the aforesaid para of the aforementioned G.O. reveals that it relates to such government servant against whom some departmental

judicial or administrative inquiry is pending on the date of retirement. But it nowhere provides that if criminal proceedings are pending even then the said G.O. would be applicable. Suffice, it would be to mention that such a provision could not have been made for the simple reason that unless departmental proceedings have been initiated or some judicial or administrative proceedings have been initiated for the purpose of determining the guilt of the government servant during the course of his service, mere pendency of a criminal proceedings cannot be a ground for taking any action against the petitioner with respect to payment of his post retiral dues.

6. Learned Counsel for petitioner has placed reliance on a Division Bench pronouncement of this Court in the case of Bangali Babu Misra v. State of U.P.. [2003 (50) ALR 538.] In the said case the petitioner was caught in a trap case and subsequently he was suspended and in that case the Court directed that the entire post retiral dues of the petitioner including pension, gratuity, leave encashment, group insurance be paid to the petitioner.

7. Section 4(6) of the Payment of Gratuity Act, 1972 reads as under,

"6. Notwithstanding anything contained in sub section (1),-

(a) the gratuity of an employee,- whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee [may be wholly or partially forfeited]-

(i) if the services of such employee have been terminated for his riotous or disorderly conduct of any other act of violence on his part, or(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude provide that such offence is committed by him in the course of his employment."

8. A bare perusal of the aforesaid section makes it abundantly clear that the circumstances as enumerated in the aforesaid section does not extended at all in the case of the petitioner, therefore, the order of stopping the gratuity of the petitioner was not in accordance with law. This Court in the case of Amod Prasad Rai v. State of U.P., [2009 (122) FLR 350 (Alld.-L.B.).] has held that withholding of gratuity is not permissible in any circumstance other than those enumerated in section 4(6) of the Payment of Gratuity Act and held that right to gratuity is a statutory right. It is nowhere the case of the opposite party that because of the aforementioned criminal proceeding any loss was occasioned to the department or such an offence was committed during the course of his employment. It is also nowhere the case of the opposite party that any amount has to be recovered from the petitioner as outstanding dues against him towards the department. This Court in the case of Radhey Shyam Shukla v. State of U.P., [2009 (123) FLR 30 (Alld.).] has held as under:

"Normally, as urged by the learned Standing Counsel, "judicial proceedings" w, ould also include a criminal trial. However, the meaning ascribed to a word has to be given keeping in mind the intention of the legislature and the object which it sought to achieve while using it. A leading of the aforesaid provision shows that "judicial proceeding" has been used for the purpose of any administrative action or which may have given rise to a "judicial proceeding" relating to the conduct of the Government

servant. One of the main object of withholding gratuity is to compensate the Government the loss caused by the Government servant in his functioning as such. In the present case the criminal case relates to two individuals and the trial cannot in any manner fix responsibility of any loss to the Government. In fact, there is no case set up in the counter affidavit that the decision in the pending criminal trial between two individuals would in any way enable the Government to realize any alleged loss. In fact no loss has even been attributed to the petitioner. A Division Bench of this Court in the case of Bangali Babu Misra v. State of U.P., [2009 (122) FLR 350 (Alld.-LB.).] has considered the effect of the Government order which has been incorporated in the Rules and has held that mere pendency of criminal proceedings would not authorise withholding of post retiral benefits including gratuity. The aforesaid decision has been followed subsequently, in the case of Mahesh Bal Bhardwaj v. U.P. Cooperative Federation Ltd.. [2007 (10) ADJ 561.] "

10. Perusal of the aforesaid Govt. Order dated 28.10.1980 shows that respondents have misread the Govt. Order which relates only to the departmental judicial proceedings or the vigilance proceedings or the other proceedings, however, in the case in hand, it is clear from the record that no charge sheet has been filed against the petitioner, although the matter is of 1997. Speedy trial is the fundamental right of the accused and the State should promote that in concluding the criminal proceedings, if at all, initiated against the government servant. Merely by lodging an F.I.R. without there being any charge sheet, it cannot be said that judicial criminal proceedings are pending against the petitioner. The criminal case of such nature should not be allowed to linger for decades.

11. No provision has been cited by the learned Standing Counsel before this Court to show that mere lodging an F.I.R. against the petitioner way back in the year 1997 without there being any progress in the investigation, the petitioner can be debarred from his pentionary benefits, therefore, I am of the view that the view taken by the opposite party that due to this legal impediment of pendency of a criminal case, non-releasing of the post retiral dues of the petitioner is not a reasonable order. There is no legal impediment in any service rules to debar the petitioner from releasing the remaining post retiral dues. Accordingly, a writ of mandamus is issued directing the opposite parties to release the remaining post retiral dues of the petitioner such as gratuity, regular pension etc. within a period of three months from the date of certified copy of this order.

12. Till the payment of post retiral dues to him, the petitioner is allowed to get the benefit of provisional pension within the aforesaid period. The final pension of the petitioner shall be fixed and shall be paid by the opposite parties to the petitioner regularly thereafter. The arrears of the post retiral dues which have not been paid to the petitioner shall also be paid within the aforeaid period of three months.

13. Considering the fact that the petitioner has retired in December, 2010 and his part post retiral dues have been withheld since then without any justified reasons, the opposite parties are directed to pay 6% simple interest on the remaining post retiral dues to the petitioner.

14. In view of the aforesaid observations, the petition is allowed.

(2023) 3 ILRA 115
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.03.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Writ A No. 1505 of 2015

Smt. Santoshi Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mohd. Nasir, Deo Raj Singh, Mohd. Yasin

Counsel for the Respondents:
C.S.C.

A. Service Law – Compassionate Appointment – Suppression of material facts - Dying in Harness Rules, 1974; U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974: Sub-rule C of Rule 2 - The jurisdiction of the Supreme Court u/Article 32 and of the High Court u/Article 226 of the Constitution is extraordinary, equitable and discretionary. It is well settled that a prerogative remedy is not a matter of course. In exercising extraordinary power, therefore, a writ court will indeed bear in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the court, the court may dismiss the action without adjudicating the matter. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly St.d or are suppressed or are distorted, the very functioning of the writ courts would become impossible. (Para 6)

In the present case, the applicant while filing the writ petition has suppressed the material facts that she is the daughter-in-law of the second wife of the deceased employee, who died in harness, so also the fact that the deceased entered into the second marriage while his first wife was surviving and therefore applicant does not come in the definition of 'family'. Therefore, the petition is liable to be dismissed. (Para 7)

Writ petition dismissed. (E-4)

Precedent followed:

1. K.D. Sharma Vs Steel Authority of India Ltd. & ors., (2008) 12 SCC 481 (Para 6)

2. G. Jayshree & ors. Vs Bhagwandas S.B.I. Bank of India, (2007) 8 SCC 449 (Para 6)

Present petition assails order dated 27.11.2014, passed by opposite party no.3. Further prayer is for issuance of writ in the nature of Mandamus to command the opposite parties to consider and take decision for appointment on compassionate ground of the petitioner and direction to pay consequential benefits including salary admissible and permissible in accordance with law.

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

1. The present petition has been filed by the petitioner praying for issuance of a writ in the nature of Certiorari for quashing of the impugned order dated 27.11.2014 passed by opposite party no.3 (Annexure-7 to the writ petition). He further prayed for issuance of writ in the nature of Mandamus to command the opposite parties to consider and take decision for appointment on compassionate ground of the petitioner under Dying in Harness Rules 1974 and also directed the opposite parties to pay consequential benefits including salary admissible and permissible in accordance with law.

2. Heard learned Counsel for the petitioner and learned Standing Counsel for the respondent as well as perused the record.

3. This Court vide order dated 16.3.2023 has passed the following order:-

"Heard learned Counsel for the petitioner and learned Standing Counsel for the State as well as perused the record.

Learned Counsel for the petitioner submits that father-in-law of the petitioner died in harness on 5.8.2007. An application was given by the son of the deceased, however, no decision was taken in the application and in the meantime, on 29.12.2012 son of the deceased/husband of the petitioner also died. Faced with this situation, the petitioner, who is widow daughter-in-law of the deceased Mewalal gave an application immediately on the second day of the death of his husband i.e. on 30.12.2012. The defect in this application was removed after the same was being asked by the department on 7.5.2014. It is submitted that an application of the petitioner has been rejected in a cursory manner by the respondent authorities on the ground that the application has been given after delay. It is submitted on behalf of the petitioner that while rejecting the application the respondents have overlooked their own conduct by which they kept pending the application given by the husband of the applicant for five years and no decision was taken by them on that application. It has also been overlooked that immediately after the death of the husband of the present applicant she has given the application on the very next day of the death of her husband. He submits that respondent authorities have power to relax the requirement of giving application in five years the same has not been exercised.

At this stage, learned Standing Counsel submits that the case may be taken up tomorrow i.e. 17.3.2023.

As prayed, put up this case tomorrow i.e. 17.3.2023."

4. Learned Standing Counsel has invited attention of this Court towards the pleadings made in paragraph 11 of the Counter Affidavit and submits that averments of the petitioner that no action was taken upon the application given by the husband of the present applicant for compassionate appointment is factually incorrect. In fact efforts were made by the authorities by conducting personal hearing on 15.6.2009 to consider the case of the husband of the present applicant for compassionate appointment. However, owing to the fact that the petitioner's father-in-law who died in harness was having two wives namely Ramjati (first wife) and Mayadevi (second wife), who is in fact the mother-in-law of the present applicant the application moved by the husband of the present petitioner could not be finalized.

He submits that the fact that the applicant is daughter-in-law of the second wife Mayadevi of the deceased employee is borne out from the succession certificate, which is on record. This fact has not been disputed by learned counsel for the petitioner.

Learned Standing Counsel further submits that the petitioner or her deceased husband does not come into the definition of 'family' as provided under Sub-rule C of Rule 2 of The U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (in short hereinafter referred to as 'Rule 1974'.)

Learned Standing Counsel submits that earlier a Writ Petition No.2611 (SS) of 2009 was filed by husband of the petitioner, Sushil Kumar, which was disposed of vide order dated 5.5.2009 (Annexure-1 to the writ petition). The petitioner has also filed a Writ Petition No.5147 (SS) of 2014, Smt. Santosh Devi vs. State of U.P., which was disposed of vide order dated 15.9.2014. He submits that both these orders were passed by this Court.

Learned Standing Counsel further submits that the petitioner has suppressed of aforesaid facts that the petitioner as well as his deceased husband were daughter-in-law and son of the second wife of the deceased employee, who died in harness. They clearly do not come in the definition of 'family' as provided in the Rule 1974. He further submits that the petitioner has not approached this Court with clean hands and as such the petition filed by him is liable to be dismissed.

He further submits that the application on prescribed form has been given by the present applicant on 7.5.2014 i.e. after delay of six years, nine months and two days'.

He further submits that the objective of compassionate appointment is to provide immediate support to the family of deceased employee who was sole bread-earner and his sudden death in harness has caused serious financial scarcity and penury to the family and to mitigate such sufferance. The application of the compassionate appointment given by the applicant was delayed and, therefore, the impugned order has rightly been passed.

5. I have considered the arguments advanced by learned counsel for the parties. While filing the writ petition the petitioner has suppressed the material facts that petitioner is the daughter-in-law of the second wife of the deceased employee, who died in harness.

6. Hon'ble Supreme Court in ***K.D. Sharma vs. Steel Authority of India Ltd. and others reported*** **in (2008) 12 SCC 481** held that the jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary and it is imperative that the petitioner approaching the Writ Court must come with clean hands and put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim. The same rule was reiterated in ***G. Jayshree and others v. Bhagwandas S. Patel and others*** **(2009) 3 SCC 141.**

Hon'ble Supreme Court in the case of *Prestige Lights Ltd. V. State Bank of India* reported in (2007) 8 SCC 449, held in para 35 as under:-

35. It is well settled that a prerogative remedy is not a matter of course. In exercising extraordinary power, therefore, a writ court will indeed bear in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the court, the court may dismiss the action without adjudicating the matter. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not

candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible.?

The aforesaid law that coming to Court with clean hands has been repeatedly reiterated the law that by this Hon'ble Supreme Court of India in a large number of cases. *Some ofwhich may be noted, they are: Hari Narain v. Badri Das - AIR 1963 SC 1558, Welcome Hotel v. State of A.P. - (1983) 4 SCC 575, G. Narayanaswamy Reddy (Dead) by LRs. v. Government of Karnatka - JT 1991 (3) SC 12 : (1991) 3 SCC 261, S.P. Chengalvaraya Naidu (Dead) by LRs. v. Jagannath (Dead) by LRs. - JT 1993 (6) SC 331 : (1994) 1 SCC 1, A.V. Papayya Sastry v. Government of A.P. - JT 2007 (4) SC 186 : (2007) 4 SCC 221, Prestige Lights Limited v. SBI - JT 2007 (10) SC 218 : (2007) 8 SCC 449, Sunil Poddar v. Union Bank of India- JT 2008 (1) SC 308 : (2008) 2 SCC 326, K.D. Sharma v. SAIL - JT 2008 (8) SC 57: (2008) 12 SCC 481, G. Jayashree v. Bhagwandas S. Patel - JT 2009 (2) SC 71 : (2009) 3 SCC 141, Dalip Singh v. State of U.P. - JT 2009 (15) SC 201: (2010) 2 SCC 114.*

7. On due consideration to the submissions advanced, perusal of the record, so also the fact that the applicant while filing the writ petition has suppressed the material facts that she is the daughter-in-law of the second wife of the deceased employee, who died in harness, so also the fact that the deceased entered into the second marriage while his first wife was surviving and does not come in the definition of 'family' as also considering the aforementioned judgements, the petition is liable to dismissed.

8. Accordingly, the petition being devoid of merit, is dismissed.

(2023) 3 ILRA 118
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.03.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Writ A No. 1685 of 2011

Shadi Lal ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Prem Shankar Trivedi, Alpana Yadav, Shikha Singh

Counsel for the Respondent:
C.S.C.

A. Service Law – Challenge to the date of birth at the time of retirement – It is settled law that after attaining the age of retirement or at the fag end of the service, an employee cannot dispute the entry in the service book regarding his date of birth. (Para 7)

The petitioner cannot be permitted to challenge the date of birth recorded in his service book after his retirement. (Para 6, 8)

Writ petition dismissed. (E-4)

Precedent followed:

1. Hindustan Lever Ltd. Vs S.M. Jadhav & anr., (2001) 4 SCC 52 (Para 6)

2. Jagir Singh Vs St.of Punjab & ors., CWP No. 21166 of 2014 (Para 6)

3. Prabhu Lal Son of Shri Assistant……Vs District Basic Education……, order dated 05.12.2003 (Para 6)

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

1. Heard learned counsel for petitioner as well as learned Standing Counsel for opposite parties No.1 to 4.

2. The petitioner by way of filing instant writ petition has prayed for following reliefs:-

"(i) issue a writ, order or direction in the nature of Mandamus commanding the opposite parties directing them to allow the petitioner to continue in service and pay him salary regularly til the date of his actual retirement i.e. 30.6.2018 in the interest of justice.

(ii) issue a writ, order or direction in the nature of Certiorari thereby quashing the impugned order dated 15.2.2011 passed by opposite party no.4 against the petitioner, contained as annexure no.6 to the writ petition.

(iii) issue a writ, order or direction in the nature of Mandamus commanding the opposite party no.2 directing him to decide the representation of the petitioner dated 15.3.2011 contained as annexure no.9 to this writ petition.

(iv) issue any other writ, order or direction which this Hon'ble Court may deems fit and proper in the circumstances of the case may be passed in favour of the petitioners in the interest of justice.

(v) allow the writ petition with costs."

3. During the course of the pendency of the writ petition, petitioner has passed away and petitioner Nos.1/1 to 1/5 has been substituted.

4. Brief facts of the case are that petitioner was initially appointed on daily wage basis on 26.06.1986 on the post of Beldar Class IV category. The services of the petitioner were transferred in the Work Charge Establishment by the competent authority vide order dated 10.07.2001 w.e.f. 15.08.1999. Vide office memo dated 01.05.2010, a notice was received by the petitioner wherein it has been stated that he is going to be retired on 30.06.2010 after completing 60 years of age of superannuation. It is contended by the petitioner that he is uneducated employee, he was born on 29.02.1958 which is mentioned in the family register. After receiving the notice dated 01.05.2010, petitioner represented the respondent No.4. The representations are contained in Annexure Nos.4 and 5 thereafter, by way of filing two RTIs, the petitioner got information from the office of C.M.O., Firozabad. According to which, the medical certificate is only of fitness certificate and not certificate regarding the age. The photocopy of the letter dated 11.03.2011 issued by the C.M.O., Firozabad is also on record. Again the petitioner represented the authority vide Annexure Nos.8 and 9. It is thus, submitted on behalf of the petitioner that he has been wrongly retired from the service on 30.06.2010 on the basis of the certificate of age issued by the C.M.O., Firozabad whereas according to the family register he was born in the year 1958 therefore, he should have been retired from service in the year 2018.

5. *Per contra*, learned Standing Counsel has submitted that medical test of the petitioner was conducted by the Chief Medical Superintendent in which his age was determined as 48 years and accordingly, his date of birth was determined as 27.06.1950 and the same was entered in his service record. This was acknowledged and accepted by the petitioner by making his signature on the service book. Thus, on the basis of the date of birth recorded in the service book of the

petitioner, the order/notice dated 01.05.2010 was passed by the respondent No.4 and consequently, the petitioner was superannuated on 30.06.2010 after attaining the age of superannuation which is totally in accordance with law.

6. On due consideration to the submissions advanced and perusal of the record, it is not in dispute that the date of birth recorded in the service book is 27.06.1950, a notice of retirement was issued prior to his retirement on 01.05.2010 and the petitioner retired from service on 30.06.2010 after attaining the age of superannuation. The petitioner is raising dispute regarding the incorrect date of birth mentioned in the service book, however, law in this regard has been settled by the Hon'ble Supreme Court in following judgments:-

(i) Hindustan Lever Ltd. vs. S.M. Jadhav & Anr. reported in [(2001) 4 SCC 52]

(ii) Jagir Singh vs. State of Punjab & Ors. [CWP No.21166 of 2014]

(iii) Prabhu Lal Son of Shri Assistant.....vs. District Basic Education.....[order dated 05.12.2003].

7. A perusal of aforesaid judgments depicts that it is settled law that after attaining the age of retirement or at the fag end of the service, an employee cannot dispute the entry in the service book regarding his date of birth.

8. In view of settled law and in the peculiar facts of this case, the petitioner cannot be permitted to challenge the date of birth recorded in his service book after his retirement.

9. In view of above, the petition is **dismissed.**

(2023) 3 ILRA 120
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.02.2023

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Writ A No. 1766 of 2023

State of U.P. & Anr. ...Petitioners
Versus
Pramod Kumar Tiwari & Anr. ...Respondents

Counsel for the Petitioners:
C.S.C.

Counsel for the Respondents:
Praveen Kumar Tewari, Prateek Tewari, Shikhar Anand

A. Service Law – Promotion – Censure entry - In a situation where a censure is being awarded to an employee on 10.04.2017 in respect of period of 2008-09 and in the annual entry for the year 2017-18 he is being rated as a very good official/officer, denying the claim of promotion on the ground of the censure entry dated 10.04.2017 pertaining to the period 2008-09 is, thus, not only illegal being contrary to what has been prescribed in Para 2(स) of the GO dated 30.06.1993 but is also arbitrary. (Para 20)

As per Para 2(स) of the GO dated 30.06.1993, the St. Government has provided that in case any censure entry is available during the period for which the relevant service record of an employee is under consideration and no other adverse entry or punishment is awarded to such an employee within five years from the date in respect of which the censure entry is available, such censure entry shall not be considered for the purposes of evaluating satisfactory service of the employee concerned,

that is to say such censure entry is to be ignored. (Para 11, 12)

Para 5(4) of the GO dated 25.03.1994 provides that any punishment order issued will be effective with immediate effect even if it is issued in respect of some irregularity committed at a prior point in time. It further provides that such punishment order shall be kept in the character roll of the employee concerned in the year in which it is awarded. Para 6 of GO dated 25.03.1994 St.s that **Para 5 of GO dated 25.03.1994 shall be read in conjunction with guidelines given in GO dated 30.06.1993.** (Para 14)

From perusal of provision of Para 2 of the GO dated 06.04.1999, it is clear that it has been provided therein that in case after enquiry any censure entry is awarded against an employee, such censure entry shall be kept in the character roll of the employee concerned in the year in which censure entry is awarded, however, while doing so it shall also be mentioned, while recording the censure entry in the year in which it is awarded, that censure entry related to which year or which post and what has been the nature of the mistake which resulted in award of censure entry so that the actual and natural consequence and effect such censure entry can be taken into account while evaluating an employee. Thus, **GO dated 06.04.1999, appears to be in complete sync with provisions contained in Para 2(स) of the GO dated 30.06.1993 which does not get diluted by the provisions contained in Para 5(4) of the GO dated 25.03.1993 (which is fortified by the subsequent GO dated 06.04.1999).** (Para 18)

In the present case, a censure entry awarded to the claimant on 10.04.2017 pertained to the period 2008-09 and the DPC was convened firstly on 13.10.2017 and thereafter on 28.03.2018 and again on 30.06.2020. As per the GOs, the censure entry awarded on 10.04.2017 is to be kept in the service record of the claimant in the year 2017-18 however simultaneously a mention is to be made that the said censure entry pertained to the year 2008-09. **Since there is nothing on record which can reveal that the claimant was awarded any other censure entry or punishment within five years after 2008- 09 and the censure entry dated 10.04.2017 was the sole adverse material as such while considering his promotion to the post of Head Assistant, the DPC has unlawfully considered the censure entry dated 10.04.2017, whereas the said entry ought to have been ignored.** (Para 19)

The DPCs held successively on 13.10.2017 and thereafter on 28.03.2018 and again on 30.06.2020 have repeated the mistake which has resulted in denial of right the petitioner being considered for promotion to the post of Head Assistant. (Para 20)

Writ petition dismissed. (E-4)

Present petition challenges judgment and order dated 08.06.2022, passed by U.P. Public Services Tribunal, whereby the St. authorities have been directed to consider the case of the claimant for promotion to the post of Head Assistant from the post of Senior Assistant and also to provide consequential benefits, including the benefit of third Assured Career Progression.

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.
&
Hon'ble SubhashVidyarthi, J.)

1. Heard learned counsel for the State-petitioners and Sri Prateek Tewari, learned counsel representing the respondent no.1.

2. Under challenge in this petition filed under Article 226 of the Constitution of India is the judgment and order dated 08.06.2022, passed by U.P. Public Services Tribunal (hereinafter referred to as "the Tribunal'), whereby the Claim Petition No.249 of 2021 filed by the respondent no.1-claimant has been allowed and while quashing the order dated 22.12.2020,

whereby the respondent-claimant was denied promotion to the post of Head Assistant from the post of Senior Assistant, the State authorities have been directed to consider the case of the claimant for promotion to the said post and also to provide consequential benefits, including the benefit of third Assured Career Progression.

3. Submission of learned counsel for the State-petitioners is that the learned Tribunal has completely ignored the Government Order dated 25.03.1994 while allowing the claim petition and as a matter of fact on account of availability of a censure entry awarded to the claimant on 10.04.2017, he could not have been legally promoted to the post in question. It has been argued that the case of the claimant was considered by the Departmental Promotion Committed thrice i.e. on 13.10.2017, 28.03.2018 and 30.06.2020, however, because of availability of the censure entry awarded to the claimant on 10.04.2017 by all the three Departmental Promotion Committees his claim for promotion has rightly been rejected.

4. It has been argued by learned counsel appearing on behalf of the petitioners-State authorities that the learned Tribunal has not considered the Government Order dated 25.03.1994 which unambiguously provides that even if a censure entry pertains to an incident occurred previously which is awarded later on, such censure entry will be effective from the date of its award and not with effect from of the date of the incident in respect of which it is awarded. It has thus been argued that such stipulation made in the Government Order dated 25.03.1994 dis-entitles the claimant to claim his promotion to the post in question.

5. On the other hand, Sri Prateek Tewari, learned counsel representing the respondent no.1-claimant has submitted that in fact the provisions contained in Government Order dated 25.03.1994 and the Government Order dated 30.06.1993 are not in conflict with each other and both operate in different fields. He has also drawn our attention to another Government Order dated 06.04.1999 and has stated that the very purpose of issuance of the said Government Order is to not only to keep the censure entry in the service record of the employee concerned in the year in which it is awarded, but also to mention as to for which period the censure entry has been awarded so that at the time of evaluation of the character roll of the employee concerned for any purpose the natural consequence/effect of such censure entry awarded later in respect of an earlier incident may be assessed.

6. The submission made by Sri Tewari further is that though the claimant was awarded censure entry on 10.04.2017, however, since while making assessment of annual confidential report for the year 2017-18 the claimant was rated as a very good official/officer as such the censure entry awarded in the mid of 2017 i.e. on 10.04.2017 will lose its efficacy so for as the promotion of claimant to the post in question is concerned for the reason that the said censure entry pertained to the period 2008-09. The submission, thus is that the writ petition is highly misconceived and is based on complete misreading of the provisions contained in the Government Order dated 25.03.1994 and in ignorance of what has been prescribed by the Government in its Government Order dated 06.04.1999, which is liable to be dismissed at its threshold.

7. The fate of this writ petition depends on deciphering the actual purport and correct construction of the provisions contained in the Government Order dated 25.03.1994 vis-a-vis the provisions contained in the Government Orders dated 30.06.1993 and 06.04.1999.

8. The petitioner is working in the Commercial Tax Department on the post of Senior Assistant and has been claiming his promotion to the post of Head Assistant. His case though has been considered thrice by the Departmental Promotion Committee, as noted above, however, on all these three occasions he has been denied promotion to the post in question for the reason that he was awarded a censure entry on 10.40.2017.

9. First of all, we will examine as to what prescription is available in the Government Order dated 30.06.1993.

10. Learned counsel for the State authorities-petitioners has referred to the provisions contained in Para 2 (स) of the said Government Order dated 30.06.1993, which is quoted hereunder:

"(2) (स) यदि उस अवधि में, जिसके सेवाभिलेख उपरोक्तानुसार विचार क्षेत्र में आते हों, कोई निन्दा प्रविष्टि विद्यमान हो और उस निन्दा प्रविष्टि से संबंधित घटना की तिथि के बाद की अगले पांच वर्ष की अवधि में कोई अन्य प्रतिकूलता (यथा प्रतिकूल प्रविष्टि, दण्ड आदि) न हो तो उस निन्दा प्रविष्टि को संतोषजनक सेवा के मूल्यांकन हेतु विचार में न लिया जाये अर्थात् उसे नजरअन्दाज कर दिया जाये।"

11. When we peruse the afore-quoted provision, what we find is that the State Government has provided that in case any censure entry is available during the period for which the relevant service record of an employee is under consideration and no other adverse entry or punishment is awarded to such an employee within five years from the date in respect of which the censure entry is available, such censure entry shall not be considered for the purposes of evaluating satisfactory service of the employee concerned, that is to say such censure entry is to be ignored.

12. Accordingly, we are very clear in our mind that in case during the period in respect of which service record of an employee is under consideration if only solitary censure entry is available which pertains to some previous period and is not coupled with any other adverse material including the adverse entry or punishment etc. awarded within five years from the incident which had resulted in award of censure, such adverse entry is to be ignored and it will have no impact so far as the assessment of the employee concerned for the purposes of determination of satisfactory service is concerned.

13. Now, we examine the provisions as relied upon by the learned counsel representing the State authorities-petitioners contained in the Government Order dated 25.03.1994. Learned State Counsel has relied upon Para 5 (4) and Para 6 of the said Government Order, which are quoted hereunder:

"5- वर्णित परिस्थितियों में प्रश्नगत मामले में मुझे निम्नलिखित स्थिति को स्पष्ट करने व शासकीय निर्णय से आपको अवगत कराने का निर्देश हुआ है–

(4) प्रत्येक अनियमितता के सम्बन्ध में चाहे वे किसी पूर्व वर्ष की हो, जो भी दण्डादेश निर्गत किया जायेगा, उसका तात्कालिश प्रभाव होगा तथा दण्डादेश निर्गत होने के दिनांक से सम्बन्धित वर्ष की वार्षिक प्रविष्टि के साथ उसे रखा जायेगा।

6. अनुरोध है कि सन्दर्भगत शासनादेश दिनांक 30 जून, 1993 में निर्धारित सामान्य

मार्गदर्शक सिद्धान्तों को उपरोक्त प्रस्तर–5 के साथ पढ़ा जाय व उनका कृपया सभी स्तरों पर कड़ाई से अनुपालन सुनिश्चित किया जाय।"

14. Paragraph 5 (4) of the Government Order dated 25.03.1994 as afore-quoted provides that any punishment order issued will be effective with immediate effect even if it is issued in respect of some irregularity committed at a prior point in time. It further provides that such punishment order shall be kept in the character roll of the employee concerned in the year in which it is awarded. Paragraph 6 states that the Government Order dated 30.06.1993 shall be read in conjunction which para 5 of the Government Order dated 30.06.1993.

15. If we compare Paragraph 5 (4) available in the Government Order dated 25.03.1994 and Paragraph 2 (स) of the Government Order dated 30.06.1993, we do not find that there is any conflict between the said provisions. In fact both operate in different fields. So far as Paragraph 5 (4) of the Government Order dated 25.03.1994 is concerned, according to our considered opinion, the same provides as to in the character roll of which year punishment awarded to a government employee has to be kept and from what date will it be effective. Whereas so far as the provisions contained in Paragraph 2 (स) of the Government Order dated 30.06.1993 is concerned, the same, in our considered opinion, provides that even if a censure entry is available in the service record of an employee awarded in a year subsequent to the year in which any irregularity is said to have been committed which has resulted in award of censure entry, the same is to be ignored for the purposes of assessment of satisfactory service of an employee provided that during next five years from the date of incident in respect of which censure entry was awarded, the employee concerned has not been awarded with any other censure entry or punishment.

16. Accordingly, Paragraph 5 (4) of the Government Order dated 25.06.1994 does not in any manner dilute the provisions contained in Paragraph 2 (स) of the Government Order dated 30.06.1993. The said interpretation and construction of the provisions contained in the Paragraph 2 (स) of the Government Order dated 30.06.1993 has a rationale too which is that in a situation where a censure entry is awarded to an employee in respect of an incident or alleged irregularity said to have occurred or committed in past and considerable time has elapsed since then, taking into consideration award of censure entry for the purposes of reckoning the satisfactory service, in our opinion, will be highly arbitrary.

17. Our view that Paragraph 5 (4) of the Government Order dated 25.03.1994 does not in any manner dilute or rescind the provisions contained in Paragraph 2 (स) of the Government Order dated 30.06.1993, is fortified by a subsequent Government Order dated 06.04.1999. Paragraph 2 of the said Government Order dated 06.04.1999 is quoted hereunder:

"*2. मुझे यह कहने का निदेश हुआ है कि ऐसे प्रकरणों पर जिसमें जांचोपरान्त सेंसर या निन्दात्मक प्रविष्टि दिये जाने का निर्णय लिया जाता है, वह प्रविष्टि संबंधित कर्मचारी/अधिकारी की चरित्र–पंजिका में उसी वर्ष की प्रविष्टि में रखी जायेगी जिस वर्ष सेन्सर अथवा निन्दात्मक प्रविष्टि दिये जाने का निर्णय लिया गया है। वह उल्लेख अवश्य कर दिया जाय कि प्रकरण संबंधित के सेवाकाल के किस पद व वर्ष से संबंधित रहा है और प्राप्त की गयी त्रुटि किस प्रकृति की रही है जिससे चरित्र पंजिका का मूल्यांकन करते समय दी*

गयी प्रविष्टि के स्वाभाविक असर को दृष्टिगत रखा जा सके।"

18. From a perusal of the afore-quoted provision of Paragraph 2 of the Government Order dated 06.04.1999, it is clear that it has been provided therein that in case after enquiry any censure entry is awarded against an employee, such censure entry shall be kept in the character roll of the employee concerned in the year in which censure entry is awarded, however, while doing so it shall also be mentioned, while recording the censure entry in the year in which it is awarded, that censure entry related to which year or which post and what has been the nature of the mistake which resulted in award of censure entry so that the actual and natural consequence and effect of such censure entry can be taken into account while evaluating an employee. Thus, the Government Order dated 06.04.1999, to us, appears to be in complete sync with provisions contained in Paragraph 2 (स) of the Government Order dated 30.06.1993 which, as observed above, does not get diluted by the provisions contained in Paragraph 5 (4) of the Government Order dated 25.03.1993.

19. So far as the facts of the present case are concerned, admittedly a censure entry awarded to the claimant on 10.04.2017 pertained to the period 2008-09 and the Departmental Promotion Committee was convened firstly on 13.10.2017 and thereafter on 28.03.2018 and again on 30.06.2020. As per the Government Orders as discussed above, the censure entry awarded on 10.04.2017 is to be kept in the service record of the claimant in the year 2017-18 however simultaneously a mentioned is to be made that the said censure entry pertained to the year 2008-09. Since there is nothing on record which can reveal that the claimant was awarded any other censure entry or punishment within five years after 2008-09 and the censure entry dated 10.04.2017 was the sole adverse material as such in our opinion while considering his promotion to the post of Head Assistant the Departmental Promotion Committee has unlawfully considered the censure entry dated 10.04.2017, whereas the said entry ought to have been ignored.

20. The Departmental Promotion Committees held successively on 13.10.2017 and thereafter on 28.03.2018 and again on 30.06.2020 have repeated the mistake which has resulted in denial of right the petitioner being considered for promotion to the post of Head Assistant. Even otherwise, what the learned Tribunal has noticed is that for the year 2017-18 the annual character roll entry of the claimant was "very good". In a situation where a censure is being awarded to an employee on 10.04.2017 in respect of period of 2008-09 and in the annual entry for the year 2017-18 he is being rated as a very good official/officer, denying the claim of promotion on the ground of the censure entry dated 10.04.2017 pertaining to the period 2008-09 is, thus, not only illegal being contrary to what has been prescribed in Paragraph 2 (स) of the Government Order dated 30.06.1993 but is also arbitrary.

21. For the reasons aforesaid, we are in complete agreement with the judgment passed by the U.P. State Public Services Tribunal which is under challenge herein.

22. The writ petition thus lacks merit, which is hereby

23. The judgment of the learned Tribunal shall be complied with within a period of two months from today. This

order shall be communicated by learned State Counsel to the authority concerned forthwith.

(2023) 3 ILRA 126
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.03.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ A No. 1811 of 2023

Smt. Madhavi Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
O.P. Tiwari

Counsel for the Respondents:
C.S.C., Rakesh Kumar Chaudhary

A. Service Law – Compassionate Appointment - Uttar Pradesh Cooperative Society Employees' Service Regulation, 1975 - Regulation 104(V); Uttar Pradesh Dying in Harness Rules 1974 - Exclusion of married daughter from the ambit of family in the Note appended in sub clause (V) in Regulation 104 of the Regulations of 1975 is illegal, unconstitutional and violative of Articles 14 and 16 of the Constitution of India. Accordingly, the word 'unmarried' in the said Note is struck down. (Para 14)

The definition of family occurring in the Dying in Harness Rules, 1974 is *pari materia* with Note appended to Regulation 104 of the Regulations of 1975 and the definition of family included the daughter but excluded married daughter. The assumption that after marriage, a daughter cannot be said to be a member of the family of her father or that she ceases to be dependent on her father irrespective of social circumstances cannot be countenanced.

B. The test in matters of compassionate appointment is a test of dependency within defined relationships. There are situations where a son of the deceased government servant may not be in need of compassionate appointment because the economic and financial position of the family of the deceased are not such as to require the grant of compassionate appointment on a preferential basis. But **the dependency or a lack of dependency is a matter which is not determined *a priori* on the basis of whether or not the son is married. Similarly, whether or not a daughter of a deceased should be granted compassionate appointment has to be defined with reference to whether, on a consideration of all relevant facts and circumstances, she was dependent on the deceased government servant.** Excluding daughters purely on the ground of marriage would constitute an impermissible discrimination and be violative of Articles 14 and 15 of the Constitution. (Para 12, 13)

A direction is issued to the respondents to consider the claim of the petitioner for compassionate appointment again in light of the decision of the Full Bench in the case of *Vimla Srivastava* (*infra*) as well as the directions issued hereinabove and the case of the petitioner would not be rejected merely on the ground that she is a married daughter. (Para 16)

Writ petition allowed. (E-4)

Precedent followed:

Smt. Vimla Srivastava Vs St. of U.P. & ors., 2016 (2) ESC 660 (AIL (DB) (Para 11)

Present petition assails the orders dated 29.06.2021 and 01.07.2022, passed by opposite party No. 2 i.e. Secretary, Uttar Pradesh Cooperative Institutional Services Board, Lucknow, rejecting the claim of the petitioner for appointment under Dying in Harness Rules.

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Sri O. P. Tiwari, learned counsel for the petitioner, learned Standing counsel for respondent No.s 1 and Sri Rakesh Kumar Chaudhary for respondent No.s 2 to 5.

2. The short counter affidavit filed on behalf of respondent No.2 and its rejoinder affidavit filed today in the Court are taken on record.

3. With the consent of the parties the petition is being decided at the admission stage itself.

4. By means of the present writ petition the petitioner has assailed the order dated 29.6.2021 as well as the order dated 1.7.2022 passed by opposite party No.2 i.e. Secretary, Uttar Pradesh Cooperative Institutional Services Board, Lucknow thereby rejecting the claim of the petitioner for appointment under Dying in Harness Rules.

5. It is submitted on behalf of the petitioner that her father Sri Sunil Kumar Mishra, who was working on Class IV Post in District Cooperative Bank, died during service on 7.1.2021 leaving behind the petitioner and his widow. It is stated that the mother of the petitioner is also a cancer patient and the petitioner, who is a married lady is living with her mother and looking after after her. It is stated that due to sudden demise of father of the petitioner the family has fallen into financial destitution and, hence, according to Regulation 104 (V) of Uttar Pradesh Cooperative Society Employees' Service Regulation 1975 (hereinafter referred to as the Regulations of 1975) which provides for compassionate appointment, the petitioner made an application on 1st March, 2021 for compassionate appointment. It has further been submitted that the petitioner had annexed all the relevant documents for due consideration for such appointment. The case of the petitioner was considered and forwarded to the Bank Managing Committee and subsequently has been rejected by means of the impugned order solely on the ground that the petitioner is a married daughter of the deceased employee and is not included in the definition of the family as per note appended to Rule 104 of the Regulations of 1975.

6. It is stated that the petitioner being aggrieved of the aforesaid order has approached this Court challenging the impugned order whereby her candidature has been rejected and has further assailed the validity of Rule 104 (v) of the the Regulations of 1975 in as much as married daughter would be included in the definition of daughter and such a discrimination on the face of it is illegal and arbitrary.

7. It has been submitted that according to the note appended to Regulation 104 of the Regulations of 1975 "the family, for the purposes of this Regulation, shall include wife/husband, sons and unmarried or widowed daughters of the deceased employee.' It is stated that just because of the fact that unmarried and widow daughters only are included in the said definition and the petitioner being married daughter has been held to be excluded from the definiton of family.

8. Sri Rakesh Kumar Chaudhary appearing for the respondents i.e. Cooperative Institutional Services Board has supported the impugned order and submitted that there is no infirmity in the same in as much as the service Regulations of 1975 do not included a married daughter

in the definition of the family and, hence, there is no infirmity in the impugned order by which the claim of the petitioner for compassionate appointment has been rejected. He has further submitted that in the counter affidavit filed by respondent No.2 it has been stated that U.P. Cooperative Institutional Services Board had already proposed an amendment to the definition of the family in the Regulation 1975 to the effect that married daughter be also included in the definition of the family. He has annexed a copy of the letter dated 22.9.2022 along with the proposed amendment. He has further submitted that had the amendment been allowed and incorporated in the Service Regulations then the claim of the petitioner could have been accepted but prior to its approval and incorporation in the said Regulations there is no infirmity in the rejection of the claim of the petitioner.

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

10. The only question which falls for determination before this Court is as to whether married daughter would fall into the definition of family. The note appended to Rule 104 of the Regulations of 1975 is quoted as under:-

" Note. The family, for the purposes of this Regulation, shall include the wife / husband, sons and unmarried or widowed daughters of the deceased employee."

11. This question has been elaborately considered by a Division Bench of this Court in the case of ***Smt. Vimla Srivastava Vs. State of U.P. and others, 2016 (2) ESC 660 (All. (DB)*** where a similar provision which had occurred in the Uttar Pradesh Dying in Harness Rules, 1974 came under the scrutiny of the Division Bench of this Court where also the married daughter was not included in the definition of the family. This Court held the said provision to be iin violation of the provisions of the Constitution as well as arbitrary and and held that married daughter would fall within the ambit of explanation "family'. For the sake of convenience the relevant paragraphs of the said judgment are quoted as under:-

"9. While assessing the rival submissions, it must be noted at the outset that the definition of the expression "family" in Rule 2 (c) incorporates the categories of heirs of a deceased government servant. Among them are the wife or husband, sons and adopted sons, unmarried daughters, unmarried adopted daughters, widowed daughters and widowed daughters-in-law. Clause (ii) of Rule 2 (c) brings a son as well as an adopted son within the purview of the expression "family" irrespective of marital status. A son who is married continues to be within the ambit of the expression "family" for the purpose of Rule 2 (c). But by the stroke of a legislative definition, a daughter who is married is excluded from the scope and purview of the family of a deceased government servant unless she falls within the category of a widowed daughter. The invidious discrimination that is inherent in Rule 2 (c) lies in the fact that a daughter by reason of her marriage is excluded from the ambit of the expression "family". Her exclusion operates by reason of marriage and, whether or not she was at the time of the death of the deceased government servant dependent on him. Marriage does not exclude a son from the ambit of the expression "family". But marriage excludes a daughter. This is

invidious. A married daughter who has separated after marriage and may have been dependent on the deceased would as a result of this discrimination stand excluded. A divorced daughter would similarly stand excluded. Even if she is dependent on her father, she would not be eligible for compassionate appointment only because of the fact that she is not "unmarried". The only basis of the exclusion is marriage and but for her marriage, a daughter would not be excluded from the definition of the expression "family".

10. The issue before the Court is whether marriage is a social circumstance which is relevant in defining the ambit of the expression "family" and whether the fact that a daughter is married can constitutionally be a permissible ground to deny her the benefit of compassionate appointment. The matter can be looked at from a variety of perspectives. Implicit in the definition which has been adopted by the state in Rule 2 (c) is an assumption that while a son continues to be a member of the family and that upon marriage, he does not cease to be a part of the family of his father, a daughter upon marriage ceases to be a part of the family of her father. It is discriminatory and constitutionally impermissible for the State to make that assumption and to use marriage as a rationale for practicing an act of hostile discrimination by denying benefits to a daughter when equivalent benefits are granted to a son in terms of compassionate appointment. Marriage does not determine the continuance of the relationship of a child, whether a son or a daughter, with the parents. A son continues to be a son both before and after marriage. A daughter continues to be a daughter. This relationship is not effaced either in fact or in law upon marriage. Marriage does not bring about a severance of the relationship between a father and mother and their son or between parents and their daughter. These relationships are not governed or defined by marital status. The State has based its defence in its reply and the foundation of the exclusion on a paternalistic notion of the role and status of a woman. These patriarchal notions must answer the test of the guarantee of equality under Article 14 and must be held answerable to the recognition of gender identity under Article 15.

11. The stand which has been taken by the state in the counter affidavit proceeds on a paternalistic notion of the position of a woman in our society and particularly of the position of a daughter after marriage. The affidavit postulates that after marriage, a daughter becomes a member of the family of her husband and the responsibility for her maintenance solely lies upon her husband. The second basis which has been indicated in the affidavit is that in Hindu Law, a married daughter cannot be considered as dependent of her father or a dependent of a joint Hindu family. The assumption that after marriage, a daughter cannot be said to be a member of the family of her father or that she ceases to be dependent on her father irrespective of social circumstances cannot be countenanced. Our society is governed by constitutional principles. Marriage cannot be regarded as a justifiable ground to define and exclude from who constitutes a member of the family when the state has adopted a social welfare policy which is grounded on dependency. The test in matters of compassionate appointment is a test of dependency within defined relationships. There are situations where a son of the deceased government servant may not be in need of compassionate appointment because the economic and financial

position of the family of the deceased are not such as to require the grant of compassionate appointment on a preferential basis. But the dependency or a lack of dependency is a matter which is not determined a priori on the basis of whether or not the son is married. Similarly, whether or not a daughter of a deceased should be granted compassionate appointment has to be defined with reference to whether, on a consideration of all relevant facts and circumstances, she was dependent on the deceased government servant. Excluding daughters purely on the ground of marriage would constitute an impermissible discrimination and be violative of Articles 14 and 15 of the Constitution.

12. A variety of situations can be envisaged where the application of the rule would be invidious and discriminatory. The deceased government servant may have only surviving married daughters to look after the widowed parent - father or mother. The daughters may be the only persons to look after a family in distress after the death of the bread earner. Yet, under the rule, no daughter can seek compassionate appointment only because she is married. The family of the deceased employee will not be able to tide over the financial crisis from the untimely death of its wage earner who has died in harness. The purpose and spirit underlying the grant of compassionate appointment stands defeated. In a given situation, even though the deceased government employee leaves behind a surviving son, he may not in fact be looking after the welfare of the surviving parents. Only a daughter may be the source of solace - emotional and financial, in certain cases. These are not isolated situations but social realities in India. A surviving son may have left the village, town or state in search of employment in a metropolitan city. The daughter may be the one to care for a surviving parent. Yet the rule deprives the daughter of compassionate appointment only because she is married. Our law must evolve in a robust manner to accommodate social contexts. The grant of compassionate appointment is not just a social welfare benefit which is allowed to the person who is granted employment. The purpose of the benefit is to enable the family of a deceased government servant, who dies in harness, to be supported by the grant of compassionate appointment to a member of the family. Excluding a married daughter from the ambit of the family may well defeat the object of the social welfare benefit.

13. The living tree - the Constitution - on which the law derives legitimacy is a liberal instrument for realising fundamental human freedoms. The law and the Constitution must account for multiple identities. Individuals - men and women - have multiple identities : as a worker in the work place; as a child, parent and spouse; identities based on preferences and orientation; those based on language, religion and culture. But from a constitutional perspective, they are protected and subsumed in the overarching privileges of citizenship and in the guarantee of individual freedoms.

14. In the judgment of this Court in Isha Tyagi vs. State of U.P.2, a Division Bench considered the legality of a condition which was imposed by the State Government while providing horizontal reservation to descendants of freedom fighters. The condition which was imposed by the State excluded the children of the daughter of a freedom fighter from seeking admission to medical colleges in the State

under an affirmative action programme. Holding this to be unconstitutional, the Division Bench held as follows:

"It would be anachronistic to discriminate against married daughters by confining the benefit of the horizontal reservation in this case only to sons (and their sons) and to unmarried daughters. If the marital status of a son does not make any difference in law to his entitlement or to his eligibility as a descendant, equally in our view, the marital status of a daughter should in terms of constitutional values make no difference. The notion that a married daughter ceases to be a part of the family of her parents upon her marriage must undergo a rethink in contemporary times. The law cannot make an assumption that married sons alone continue to be members of the family of their parents, and that a married daughter ceases to be a member of the family of her parents. Such an assumption is constitutionally impermissible because it is an invidious basis to discriminate against married daughters and their children. A benefit which this social welfare measure grants to a son of a freedom fighter, irrespective of marital status, cannot be denied to a married daughter of a freedom fighter."

15. Dealing with the aspect of marriage, the Division Bench held as follows:

"Marriage does not have and should not have a proximate nexus with identity. The identity of a woman as a woman continues to subsist even after and notwithstanding her marital relationship. The time has, therefore, come for the Court to affirmatively emphasise that it is not open to the State, if it has to act in conformity with the fundamental principle of equality which is embodied in Articles 14 and 15 of the Constitution, to discriminate against married daughters by depriving them of the benefit of a horizontal reservation, which is made available to a son irrespective of his marital status."

16. The principles underlying Articles 14 and 15 of the Constitution have an important bearing on gender identity. In C.B. Muthamma vs. Union of India3, the Supreme Court considered the legality of a rule in the Indian Foreign Service (Conduct and Discipline) Rules under which a woman member of the service was required to obtain the permission of the Government before her marriage was solemnized and could be required to resign from service after her marriage, if the Government was satisfied that her family and domestic commitments are likely to come in the way of the due and efficient discharge of her duties as a member of the service. The Supreme Court held that "If a married man has a right, a married woman, other things being equal, stands on no worse footing". In the meantime the Central Government had indicated that the rule was being reconsidered and its deletion was being gazetted.

17. In Vijaya Manohar Arbat vs. Kashirao Rajaram Sawai4, the Supreme Court held in the context of the provisions of Section 125 of the Code of Criminal Procedure 1973 that "a daughter after her marriage does not cease to be a daughter of the father or mother".

18. The same principle was applied in Githa Hariharan vs. Reserve Bank of India5 while defining the ambit of the expression "the father, and after him, the mother" in Section 6(a) of the Hindu Succession Act, 1956. The Supreme Court observed that if the word 'after' was read to mean that a mother would be disqualified from acting as a guardian of a minor during the lifetime of the father, this would run counter to the constitutional mandate of gender equality and will lead to an

impermissible differentiation between males and females. Interpreting the word 'after', the Supreme Court held that it does not necessarily mean after the death of the father but would mean in the absence of, whether temporary or otherwise or in a situation of the apathy of the father or his inability to maintain the child.

19. In Savita Samvedi vs. Union of India6, the Supreme Court considered the validity of a circular of the Railway Board by which a railway servant who is an allottee of service accommodation was entitled to nominate, while retiring from service, a son or unmarried daughter among other persons for allotment of the accommodation on out-of-turn basis. Holding that the circular (insofar as it precluded the nomination of a married daughter for allotment of accommodation) violated Article 14, the Supreme Court observed as follows:

"... If he has only one married daughter, who is a railway employee, and none of his other children are, then his choice is and has to be limited to that railway employee married daughter. He should be in an unfettered position to nominate that daughter for regularization of railway accommodation. It is only in the case of more than one children in Railway service that he may have to exercise a choice and we see no reason why the choice be not left with the retiring official's judgment on the point and be not respected by the railway authorities irrespective of the gender of the child. There is no occasion for the railways to be regulating or bludgeoning the choice in favour of the son when existing and able to maintain his parents. The Railway Ministry's Circular in that regard appears thus to us to be wholly unfair, gender biased and unreasonable, liable to be struck down under Article 14 of the Constitution. The eligibility of a married daughter must be placed on a par with an unmarried daughter (for she must have been once in that state), so as to claim the benefit of the earlier part of the Circular, referred to in its first paragraph, above-quoted."

20. In Air India Cabin Crew Assn. vs. Yeshaswinee Merchant7, the Supreme Court dealt with the prohibition under Article 15(2) on discrimination on the ground only of sex. Interpreting the provisions of Articles 15 and 16, the Supreme Court held that the constitutional mandate would be infringed where a woman would have received the same treatment as a man but for her sex.

.....

26. In conclusion, we hold that the exclusion of married daughters from the ambit of the expression "family" in Rule 2 (c) of the Dying-in-Harness Rules is illegal and unconstitutional, being violative of Articles 14 and 15 of the Constitution.

27. We, accordingly, strike down the word 'unmarried' in Rule 2 (c) (iii) of the Dying-in-Harness Rules.

28. In consequence, we direct that the claim of the petitioners for compassionate appointment shall be reconsidered. We clarify that the competent authority would be at liberty to consider the claim for compassionate appointment on the basis of all the relevant facts and circumstances and the petitioners shall not be excluded from consideration only on the ground of their marital status."

12. Considering the aforesaid judgment this Court is of the considered opinion that the said judgment passed in the case of ***Vimla Srivastava (Supra)*** squarely applies to the facts of the present case. The definition of family occurring in the Dying in Harness Rules, 1974 is *pari materia* with Note appended to Regulation 104 of the

Regulations of 1975 and the definition of family included the daughter but excluded married daughter.

13. This Court in the aforesaid Full Bench has not accepted the stand of the State which proceeds on a paternalistic notion of the position of a woman in our society and particularly of the position of a daughter after marriage. The assumption that after marriage, a daughter cannot be said to be a member of the family of her father or that she ceases to be dependent on her father irrespective of social circumstances cannot be countenanced. The test in matters of compassionate appointment is a test of dependency within defined relationships. There are situations where a son of the deceased government servant may not be in need of compassionate appointment because the economic and financial position of the family of the deceased are not such as to require the grant of compassionate appointment on a preferential basis. But the dependency or a lack of dependency is a matter which is not determined a priori on the basis of whether or not the son is married. Similarly, whether or not a daughter of a deceased should be granted compassionate appointment has to be defined with reference to whether, on a consideration of all relevant facts and circumstances, she was dependent on the deceased government servant. Excluding daughters purely on the ground of marriage would constitute an impermissible discrimination and be violative of Articles 14 and 15 of the Constitution.

14. Accordingly, it is held that exclusion of married daughter from the ambit of family in the Note appended in sub clause (V) in Regulation 104 of the Regulations of 1975 is illegal, unconstitutional and violative of Articles 14 and 16 of the Constitution of India. Accordingly, the word 'unmarried' in the said Note is struck down.

15. The impugned orders dated 29.6.2021 and 1.7.2022 passed by opposite party No.2 are quashed.

16. A direction is issued to the respondents to consider the claim of the petitioner for compassionate appointment again in light of the decision of the Full Bench in the case of ***Vimla Srivastava (supra)*** as well as the directions issued hereinabove and the case of the petitioner would not be rejected merely on the ground that she is a married daughter.

17. In light of the above, the writ petition stands **allowed.**

(2023) 3 ILRA 133
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.02.2023
BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ A No. 1834 of 2001

Aditya Kumar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
H.G.S. Parihar, Meenakshi Singh Parihar

Counsel for the Respondents:
C.S.C., Ghaus Beg, R.K. Katiyar, Rajiv Singh Chauhan

A. Service Law – Extension of Appointment/Regularization – Payment of

Salary – Long standing service of the petitioner is liable to be regularized in view of the said set of facts and grounds.

It is evident that Sri Rajendra Bahadur Singh went on leave on 17.09.1997. Almost 26 years have passed and he has not come back to join the post. Meaning thereby, he is not interested to come back and join the post. The petitioner is continuously discharging his duty on the post of Assistant Teacher in the vacancy due to leave granted to Sri Rajendra Bahadur Singh. Time to time approval has also been accorded by the District Basic Education Officer for extension of service of the petitioner. Lastly, vide order dated 23.06.2002 direction was issued by the District Basic Education Officer to permit continuance of the petitioner till further order passed by him. (Para 10)

Accordingly, this writ petition is finally disposed of with a direction to the District Basic Education Officer, Unnao to pass an order for regularization of service of the petitioner within a period of six weeks from the date of production of a certified copy of this order. However, the petitioner shall be permitted to continue on the post of Acting Headmaster and to pay regular monthly salary month by month. (Para 12)

Writ petition disposed of. (E-4)

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Ms. Meenakshi Parihar Singh, learned counsel for the petitioner, learned Standing Counsel for respondent nos.1, Shri Madhukar Dixit, learned counsel for respondent no.2 and Shri Rajiv Singh Chauhan, learned counsel for the respondent no.3.

2. By means of the present writ petition, the petitioner has prayed for issuance of a writ in the nature of Mandamus commanding the respondents to allow the petitioner to work on the post of Assistant Teacher and pay him salary regularly each and every month without any break till Sri Rajendra Bahadur Singh is on leave.

3. Factual matrix of the case is that Sri Rajendra Bahadur Singh, Assistant Teacher proceeded on leave without pay on 17.9.1997. The petitioner was granted appointment under Rule 20 of the Rules against the vacancy which was caused due to leave granted to Sri Rajendra Bahadur Singh on 13.11.1997. The appointment of the petitioner was approved by the District Basic Education Officer for a period of six months from 13.11.1997 vide order dated 20.12.1997. The District Basic Education Officer approved the extension of appointment of petitioner for a period of six months from 1.7.1998 vide order dated 25.5.1998.

The District Basic Education Officer again approved the extension of appointment of petitioner for a period of six months upto 20.5.1999 vide order dated 21.12.1998. The Committee of Management took decision for extension of appointment of petitioner upto 30.6.2007as the leave without pay of Rajendra Bahadur Singh was sanctioned by the Committee of Management upto 30.6.2007 vide resolution dated 15.5.1999. Letter was sent by the Management seeking approval of the District Basic Education Officer for extension of appointment of petitioner upto 30.6.2007 vide covering letter dated 17.5.1999. In response to the letter dated 17.5.1999, the District Basic Education Officer accorded approval to the appointment of petitioner only from 1.7.1999 to 31.12.1999.

The Manager of the Committee of Management again wrote letter to District Basic Education Officer for approval of extension of appointment of the

petitioner upto 30.6.2007. In response to the letter dated 12.11.1999 the District Basic Education Officer accorded approval to the extension of the petitioner only for a period of six months i.e. upto 30.6.2000 vide order dated 31.12.1999. The Manager of the Committee of Management again wrote letter dated 27.5.2000 to the District Basic Education Officer for extension of appointment of petitioner upto 30.6.2007.

The District Basic Education Officer vide letter dated 27.5.2000 approved the extension of the petitioner only for a period of six months. Approval of the extension of the appointment of petitioner from 1.1.2001 to 20.5.2001 has been granted by the District Basic Education Officer and artificial break is being made in the service of the petitioner and his appointment is being extended only in piece meal only for a period of six months and artificial break has been given from 18.5.1998 to 30.6.1998 and 21.5.1999 to 30.6.1999. Feeling aggrieved, the petitioner has filed the present writ petition.

4. This Court vide order dated 20.4.2001 passed the following order:

"Issue notice.

Notices on behalf of respondents no.1 and 2 has been accepted by the learned Chief Standing Counsel and notice on behalf of respondent No.3 has been accepted by Sri R.K. Katiyar, Advocate. Sri Rajiv Sharma, learned STanding Counsel prays for and is granted four weeks time to file counter affidavit after serving its duplicate on the counsel for the petitioner, who may, if he so desires to file rejoinder affidavit within next two weeks.

Issue notice to respondent No.4 to show cause as to why writ petition be not admitted and if possible be not disposed of finally on the date of time of admission.

Petitioner shall take steps for notice on respondent no.4 by registered post and also by speed post and for purpose of dasti summons be issued to the learned counsel for the petitioner within three days.

List in the first week of July, 2001. Till the next date of listing status-quo exists as on today, shall be maintained by the parties to the writ petition."

5. In compliance of the order of this Court, the District Basic Education Officer passed an order on 23.6.2002 whereby it has been directed that the status quo shall be maintained till further orders of this Court. In compliance of the order of this Court as well as order of the District Basic Education Officer dated 23.6.2002, the petitioner is continuously discharging his duty and has been paid salary in pursuance thereof.

6. Supplementary affidavit has been filed by the petitioner enclosing copy of the order of the Finance & Accounts Officer, Basic Education, Unnao dated 1.7.2017 as Annexure No.A-1 wherein it has been stated that since 8.12.1997, benefits of regular salary, annual increment, G.P.F Deduction and Group Insurance etc. have been granted keeping in view past 19 years' satisfactory services of the petitioner. Vide order dated 8.12.1997 (Annexure A-2 to the supplementary affidavit), selection grade was provided with effect from 18.11.2007 and now, he is officiating Headmaster of the Junior Highschool.

7. Submission of learned counsel for the petitioner is that taking into consideration the long standing service of the petitioner as Assistant Teacher in the institution, his service is liable to be regularized. She next submits that the

person who went on leave, has not come back since 1997, therefore, the service of the petitioner is liable to be regularized. Her last submission is that the long standing service of the petitioner is liable to be regularized in view of the said set of facts and grounds.

8. On the other hand, learned Standing Counsel for the respondent nos.1 and 2 and Shri Rajiv Singh Chauhan, learned counsel for the respondent no.3 submit that the appointment of the petitioner was made under Rule 20 for a period of six months, but due to non-availability of the teacher who went on leave, the service of the petitioner was extended and he is continuously discharging his duty. The vacancy has not become substantive, therefore, the claim for regularization is not available to the petitioner.

9. I have considered the submissions advanced by learned counsel for the parties and perused the material available on record.

10. On its perusal, it is evident that Sri Rajendra Bahadur Singh went on leave on 17.9.1997. Almost 26 years have passed and he has not come back to join the post. Meaning thereby, he is not interested to come back and join the post. The petitioner is continuously discharging his duty on the post of Assistant Teacher in the vacancy caused due to leave granted to Sri Rajendra Bahadur Singh. Time to time approval has also been accorded by the District Basic Education Officer for extension of service of the petitioner. Lastly, vide order dated 23.6.2002 direction was issued by the District Basic Education Officer to permit continuance of the petitioner till further order passed by him.

11. In view of the above, there is no justification to keep this writ petition pending any more.

12. Accordingly, this writ petition is finally **disposed of** with a direction to District Basic Education Officer, Unnao to pass an order for regularization of service of the petitioner within a period of six weeks from the date of production of a certified copy of this order. However, the petitioner shall be permitted to continue on the post of Acting Headmaster and to pay regular monthly salary month by month.

(2023) 3 ILRA 136
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.03.2023

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Writ A No. 3979 of 2022

Uday Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Avinash Tiwari

Counsel for the Respondents:
C.S.C., Shubham Tripathi

A. Education/Service Law – Recruitment/Selection/Appointment - Sanjay Gandhi Post Graduate Institute of Medical Sciences Act, 1983 - The proper and appropriate remedy in a situation where enforcement of the right depends upon the acceptance of a policy of examination for admission in any particular language to the Institution on that basis, is a matter of policy and cannot be appropriately dealt with u/Article 32 of the Constitution. It is difficult to accept that in not holding entrance examination

in any particular language, be it Hindi or regional language, amounts to denial of admission on the ground of language. Every Educational Institution has right to determine or set out its method of education and conditions of examination. (Para 14)

The CRT was held only in English language. Therefore, the petitioners have approached this Court by means of the present writ petition with a prayer that the CRT should be held in Hindi language also and after holding the CRT in Hindi, the result should be declared a fresh. (Para 9)

B. Uttar Pradesh Competitive Examination (Medium of Written Examination) Rules, 1994: Rule 4 - Rule 4 provides that a candidate may answer papers in English in Roman Script or Hindi in Devanagari script or Urdu in Persian script except that the language paper must be answered in the same language; provided that question paper as a whole, and not for each question separately, must be answered in any of the above script; provided further that the question paper shall be in English in Roman script and Hindi in Devanagari Script. **Therefore, the rule indicates that it is not for the multiple choice questions because in multiple choice questions there is no requirement of answering the question paper in any language and it is also not the case herein.** (Para 12)

C. Once the Rules/Regulations have been framed by the SGPGI with the approval of the St. Government, the selection is to be made on the basis of same and GO dates 07.08.1992 is not applicable. This Government order only indicates the consent of the Government for applicability of the Rules/Regulations of the St. Government but it does not indicate that SGPGI, which is an autonomous body created under the statue, i.e., Act 1983, has adopted and applied it. (Para 13)

D. Any condition, which is not provided under the advertisement cannot be said to have been violated in such a situation. When the language of paper was not provided in the advertisement, it cannot be said that CRT has been held in violation of the terms and conditions of the advertisement. Even otherwise, when there are 10 marks for English language, then English would be required for the post in question and it cannot be accepted that a candidate who has applied for the post knowing it well does not know the English required for multiple choice questions paper. (Para 11, 16)

E. It was not open to the appellants after participating in the selection process to question the result on being declared unsuccessful. The syllabus of the selection in question was in English and no objection was raised by the petitioners and nothing has been brought on record to show that the petitioners have ever made any request for providing the syllabus in Hindi, therefore, it cannot be said that the petitioners do not know the English language, which may have been required for multiple choice questions, particularly when there are 10 marks for General English. If the syllabus was in English language then it can safely be inferred that the question papers would be in English and if the petitioners have not raised any objection at that stage, they cannot say now that the question paper should have been in Hindi also. (Para 16, 17)

F. Words and Phrases – (i)`*Examination*' - The definition clause in Rule 3(b) provides that the 'Examination' means a written examination or a competitive examination for direct recruitment to any post or service under the Rule making power of the Governor under the proviso to Article 309 of the Constitution. Therefore, this Rule is applicable only to the posts or services, which are under the Rule making power of the Governor u/Article 309 of the Constitution, whereas the appointment in the SGPGI are made under the first statute of the SGPGI by the Director.

(ii) `*Commission*' - Rule 3(e) provides that the 'Commission' means the Uttar Pradesh Public Service Commission or Uttar Pradesh Subordinate Service Selection Commission as the case may be. It indicates that this Rule is applicable on the examinations being conducted by the said commissions. Therefore, it is not applicable on the selection in question. (Para 12)

Writ petition dismissed. (E-4)

Precedent followed:

1. Hindi Hitrakshak Samiti & ors. Vs U.O.I. & ors., (1990) 2 SCC 352 (Para 7)

2. Ashima Dwivedi Vs Registrar General High Court Judicature at Allahabad & anr., Special Appeal No. 1572 of 2011 (Para 7)

3. Ashok Kumar & anr. Vs St. of Bihar & ors., (2017) 4 SCC 357 (Para 7)

Precedent distinguished:

1. Bedanga Talukdar Vs Saifudullah Khan & ors., (2011) 12 SCC 85 (Para 5, 11)

2. Anil Chandra Vs Birbal Sahni Institute of Palaebotany, 2003 LawSuit (All) 76/2003 21 LCD 396 (Para 5, 11)

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

1. Heard Shri Avinash Tiwari, learned counsel for the petitioners and Shri Sanjay Bhasin, learned Senior Advocate assisted by Shri Shubham Tripathi, learned counsel for the respondent Nos.2 to 5. Learned Standing Counsel is present for respondent No.1.

2. By means of the present writ petition, the petitioners have prayed for a direction to conduct online common recruitment test in Hindi language for selection in pursuance of the advertisement dated 06.01.2022 and declare the final result of the selection only after conducting Common Recruitment Test in Hindi language properly with all consequential benefits. The petitioners have also prayed for quashing the procedure of online Common Recruitment Test conducted on 20.06.2022 or in alternative issue a suitable direction to the opposite parties not to make any selection or appointment only in pursuance of Common Recruitment Test conducted on 20.06.2022. The petitioners have also prayed for a direction not to give effect to the marks obtained in online Common Recruitment Test conducted on 20.06.2022. The petitioners have also prayed for similar and consequential reliefs.

3. The brief facts of the case, for adjudication of the controversy raised in this petition, are that an advertisement dated 06.01.2022 was issued by the opposite party No.3/Director Sanjay Gandhi Post Graduate Institute of Medical Sciences, Lucknow for several posts. The petitioner Nos.1, 2 & 3 had applied for post of Sister Grade II, Petitioner Nos.4, 5 & 6 for the post of Medical Lab Technologist and petitioner No.7 for the post of Junior Medical Lab Technologist against the said advertisement. The petitioners, being found eligible, were called for the online Common Recruitment Test (hereinafter referred to as the 'CRT') containing multiple choice questions of 100 marks. The CRT was held on 20.06.2022 and the list of marks obtained by the candidates was declared on 21.06.2022. After being unsuccessful in the CRT, the petitioners approached this Court mainly with the prayer that CRT may be conducted in Hindi language and to declare the result on the basis of same.

4. Learned counsel for the petitioners submitted that the CRT has wrongly and illegally been conducted only in English language in violation of the terms and conditions of the advertisement for selection. The Rules and the advertisement does not provide the English language as the medium of test, therefore, the CRT should have been held in bilingual languages, i.e., in Hindi also. The

advertisement and admit card were issued in bilingual languages for the said posts. He also submitted that Diploma essential for the posts in question is also being held in bilingual languages. He further submitted that as per the Government Order dated 7th August, 1992, the Rules/Regulations of the State Government in service matters of the employees would be applicable on the employees of Sanjay Gandhi Post Graduate Institute of Medical Sciences (hereinafter referred to as the 'SGPGI'). He also submitted that the State Government has issued the Uttar Pradesh Competitive Examination (Medium of Written Examination) Rules, 1994 (hereinafter referred to as the Rules of 1994), which provides that the questions paper shall be in English in Roman script and Hindi in Devanagari Script. Therefore, the question paper should have been in English as well as in Hindi.

5. Learned counsel for the petitioners relied on ***Bedanga Talukdar Vs. Saifudaullah Khan and others; (2011) 12 SCC 85 and Anil Chandra Vs. Birbal Sahni Institute of Palaeobotany; 2003 LawSuit (All) 76/2003 21 LCD 396.***

6. Per contra, learned counsel for the respondents submitted that the petitioners have challenged the selection after participation without any demur and after being unsuccessful, therefore, the writ petition is not maintainable. He further submitted that the SGPGI is an autonomous Institute created under the statute namely Sanjay Gandhi Post Graduate Institute of Medical Sciences Act, 1983 (hereinafter referred to as the 'Act 1983'). The Director of SGPGI is the appointing authority. He further submitted that after framing of the first statute of the SGPGI in 2011, the Rules and Regulations of the Government are not applicable unless adopted by the Institute and Rules relied by the petitioners have not been adopted by the Institute. He further submitted that the CRT conducted in pursuance of the advertisement issued on 06.01.2022 was an All India Test and is being conducted in English medium only as per the policy of the Institute. He also submitted that all previous examinations (CRT) have been conducted in English language only. He further submitted that though the advertisement and the admit card were issued in bilingual languages but the syllabus for the posts in question was published in English language only and no objection was ever raised by the petitioners or any candidate. He also submitted that 10 marks were for General English in CRT. It is also not the case of the petitioners that they do not have the knowledge of the English language or English is not required for the posts in question. It is well known to the petitioners as they are working with the SGPGI through outsourcing agency.

7. Learned counsel for the respondents relied on ***Hindi Hitrakshak Samiti and others Vs. Union of India and others; (1990) 2 SCC 352,*** Judgement and order dated 03.09.2011 passed in ***Ashima Dwivedi Vs. Registrar General High Court Judicature at Allahabad and another; Special Appeal No.1572 of 2011 and Ashok Kumar and another Vs. State of Bihar and others; (2017) 4 SCC 357.***

8. I have considered the submissions of learned counsel for the parties and perused the records.

9. The advertisement dated 06.01.2022 was issued for several posts including the posts of Sister Grade-II, Medical Lab Technologist and Junior Medical Lab Technologist for which the

petitioners had applied. The CRT was held on 20.06.2022, result of which was declared on 21.06.2022. The CRT was held only in English language. Therefore, the petitioners have approached this Court by means of the present writ petition with a prayer that the CRT should be held in Hindi language also and after holding the CRT in Hindi, the result should be declared a fresh. Therefore, the issue to be decided in this case is as to whether the CRT should be held in Hindi also or not.

10. The advertisement provides that for all the posts a CRT will be held. The CRT will be of 2 hours duration and of 100 marks. It will contain multiple choice questions. It is further provided that 60 marks on the subject(s) related to the posts and of level of qualifications required; 10 marks on General English, 10 marks on General Knowledge, 10 marks on Reasoning and 10 marks on Mathematical Aptitude. It has further been provided that 1 mark will be given for the correct answer and 1/3rd mark will be deducted for the wrong answer, (i.e., there will be negative marking). Minimum qualifying marks of the CRT for all the posts will be 50% for General, EWS and OBC and 45% for SC/ST.

11. The advertisement does not provide any medium of questions paper. However, there are 10 marks on General English, therefore, a person appearing in the CRT is required to know the General English. The question paper was a multiple choice questions paper. Since the advertisement does not provide for any language for CRT, therefore, the contention of learned counsel for the petitioners that there is violation of terms and conditions of the advertisement is misconceived and not tenable. Any condition, which is not provided under the advertisement cannot be said to have been violated. Therefore, the judgements relied by the learned counsel for the petitioners in the case of **Bedanga Talukdar Vs. Saifudaullah Khan and others (supra)** and **Anil Chandra Vs. Birbal Sahni Institute of Palaeobotany (supra)** are not applicable on the facts and circumstances of the case. As per the said judgements, the selection procedure has to be conducted strictly in accordance with stipulated selection procedure and the conditions of advertisement has to be adhered.

12. So far as the Uttar Pradesh Competitive Examination (Medium of Written Examination) Rules, 1994 relied by learned counsel for the petitioners is concerned, Rule 4 of the said Rules provides that a candidate may answer papers in English in Roman Script or Hindi in Devanagari script or Urdu in Persian script except that the language paper must be answered in the same language; provided that question paper as a whole, and not for each question separately, must be answered in any of the above script; provided further that the question paper shall be in English in Roman script and Hindi in Devanagari Script. Therefore, the rule indicates that it is not for the multiple choice questions because in multiple choice questions there is no requirement of answering the question paper in any language and it is also not the case herein. The definition clause in Rule 3(b) provides that the 'Examination' means a written examination or a competitive examination for direct recruitment to any post or service under the Rule making power of the Governor under the proviso to Article 309 of the Constitution. Therefore, this Rule is applicable only to the posts or services, which are under the Rule making power of

the Governor under Article 309 of the Constitution, whereas the appointment in the SGPGI are made under the first statute of the SGPGI by the Director. Rule 3(e) provides that the 'Commission' means the Uttar Pradesh Public Service Commission or Uttar Pradesh Subordinate Service Selection Commission as the case may be. It indicates that this Rule is applicable on the examinations being conducted by the said commissions. Therefore, it is not applicable on the selection in question.

13. The Government Order dated 7th August, 1992 provides that in the service matters of the employees of the Institute the Government has accorded its consent for applicability of the Rules/Regulations of the State Government. Therefore, this Government order only indicates the consent of the Government for applicability of the Rules/Regulations of the State Government but it does not indicate that SGPGI, which is an autonomous body created under the statue, i.e., Act 1983, has adopted and applied it. Even otherwise, once the Rules/Regulations have been framed by the SGPGI with the approval of the State Government, the selection is to be made on the basis of same and the aforesaid Government Order is not applicable.

14. The Hon'ble Supreme Court, in the case of **Hitrakshak Samiti and others Vs. Union of India and others (supra),** has held that the proper and appropriate remedy in a situation where enforcement of the right depends upon the acceptance of a policy of examination for admission in any particular language to the Institution on that basis, is a matter of policy and held that it cannot be appropriately dealt with under Article 32 of the Constitution. Hon'ble Supreme Court has also held that it is difficult to accept that in not holding entrance examination in any particular language, be it Hindi or regional language, amounts to denial of admission on the ground of language. It has also been held that every Educational Institution has right to determine or set out its method of education and conditions of examination. The relevant paragraph 6 is extracted herein below:-

"6. Article 32 of the Constitution of India guarantees enforcement of fundamental rights. It is well-settled that the jurisdiction conferred on the Supreme Court under Article 32 is an important and integral part of the Indian Constitution but violation of a fundamental right is the sine qua non for seeking enforcement of those rights by the Supreme Court. In order to establish the violation of a fundamental right, the Court has to consider the direct and inevitable consequences of the action which is sought to be remedied or the guarantee of which is sought to be enforced. Mr Singhvi, counsel for the petitioners, contends that under Article 29(2) of the Constitution no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. He contends that by not holding the test in Hindi or other regional languages, there is breach of Article 29(2). He also draws our attention to Article 29(1) of the Constitution which enjoins that any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of his own, shall have right to conserve the same. It is difficult to accept that in not holding entrance examination in any particular language. be it Hindi or regional language, amounts to denial of admission on the

ground of language. Every educational institution has right to determine or set out its method of education and conditions of examination and studies provided these do not directly or indirectly have any casual connection with violation of the fundamental rights guaranteed by the Constitution. It may be that Hindi or other regional languages are more appropriate medium of imparting education to very many and it may be appropriate and proper to hold the examinations, entrance or otherwise, in any particular regional or Hindi language, or it may be that Hindi or other regional language because of development of that language, is not yet appropriate medium to transmute or test the knowledge or capacity that could be had in medical and dental disciplines. It is a matter of formulation of policy by the State or educational authorities in-charge-of any particular situation. Where the existence of a fundamental right has to be established by acceptance of a particular policy or a course of action for which there is no legal compulsion or statutory imperative, and on which there arc divergent views, the same cannot be sought to be enforced by Article 32 of the Constitution. Article 32 of the Constitution cannot be a means to indicate policy preference."

15. Relying on the aforesaid judgement, this Court has dismissed the **Special Appeal No.1572 of 2011; Ashima Dwivedi Vs. Registrar General High Court Judicature at Allahabad and another (supra).**

16. The syllabus of the selection in question was in English and no objection was raised by the petitioners and nothing has been brought on record to show that the petitioners have ever made any request for providing the syllabus in Hindi, therefore, it cannot be said that the petitioners do not know the English language, which may have been required for multiple choice questions, particularly when there are 10 marks for General English. If the syllabus was in English language then it can safely be inferred that the question papers would be in English and if the petitioners have not raised any objection at that stage, they cannot say now that the question paper should have been in Hindi also. A thing which is not provided under the advertisement cannot be said to have been violated in such a situation. When the language of paper was not provided in the advertisement, it cannot be said that CRT has been held in violation of the terms and conditions of the advertisement. Even otherwise, when there are 10 marks for English language, then English would be required for the post in question and it can not be accepted that a candidate who has applied for the post knowing it well does not know the English required for multiple choice questions paper.

17. The Hon'ble Supreme Court, in the case of **Ashok Kumar and others Vs. Bihar and others (supra)**, as held that it was not open to the appellants after participating in the selection process to question the result on being declared unsuccessful.

18. In view of the above and considering overall facts and circumstance of the case, this Court is of the view that the writ petition has been filed on misconceived and baseless ground, which is liable to be dismissed.

19. The writ petition is, accordingly, **dismissed**. No order as to costs.

(2023) 3 ILRA 143
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.02.2023

BEFORE

THE HON'BLE BRIJ RAJ SINGH, J.

Writ A No. 5977 of 2013

Girdhar Gopal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Avinash Srivastava, Yogeshwar Sharan Srivastava

Counsel for the Respondents:
C.S.C.

A. Service Law – Disciplinary proceedings – Salary - U.P. Government Servants (Discipline and Appeal) Rules, 1999 - In the matter of enquiry for awarding major punishment, no short-cut is permissible. The charge-sheet has to be furnished to the delinquent to apprise him of the charges, which should be specific along with the evidence, both oral and documentary, which the department intends to rely for upholding the charges. In case after service of charge-sheet, the delinquent needs any documents or copy thereof, such prayer has to be considered by the enquiry officer and the documents which are found relevant for enquiry are to be supplied to the delinquent. In case copies of any such document cannot be supplied for any valid reason, free access has to be afforded to the delinquent for making inspection of such records. After this stage, the reply is to be submitted by the delinquent within the given time schedule and the **enquiry is to proceed, fixing the date, time and place calling the delinquent.**

Normally, the evidence by the department is required to be led first to prove the charges wherein the delinquent is also allowed to participate, who can cross-examine the witnesses, with opportunity of adducing the evidence either in rebuttal or for disproving the charges. It is thereafter that the enquiry officer has to submit its report either saying that any of the charges stand proved or not. There has to be corroborating evidence to prove the charge and without any material being placed by the department to substantiate the documentary evidence, the charge cannot be found to be proved. There has to be a corroboration of facts from the documents on record and if any report is also being relied upon, the said report is also required to be authenticated by the person who has submitted the report, therefore, for this purpose **the oral enquiry is required to be held for proving the charges.** (Para 4)

B. Scope of Judicial Review - Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. It is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eyes of the court. The court/tribunal in its power of judicial review does not act as an appellate authority; it does not re-appreciate the evidence. (Para 7)

The Writ Petition No. 4274 (S/S) of 2002 was disposed of with a direction to conduct fresh enquiry. The court had already observed that **the principles of natural justice were not followed by the Enquiry Officer while conducting the enquiry.** Once the matter was remanded on a specific point, there was no occasion to commit the same error by the Enquiry Officer and in the present case, second time, again it is admitted on record that **the Enquiry Officer did not fix any date, time and place while proceeding in the enquiry and no oral examination was done. The Enquiry Officer completed the enquiry, ex-parte, only on the basis of reply of the Petitioner.** Nowhere, St. has mentioned that any date, time or place for cross examination was fixed. Thus, it shows that **enquiry was vitiated.** In place of four months, they completed enquiry in four years that too without following the procedure. It would not be fit to remand the matter at this stage. It is also borne

in mind that the Petitioner is retired from service in the year 2014. (Para 8, 11)

Writ petition allowed. (E-4)

Precedent followed:

1. Abdul Salam Vs St. of U.P. & ors., 2011 (29) LCD 832 (Para 4)

2. Avadhesh Kumar Rastogi Vs St. of U.P. & ors., 0024 (22) LCD 1 (Para 4)

3. Chamoli District Co-operative Bank Ltd. through its Secretary & anr. Vs Raghunath Singh Rana & ors., Civil Appeal No. 2265 of 2011 (Para 4)

4. United Bank of India Vs Biswanath Bhattacharjee, Civil Appeal No. 8258 of 2009, 2021 LiveLaw (SC) 109 (Para 4)

Present petition challenges order dated 06.03.2013, passed by disciplinary authority, awarding major punishment to the petitioner fixing his salary to the lowest grade.

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

1. Heard Shri Yogeshwar Sharan Srivastava, learned counsel for the Petitioner and Shri Rajesh Shukla, learned Standing Counsel for the respondents.

2. The brief facts of the case are that on 05.07.2001, the Petitioner was suspended pending disciplinary proceedings against him. A Departmental enquiry was conducted and Petitioner was dismissed from service vide order dated 11.07.2002. Challenging the said dismissal order, the Petitioner filed Writ Petition (S/S) No.4274 of 2002 in which a specific stand was taken by the Petitioner that enquiry was not done in accordance with law and principles of natural justice was not followed. It is also submitted that no date, time and place was fixed by the Enquiry Officer, therefore, the impugned order could not survive. The writ petition was heard and decided and the Court passed order on 12.08.2008. The impugned order of dismissal was quashed. However, it was open for the respondents to proceed for departmental proceedings afresh.

3. The State filed Special Appeal No.63 of 2009 challenging the order dated 12.08.2008 which was disposed of with slight modification that State will complete departmental enquiry within four months. An enquiry was completed on 19.01.2011 and impugned order was passed by the disciplinary authority on 06.03.2013 and major punishment has been awarded to the petitioner fixing his salary to the lowest grade which is under challenge.

4. Learned counsel for the Petitioner in para 7 of the writ petition has submitted that Enquiry Officer did not fixed any date, time and place while proceeding in the enquiry and no oral examination was done. The Enquiry Officer completed the enquiry, ex-parte, only on the basis of reply of the Petitioner. He has submitted that the impugned order cannot survive in the eyes of law, which is a settled law and the same is violated under U.P. Government Servants (Discipline and Appeal) Rules, 1999 (hereinater referred to as "Rules'). In support of his contention, learned counsel for the petitioner has placed reliance on the following judgments :

(i). Abdul Salam vs. State of U.P. and others 2011 (29) LCD 832 ;

(ii). Avadhesh Kumar Rastogi vs. State of U.P. and others 2004 (22) LCD 1 ;

(iii). Chamoli District Co-operative Bank Ltd through its Secretary and anor v. Raghunath Singh Rana and others in Civil Appeal No.2265 of 2011 ;

(iv). United Bank of India v. Biswanath Bhattacharjee in Civil Appeal No.8258 of 2009 2021 LiveLaw (SC) 109.

(v). In Abdul Salam (Supra), the court in Para Nos. 16 to 19 and 24 to 27 has held as under :

"16. Before coming to any conclusion, it would be relevant to mention the legal position with regard to the conduction of the departmental enquiry and award of punishment to a delinquent employee. Time and again, the Hon'ble Apex Court as well as this Court has pronounced that in the matter of enquiry for awarding major punishment, no short-cut is permissible. The charge-sheet has to be furnished to the delinquent to apprise him of the charges, which should be specific along with the evidence, both oral and documentary, which the department intends to rely for upholding the charges. In case after service of charge-sheet, the delinquent needs any documents or copy thereof, such prayer has to be considered by the enquiry officer and the documents which are found relevant for enquiry are to be supplied to the delinquent. In case copies of any such document can not be supplied for any valid reason, free access has to be afforded to the delinquent for making inspection of such records. After this stage, the reply is to be submitted by the delinquent within the given time schedule and the enquiry is to proceed, fixing the date, time and place calling the delinquent.

17. Normally, the evidence by the department is required to be led first to prove the charges wherein the delinquent is also allowed to participate, who can cross-examine the witnesses, with opportunity of adducing the evidence either in rebuttal or for disproving the charges. It is thereafter that the enquiry officer has to submit its report either saying that any of the charges stand proved or not. There has to be corroborating evidence to prove the charge and without any material being placed by the department to substantiate the documentary evidence, the charge can not be found to be proved. There has to be a corroboration of facts from the documents on record and if any report is also being relied upon, the said report is also required to be authenticated by the person who has submitted the report, therefore, for this purpose the oral enquiry is required to be held for proving the charges.

18. In the case of State of Uttar Pradesh and others Versus Saroj Kumar Sinha, the Hon'ble Apex Court has observed as under:

"26. The first inquiry report is vitiated also on the ground that the inquiry officers failed to fix any date for the appearance of the respondent to answer the charges.

Rule 7(x) clearly provides as under:

"(x) Where the charged Government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding in spite of the service of the notice on him or having knowledge of the date, the Inquiry Officer shall proceed with the inquiry ex parte. In such a case the Inquiry Officer shall record the statement of witnesses mentioned in the charge- sheet in absence of the charged Government servant."

27. A bare perusal of the aforesaid sub-Rule shows that when the respondent had failed to submit the explanation to the charge sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the Government servant despite notice of the date fixed failed to appear that the enquiry officer can proceed with the inquiry ex parte. Even in

such circumstances it is incumbent on the enquiry officer to record the statement of witnesses mentioned in the charge sheet. Since the Government servant is absent, he would clearly lose the benefit of cross examination of the witnesses. But nonetheless in order to establish the charges the department is required to produce the necessary evidence before the enquiry officer. This is so as to avoid the charge that the enquiry officer has acted as a prosecutor as well as a judge.

28. An enquiry officer acting as 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."

19. In the case of Union of India and others Versus Prakash Kumar Tandon and others, while examining the effect of not examining the witnesses, the Hon'ble Apex Court

observed as under:

"14. In the aforementioned situation, we are of the opinion that the Tribunal as also the High Court cannot be said to have erred in holding that the said Mr. Walia should have been examined as a witness.

15. The principles of natural justice demand that an application for summoning a witness by the delinquent officer should be considered by the enquiry officer. It was obligatory on the part of the enquiry officer to pass an order in the said application. He could not refuse to consider the same. It is not for the Railway Administration to contend that it is for them to consider as to whether any witness should be examined by it or not. It was for the enquiry officer to take a decision thereupon. A disciplinary proceeding must be fairly conducted. An enquiry officer is a quasi-judicial authority. He, therefore, must perform his functions fairly and reasonably which is even otherwise the requirement of the principles of natural justice."

24. In the present case it is evident from the records that the enquiry officer during the course of enquiry by order dated 03.07.2002 had come to the conclusion that it is necessary to provide opportunity of hearing to the delinquent employee and for that purpose had fixed 15.07.2002. However, on 15.07.2002 enquiry could not be held, so another date was fixed. Thereafter certain dates were fixed by the enquiry officer and it was by an order dated 29.8.2002, the enquiry officer had observed that no other document is required to be given to the delinquent employee, therefore, 07.09.2002 was fixed for submitting reply by the delinquent. It is admitted fact as borne out from the enquiry report dated 17.10.2002 that the delinquent employee had submitted his written reply on 05.10.2002. However, from the perusal of record it appears that no date, time and place was fixed by the enquiry officer for holding oral enquiry after submission of the reply to the charge-sheet by the delinquent employee and the entire enquiry proceedings were completed on the basis of charge-sheet and the reply submitted by the delinquent employee, relying on the documentary evidence submitted in support of the alleged charges.

25. The learned Single Judge in the impugned judgment has come to the conclusion that the enquiry officer did not examine any witnesses as there was no need to summon any witness for the simple reason that in support of the charges, only the documents were relied upon and the documents were so categorical that they were not required to be proved by any witness. It has been further observed by the learned Single Judge that if we examine the report of the enquiry officer, indeed, the documentary evidence seems to be so whelming that it was not obligatory for the enquiry officer to have called any witness in support of the charges.

26. The learned Single Judge, however, did not take into consideration that if the witnesses were not required to be examined in support of the charges, even then it was incumbent upon the enquiry officer to have fixed the date, time and place after submission of the reply to the charge-sheet by the delinquent for holding oral enquiry in order to appreciate the evidences filed in support of the charges in presence of the delinquent employee and call upon the department to prove the alleged charges. There is no denial about the fact that such exercise was not done by the enquiry officer in the present case.

27. In this view of the matter, we are of the considered opinion that the departmental enquiry conducted against the appellant-petitioner on the basis of which the punishment of dismissal from service was awarded, was not held in accordance with law as propounded by the Apex Court as well as this Court, as discussed above."

5. In Avadhesh Kumar Rastogi (Supra), in Para 5, the Court has held that :

5. We are of the view that the procedure followed by the Inquiry Officer and the conclusions drawn by him against the petitioner are vitiated in law. There can be no debate on the point that even if the delinquent official was not replying the charges by filing written statement and was avoiding to participate in the inquiry, it was the duty of the Inquiry Officer to fix a date, time and place of the inquiry and to intimate the delinquent official about the same and to receive oral or documentary evidence in support of the charges. In this connection, a reference may be made to a recent judgment of this Court in ***Radhey Kant Khare v. U.P. Coop. Sugar Factories Federation Ltd., (2003 (21) LCD 610)*** *wherein it has been held that notice should be issued to the delinquent official indicating date, time and place of the inquiry. In the instant case, the Inquiry Officer neither held any oral inquiry nor intimated date, time and place of such inquiry to the petitioner nor received any oral or documentary evidence in support of the charges. In fact, there was no material before him, on the basis of which it could have been said that the charges were proved. It was a case where oral evidence was a must, to prove that the different sellers identified as non scheduled caste were in fact scheduled caste. The Inquiry Officer appears to have entertained the belief that if the employee was not denying the charges by filing a written statement, there was no necessity of receiving any evidence in support of the charges. Legally speaking this belief was not correct. So the order of dismissal from service is vitiated in law and deserves to be quashed. The Tribunal could not appreciate this infirmity in the inquiry and in the dismissal order. Hence, its order also deserved to be quashed."*

6. In *Chamoli District Co-operative Bank Ltd* (Supra) in Para Nos. 19 to 21 the court has held as under :

"19. The compliance of natural justice in domestic/disciplinary inquiry is necessary has long been established. This Court has held that even there are no specific statutory rule requiring observance of natural justice, the compliance of natural justice is necessary. Certain ingredients have been held to be constituting integral part of holding of an inquiry. The Apex Court in Sur Enamel and Stamping Works Pvt. Ltd. v. Their Workmen reported in (1964) 3 SCR 616 has laid down following:-

"... An enquiry cannot be said to have been properly held unless, (i) the employee proceeded against has been informed clearly of the charges levelled against him, (ii) the witnesses are examined - ordinarily in the presence of the employee - in respect of the charges, (iii) the employee is given a fair opportunity to cross-examine witnesses, (iv) he is given a fair opportunity to examine witnesses including himself in his defence if he so wishes on any relevant matter, and (v) the inquiry officer records his findings with reasons for the same in his report."

20. The Apex Court again in State Bank of India Vs. R.K. Jain and Ors., reported in (1972) 4 SCC 304 held that if an inquiry is vitiated by violation of principles of natural justice or if no reasonable opportunity was provided to the delinquent to place his defence, it cannot be characterized as a proper domestic inquiry held in accordance with the rules of natural justice. In paragraph 23, the following was laid down:- ".....As emphasised by this Court in Ananda Bazar Patrika (P) Ltd. v. Its Workmen, (1964) 3 SCR 601, the termination of an employee's service must be preceded by a proper domestic inquiry held in accordance with the rules of natural justice. Therefore, it is evident that if the inquiry is vitiated by violation of the principles of natural justice or if no reasonable opportunity was provided to a delinquent to place his defence, it cannot be characterized as a proper domestic inquiry held in accordance with the rules of natural justice....."

21. The Apex Court in State of Uttranchal & Ors. Vs. Kharak Singh reported in (2008) 8 SCC 236 had occasion to examine various contours of natural justice which need to be specified in a departmental inquiry. The Apex Court noticed earlier judgments where principles were laid down as to how inquiry is to be conducted. It is useful to refer paragraphs 9, 10, 11, 12, 13 and 15, which are to the following effect:-

".....9. Before analyzing the correctness of the above submissions, it is useful to refer various principles laid down by this Court as to how enquiry is to be conducted and which procedures are to be followed.

10. The following observations and principles laid down by this Court in Associated Cement Co. Ltd. vs. The Workmen and Anr. [1964] 3 SCR 652 are relevant:

"... ... In the present case, the first serious infirmity from which the enquiry suffers proceeds from the fact that the three enquiry officers claimed that they themselves had witnessed the alleged misconduct of Malak Ram. Mr. Kolah contends that if the Manager and the other officers saw Malak Ram committing the act of misconduct, that itself would not disqualify them from holding the domestic enquiry. We are not prepared to accept this argument. If an officer himself sees the misconduct of a workman, it is desirable

that the enquiry should be left to be held by some other person who does not claim to be an eye- witness of the impugned incident. As we have repeatedly emphasised, domestic enquiries must be conducted honestly and bona fide with a view to determine whether the charge framed against a particular employee is proved or not, and so, care must be taken to see that these enquiries do not become empty formalities. If an officer claims that he had himself seen the misconduct alleged against an employee, in fairness steps should be taken to see that the task of holding an enquiry is assigned to some other officer. How the knowledge claimed by the enquiry officer can vitiate the entire proceedings of the enquiry is illustrated by the present enquiry itself. ... .

..... It is necessary to emphasise that in domestic enquiries, the employer should take steps first to lead evidence against the workman charged, give an opportunity to the workman to cross-examine the said evidence and then should the workman be asked whether he wants to give any explanation about the evidence led against him. It seems to us that it is not fair in domestic enquiries against industrial employees that at the very commencement of the enquiry, the employee should be closely cross- examined even before any other evidence is led against him. In dealing with domestic enquiries held in such industrial matters, we cannot overlook the fact that in a large majority of cases, employees are likely to be ignorant, and so, it is necessary not to expose them to the risk of cross- examination in the manner adopted in the present enquiry proceedings. Therefore, we are satisfied that Mr. Sule is right in contending that the course adopted in the present enquiry proceedings by which Malak Ram was elaborately cross-examined at the outset constitutes another infirmity in this enquiry."

11) In ECIL v. B. Karunakar (1993) 4 SCC 727, it was held:

"(1) 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.

While the right to represent against the findings in the report is part of the reasonable opportunity available during the first stage of the inquiry viz., before the disciplinary authority takes into consideration the findings in the report, the right to show cause against the penalty proposed belongs to the second stage when the disciplinary authority has considered the findings in the report and has come to the conclusion with regard to the guilt of the employee and proposes to award penalty on the basis of its conclusions. The first right is the right to prove innocence. The second right is to plead for either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted. It is the second right exercisable at the second stage which was taken away by the Forty- second Amendment. The second stage consists of the issuance of the notice to show cause against the proposed penalty and of considering the reply to the notice and deciding upon the penalty. What is dispensed with is the opportunity of making representation on the penalty proposed and not of opportunity of making representation

on the report of the enquiry officer. The latter right was always there. But before the Forty-second Amendment of the Constitution, the point of time at which it was to be exercised had stood deferred till the second stage viz., the stage of considering the penalty. Till that time, the conclusions that the disciplinary authority might have arrived at both with regard to the guilt of the employee and the penalty to be imposed were only tentative. All that has happened after the Forty-second Amendment of the Constitution is to advance the point of time at which the representation of the employee against the enquiry officer's report would be considered. Now, the disciplinary authority has to consider the representation of the employee against the report before it arrives at its conclusion with regard to his guilt or innocence in respect of the charges.

** * * Article 311(2) says that the employee shall be given a "reasonable opportunity of being heard in respect of the charges against him". The findings on the charges given by a third person like the enquiry officer, particularly when they are not borne out by the evidence or are arrived at by overlooking the evidence or misconstruing it, could themselves constitute new unwarranted imputations. The proviso to Article 311(2) in effect accepts two successive stages of differing scope. Since the penalty is to be proposed after the inquiry, which inquiry in effect is to be carried out by the disciplinary authority (the enquiry officer being only his delegate appointed to hold the inquiry and to assist him), the employee's reply to the enquiry officer's report and consideration of such reply by the disciplinary authority also constitute an integral part of such inquiry.*

Hence, when the enquiry officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the enquiry officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of the enquiry officer's report before the disciplinary authority takes its decision on the charges, is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice."

12) In Radhey Shyam Gupta vs. U.P. State Agro Industries Corporation Ltd. and Another, (1999) 2 SCC 2, it was held:

"34. But in cases where the termination is preceded by an enquiry and evidence is received and findings as to misconduct of a definitive nature are arrived at behind the back of the officer and where on the basis of such a report, the termination order is issued, such an order will be violative of the principles of natural justice inasmuch as the purpose of the enquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental enquiry. In such cases, the termination is to be treated as based or founded upon misconduct and will be punitive. These are obviously not cases where the employer feels that there is a mere cloud against the employee's conduct but are cases where the employer has virtually accepted the definitive and clear findings of the enquiry officer, which are all arrived at behind the back of the employee -- even though such acceptance of findings is not recorded in the order of termination. That is why the misconduct is the foundation and not merely the motive in such cases."

13) In Syndicate Bank and Others vs. Venkatesh Gururao Kurati, (2006) 3 SCC 150, the following conclusion is relevant:

"18. In our view, non-supply of documents on which the enquiry officer does not rely during the course of enquiry does not create any prejudice to the delinquent. It is only those documents, which are relied upon by the enquiry officer to arrive at his conclusion, the non-supply of which would cause prejudice, being violative of principles of natural justice. Even then, the non-supply of those documents prejudice the case of the delinquent officer must be established by the delinquent officer. It is well-settled law that the doctrine of principles of natural justice are not embodied rules. It cannot be put in a straitjacket formula. It depends upon the facts and circumstances of each case. To sustain the allegation of violation of principles of natural justice, one must establish that prejudice has been caused to him for non-observance of principles of natural justice."

15. From the above decisions, the following principles would emerge:

(i) The enquiries must be conducted bona fide and care must be taken to see that the enquiries do not become empty formalities.

(ii) If an officer is a witness to any of the incidents which is the subject matter of the enquiry or if the enquiry was initiated on a report of an officer, then in all fairness he should not be the Enquiry Officer. If the said position becomes known after the appointment of the Enquiry Officer, during the enquiry, steps should be taken to see that the task of holding an enquiry is assigned to some other officer.

(iii) In an enquiry, the employer/department should take steps first to lead evidence against the workman/delinquent charged and give an opportunity to him to cross-examine the witnesses of the employer. Only thereafter, the workman/delinquent be asked whether he wants to lead any evidence and asked to give any explanation about the evidence led against him.

(iv) On receipt of the enquiry report, before proceeding further, it is incumbent on the part of the disciplinary/punishing authority to supply a copy of the enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any."

7. In *United Bank of India v. Biswanath Bhattacharjee in Civil Appeal No.8258 of 2009*, in paras 17 and 19 the Court has held as under :

17. Apart from cases of "no evidence", this court has also indicated that judicial review can be resorted to. However, the scope of judicial review in such cases is limited10. In B.C. Chaturvedi v. Union of India11 a three-judge bench of this court ruled that judicial review is not an appeal from a decision but a review of the manner in which the decision is made. It is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eyes of the court. The court/tribunal in its power of judicial review does not act as an appellate authority; it does not re-appreciate the evidence. The court held that:

"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 enquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the enquiry 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 enquiry 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 the 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 T.N.C.S. Corpn. Ltd. v. K. Meerabai, (2006) 2 SCC 255. (1995) 6 SCC 749. 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 enquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.

13. The disciplinary authority is the sole judge of facts. Where appeal is presented, the appellate authority has co-extensive power to reappreciate the evidence or the nature of punishment. In a disciplinary enquiry, 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 [Union of India v. H.C. Goel, (1964) 4 SCR 718], this Court held at p. 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."

19. The bank is correct, when it contends that an appellate review of the materials and findings cannot ordinarily be undertaken, in proceedings under Article 226 of the Constitution. Yet, from H.C. Goel onwards, this court has consistently ruled that where the findings of the disciplinary authority are not based on evidence, or based on a consideration of irrelevant material, or ignoring relevant material, are mala fide, or where the findings are perverse or such that they could not have been rendered by any reasonable person placed in like circumstances, the remedies under Article 226 of the Constitution are available, and intervention, warranted. For any court to ascertain if any findings were beyond the record (i.e., no evidence) or based on any irrelevant or extraneous factors, or by ignoring material evidence, necessarily some amount of scrutiny is necessary. A finding of "no evidence" or perversity, cannot be rendered sans such basic scrutiny of the materials, and the findings of the disciplinary authority. However, the margin of appreciation of the court under Article 226 of the Constitution would be different; it is not appellate in character."

8. Learned counsel for the Petitioner has submitted that the enquiry is

vitiated. He has further submitted that though the Division Bench has directed to conclude the enquiry within four months but the same was completed within four years beyond stipulated time by the Court. He has further submitted that disciplinary proceedings as well as Enquiry Officer have committed grave error by not considering the fact that no date, time and place was fixed and earlier stand of the petitioner which was already adjudicated by Single Judge was again reiterated by them. He has submitted that respondents have lost their right to continue their enquiry, that too after remand. He has further submitted that the Petitioner has retired from service in the year 2014. It would not be feasible to remand the matter at this moment.

9. Shri Rajesh Shukla, learned Standing Counsel for the respondents has submitted that the Petitioner had committed misconduct and his reply was considered by the Enquiry Officer and thereafter enquiry report was submitted on the basis of which final order has been passed. He has submitted that there is no illegality and infirmity in the proceedings and order impugned is justified.

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

11. It is admitted on record that earlier, the petition was allowed. The Writ Petition no. 4274 (S/S) of 2002 was disposed of with a direction to conduct fresh enquiry. The court had already observed that the principles of natural justice was not followed by the Enquiry Officer while conducting the enquiry. Once the matter was remanded on a specific point, there was no occasion to commit the same error by the Enquiry Officer and in the present case, second time, again it is admitted on record that the Enquiry Officer did not fixed any date, time and place and completed the enquiry only on the basis of reply submitted by the petitioner and stand has been taken by the petitioner in para 7 of the writ petition and same has been replied in para 8 of the counter affidavit. Nowhere, State has mentioned that any date, time or place for cross examination was fixed. Thus, it goes to show that enquiry was vitiated. In place of four months, they completed enquiry in four years that too without following the procedure. It would not be fit to remand the matter at this stage. It is also borne in mind that the Petitioner is retired from service in the year 2014.

12. In view of the above discussions made above, the writ petition deserves to be allowed.

13. The writ petition is allowed. The impugned order dated 06.03.2013 passed by respondent no. 2 is quashed. Consequences to follow.

(2023) 3 ILRA 153
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.03.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Writ A No. 7338 of 2012

Shivendra Pati Tripathi ...Petitioner
Versus
State Information Commission, UP Indira Bhawan, Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Nandita Bharti, Abhishek Mishra, Abhishek Misra

Counsel for the Respondents:
Shikhar Anand

A. Service Law – Termination - Article 311 of the Constitution of India makes no distinction between the permanent and temporary posts. In case a show cause notice has been issued on the allegation regarding the misconduct or the charges such as charges of corruption or taking bribe in listing cases, then consequential order of termination howsoever innocuously worded may be, is not a termination simplicitor but it is a termination by way of punishment and in view of the settled proposition of law, it is always open for the court to lift veil in such cases to find out the real basis of the order so passed.

A perusal of the impugned order (dated 21.9.2012) vis-a-vis the letter/notice (dated 27.6.2012 sent by respondent No.3 to the petitioner), shows that the charge of taking bribe by the applicant has been levelled, which is a misconduct. Even though the appointment of the petitioner was temporary in nature, **the very language of the notice, is such which entitles the petitioner to protection of Article 311(2) of the Constitution of India** as a permanent employee in spite of the fact that temporary government servants have no right to hold the post and their services are liable to be terminated any time by giving them a month's notice without assigning any reason. The termination order, though has been passed innocuously, however, if it is read along with the show cause notice, coupled with the pleadings made in the counter affidavit leaves no doubt that it has been passed as a punishment and is stigmatic. (Para 8)

The petitioner was entitled for the protection of Article 311(2) of the Constitution of India and **since the order of termination is punitive in nature, as such regular enquiry should have been conducted by respondents in accordance with relevant rules after affording opportunity of hearing to the petitioner, as provided u/Art. 311(2) of the Constitution of India,** either in terms of the contract of service or under the relevant statutory rules. (Para 8)

B. Denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The reinSt.ment of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is *ultra vires* the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. (Para 11)

The impugned order of termination is liable to be and is hereby set aside. The petitioner shall be entitled to all consequential benefits, including 50% back wages subject to his giving an undertaking that he was not employed in any other department and not getting salary equal to the salary he was drawing prior to termination of his services or more than it. (Para 12, 13)

Writ petition allowed. (E-4)

Precedent followed:

1. High Court of Punjab & Haryana through R.G. Vs Ishwar Chand Jain & anr. (Para 4)

2. Chandra Prakash Shahi Vs St. of U.P. & ors., (2000) 5 SCC 152 (Para 4)

3. Deepali Gundu Surwase Vs Kranti Junior Adhyapak Mahavidyalaya (D.ED.) & ors., (2013) 10 SCC 324 (Para 4, 11)

4. Gowramma C (Dead) by LRS Vs Manager (Personnel) Hindustan Aeronautical Ltd. & anr., Civil Appeal Nos. 1575-1576 of 2022 (Para 4)

5. Parshotam Lal Dhingra Vs U.O.I., AIR 1958 SC 36 (Para 9)

Precedent distinguished:

1. St. of U.P. & anr. Vs Kaushal Kishore Shukla, (1991) 1 SCC 691 (Para 5, 9)

2. St. of U.P. & ors. Vs Rekha Rani, (2011) 11 SCC 441 (Para 5, 10)

Present petition challenges the termination order dated 21.9.2012, passed by Chief Information Commissioner, U.P. St. Information Commission, Indira Bhawan, Lucknow (respondent No.2).

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

1. Heard Dr. L.P. Mishra, learned counsel for the petitioner, assisted by Mr. A.K. Mishra and Mr. Shikhar Anand, learned counsel for respondents 2 and 3.

2. Under challenge in this writ petition is the termination order dated 21.9.2012, passed by Chief Information Commissioner, U.P. State Information Commission, Indira Bhawan, Lucknow (respondent No.2). Further, a writ of mandamus has been sought commanding the respondents not to give effect to the impugned termination order, Annexure No.1.

3. Brief facts of the case are that the petitioner was appointed on the post of Peshkar vide office order dated 1.2.2007 by respondent No.2 along with eighteen other employees on various posts in the department of the respondent. The appointment of the petitioner was temporary in nature. On 27.6.2012, the Deputy Secretary, respondent No.3 sent an official letter No./303 Nazarat Camp Upsachiv wherein he apprised the petitioner that on a complaint made by an anonymous person, the respondent No.2 had directed the respondent No.3 to conduct an enquiry against the petitioner.

Mainly two allegations were levelled against the petitioner in the letter dated 27.6.2012 (Annexure No.2). The first allegation is that the amendment in the cause list has been made after accepting money from the litigants in violation of the rules and secondly, he purchased a house worth Rs.15 lacs. The petitioner was required to submit his reply within two days. The petitioner submitted a detailed reply on 12.6.2012. The petitioner was again required to provide copy of the cause list w.e.f. 1.3.2012 to 31.3.2012 vide letter dated 4.7.2012 by the respondent No.3 for the purpose of enquiry. In compliance of the said letter, the petitioner vide letter dated 5.7.2012 submitted copy of the entire cause list and also tendered apology for his omission in listing of few cases in the cause list due to inadvertence. Consequently, an enquiry was conducted by the respondent No.3, allegedly at the back of the petitioner without affording proper opportunity of hearing to him. The enquiry report was submitted by the respondent No.3, however, a copy thereof was not supplied to the petitioner.

4. The petitioner's counsel submits that the impugned order dated 21.9.2012 whereby services of the petitioner have been terminated apparently seems to be innocuously worded. A perusal of the letter dated 27.6.2012 sent by respondent No.3 to the petitioner and its language clearly demonstrates that the letter/order is, in fact,

by way of punishment which is punitive in nature and stigmatic. It is submitted that Article 311 of the Constitution of India makes no distinction between the permanent and temporary posts. In case a show cause notice has been issued on the allegation regarding the mis- conduct or the charges such as charges of corruption or taking bribe in listing cases, then consequential order of termination howsoever innocuously worded may be, is not a termination simplicitor but it is a termination by way of punishment and in view of the settled proposition of law, it is always open for the court to lift veil in such cases to find out the real basis of the order so passed. In support of this contention, learned counsel has relied on **High Court of Punjab & Haryana through R.G.** versus **Ishwar Chand Jain and another** (relevant para 24). He has further relied on judgment of Supreme Court in **Chandra Prakash Shahi versus State of U.P. and others** (2000)5 SCC 152 (relevant para 12).

It is further submitted that not only Annexure No.2 but the counter affidavit filed by respondents, particularly para 9 thereof leaves no doubt that the impugned order has been passed by way of punishment, therefore, in view of the settled law as held in the aforesaid cases, the order is not sustainable and is liable to be quashed.

Learned counsel for the petitioner has further submitted that the petitioner who has been terminated from service for no fault on his part and the order being illegal is entitled to back wages from the date of his termination. In this context, learned counsel has relied on **Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.ED.) and others** (2013)10 SCC 324 (relevant para 20) and the judgment of Supreme Court dated 23.2.2022 passed in Civil appeal Nos. 1575-1576 of 2022 **Gowramma C (Dead) by LRS vs. Manager (Personnel) Hindustan Aeronautical Ltd and another** (paras 11 and 12).

5. Per contra, learned counsel for the respondents has vehemently opposed the petition and it is submitted that it is always open for the employer to assess/ascertain the suitability of an employee who is temporarily appointed as to whether to continue him in service or not, and for that purpose, an enquiry was conducted. It is submitted that the order impugned is simplicitor and not punitive. It support of his contention, learned counsel has relied on **State of U.P. and another versus Kaushal Kishore Shukla** (1991)1 SCC 691 (relevant para 7) and **State of U.P. and others versus Rekha Rani** (2011)11 SCC 441.

6. I have considered the submission advanced by learned counsel for the parties and perused the record.

7. Before scrutinising the issue involved in the petition, it would be appropriate to reproduce the allegations as levelled in the letter dated 27.6.2012 issued by Deputy Secretary, U.P. State Information Commission. The letter is quoted below :

"श्री शिवेन्द्र त्रिपाठी
पेशकार (कोर्ट संख्या एस-11)

मा० मुख्य सूचना आयुक्त पत्र सं 0 43/ सी०आईसी/पी०ए०/2012. दिनांक 26 जून 2012 द्वारा आपके में एक शिकायती पत्र मा० मुख्य सूचना आयुक्त को उपलब्ध कराया गया है, कि जाँच करने हेतु मुझे आदेशित किया गया है।

शिकायती पत्र में यह शिकायत की गई है कि आप के द्वारा काललिस्ट में पैसे लेकर संशोधन किया गया है। दिनांक 16,04,12 से 30.04.12 तक की काजलिस्ट जो कि कम्प्यूटर के अनुसार होनी चाहिए थी उसके हिसाब से न होकर आपके द्वारा अपने मन माफिक तैयार कर फेंस लगाये गये । कोर्ट संख्या एस 11 में दिनांक16,17,18,19,20,23,25, 26, 27, 30 अप्रैल 2012 को उम्प्यूटर के अनुसार कमशः 101.8397.165,167119,46,101,161,351, वाद लगाये गये थे जब कि आप के द्वारा उक्त तिथियों में कमश 88,57,63.135.95.87,38,169,144,

गा० मुख्य सूचना आयुक्त को शिकायत कर्ता ने यह भी अवगत कराया है कि आपने एक मकान 15 लाख रूपये का कय किया है उपरोक्त के सम्बन्ध में भी अधोहस्ताक्षरी वस्तु स्थिति से लिखित रूप में अपने स्पष्टीकरण के साथ अवगत कराये ।

उपरोक्त बिन्दुओं पर सुस्पष्ट स्पष्टीकरण आख्या दो दिनों के अन्दर अधोहस्ताक्षरी को उपलब्ध कराये।"

8. A perusal of the letter, above extracted reveals that the allegation/charge was made against the petitioner that he has taken bribe and has manipulated cause list and listed the cases according to his own whims. A further allegation was made that he has purchased a house worth Rs.15 lacs. The letter/notice dated 27.6.2012 reveals that it is undoubtedly a stigmatic charge relating to the mis-conduct of the petitioner and therefore, the termination order has been passed as a measure of punishment. Law in this regard is well settled as held in the aforesaid judgments of Supreme Court. It has been clearly held that veil can be lifted by the court to find out whether the order is based on any misconduct of the employee concerned or the order has been made bona fide and not with any oblique or extraneous purposes.

A perusal of the impugned order vis-a-vis the letter, Annexure No.2 shows that the charge of taking bribe by the applicant has been levelled, which is a mis-conduct. The impugned order, though is very cleverly worded but nevertheless, it is stigmatic and punitive in nature. Since the very language of the notice, Annexure No.2 is such which entitles the petitioner to protection of Article 311(2) of the Constitution of India as a permanent employee in spite of the fact that temporary government servants have no right to hold the post and their services are liable to be terminated any time by giving them a month's notice without assigning any reason. The termination order, though has been passed innocuously, however, if it is read along with the show cause notice, contained in Annexure-2 to the petition, coupled with the pleadings made in the counter affidavit leaves no doubt that it has been passed as a punishment and is stigmatic. In view of the settled law, thus, the petitioner was entitled for the protection of Article 311(2) of the Constitution of India and since the order of termination is punitive in nature, as such regular enquiry should have been conducted by respondents in accordance with relevant rules after affording opportunity of hearing to the petitioner, as provided under Art. 311(2) of the Constitution of India, either in terms of the contract of service or under the relevant statutory rules.

9. As regards the judgment in Kaushal Kishore Shukla's case (supra) relied on by learned counsel for the respondents, para 7 of the judgment itself shows that if the authority decides to take a punitive action, it may hold a formal enquiry by framing charges and giving opportunity to the government servant in accordance with the provisions of Art. 311 of the Constitution. It further says that a temporary government servant is also entitled to the protection of

Art. 311(2) of the Constitution in the same manner as a permanent government servant. It further provides that the form of the order of termination is not conclusive and it is open for the court to determine the true nature of the order as held by Supreme Court in Parshotam Lal Dhingra versus Union of India AIR 1958 SC 36. Thus, the judgment in the aforesaid case is of no help to the respondents.

The other judgment of the Supreme Court in State of U.P. and others versus Rekha Rani (2011)11 SCC 441 relied on by respondents' counsel is also of no help as the Supreme Court in that case has held that the respondent's service was not terminated as a measure of punishment. The facts of the said case were quite distinct to the present case. Hence, the judgment in Rekha Rani's case (supra) is distinguishable on the peculiar facts of the present case.

11. As regards back wages, the Supreme Court in the case of Deepali Gundu Surwase (supra) held in para 22 as follows :

"The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the latter?s source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. Denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments."

Likewise, the Supreme Court in the case of Gowramma C (supra) has enhanced the back wages while modifying the judgment of the High Court and provided enhanced back wages to the employee. Relevant paragraphs 11 and 12 are extracted below :

"11.In regard to interference in such matters, i.e., cases relating to back wages, we find similar approach adopted in other decisions which no doubt the respondent lays store by [see in this regard 2007 (5) SCC 742]. Though the decision reported in Canara Bank v. Damodar Govind Idoorkar 2009 (4) SCC 323 again

relied upon by the respondent did involve the service of the employee being terminated as he had secured employment in the reserved category using a false caste certificate and the court modified direction of the High Court which ordered full back wages by substituting the order by reducing it to 50%, we do not find that any principle has been laid down which could be treated as constituting it as a precedent. The decision in Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) 2013 (10) SCC 324 involved the High Court setting aside the award of back wages on the ground that the appellant had not proved the factum of non-employment. The court inter alia laid down as follows:

?(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 re 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 penalized. 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--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 (P) Ltd., (1979) 2 SCC 80

12. The most important question is whether the employee is at fault in any manner. If the employee is not at all at fault and she was kept out of work by reasons of the decision taken by the employer, then to deny the fruits of her being vindicated at the end of the day would be unfair to the employee. In such circumstances, no doubt, the question relating to alternative employment that the employee may have resorted to, becomes relevant. There is also the aspect of discretion which is exercised by the Court keeping in view the facts of each case. As we have already noticed, this is a case where apart from the charge of the employee having produced false caste certificate, there is no other charge. Therefore, we would think that interests of justice, in the facts of this, would be subserved, if we enhance the back wages from 50% to 75% of the full back wages, which she was otherwise entitled. The appeals are partly allowed. The impugned judgments will stand modified and the respondents shall calculate the amount which would be equivalent to 75% of the back wages and disburse the amount remaining to be paid under this judgment within a period of six weeks from today to the additional appellants."

12. As observed above, the impugned order of termination of services of the petitioner is punitive in nature, it is liable to be interfered with and the petitioner would be entitled to the back wages in view of the law laid down by the Supreme Court in the aforesaid cases

13. Keeping all what has been discussed hereinabove, I am of the view that the impugned order of termination, Annexure No.1, is punitive in nature and is not an order simplicitor and thus, the petitioner is entitled to the protection of

Art. 311 (2) of the Constitution of India. The order is liable to be and is hereby set aside. The petitioner shall be entitled to all consequential benefits, including 50% back wages subject to his giving an undertaking that he was not employed in any other department and not getting salary equal to the salary he was drawing prior to termination of his services or more than it.

14. The writ petition is accordingly allowed.

(2023) 3 ILRA 160
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.02.2023

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ A No. 8417 of 2022

Shatrughan ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Amrendra Nath Tripathi, Maya Ram Yadav

Counsel for the Respondents:
C.S.C., Neeraj Chaurasiya

A. Service Law – Suspension/Punishment - U.P. Government Servant (Discipline and Appeal) Rules, 1999: Rule 4 - On a plain reading of Rule 4(i), it is clear that the life of a suspension order survives only till the conclusion of the inquiry and not thereafter. In the present case, the suspension order had come to an end on 19.10.2022, the date on which the inquiry was concluded against the petitioner. **Merely because the order dated 19.10.2022 was set aside and liberty was granted to the respondent to proceed afresh, there can be no presumption that the suspension order would stand revived except when the same is traceable to the conditions u/Rule 4(vi), where the order of dismissal or removal from services has been imposed upon the government servants.** (Para 9)

B. Continuation of passing of suspension order can be justified only when the charges leveled can lead to award of a major penalty whereas in the present case the respondents themselves on the conclusion of the inquiry imposed a 'minor penalty'. Admittedly, the order dated 19.10.2022 has not imposed the punishment of dismissal or removal from the service. (Para 10)

The suspension order dated 06.08.2022 is declared to have come to an end on 19.10.2022 when an order was passed against the petitioner as conclusion of inquiry. Order dated 19.11.2022 was set aside by the Court on 21.11.2022 and liberty was granted to respondents to proceed afresh. Therefore, the respondents shall be at liberty to pass such order as may be in accordance with law. The respondent no.2 is directed to pass fresh orders w.r.t. the claim of the petitioner for payment of salary and all consequential service benefits within a period of six weeks. (Para 11)

Writ petition allowed. (E-4)

Present petition challenges suspension order dated 06.08.2022, whereby the petitioner was placed under suspension pending an inquiry.

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. The present petition has been filed challenging the suspension order dated 06.08.2022, whereby the petitioner was placed under suspension pending an inquiry.

2. The contention of the counsel for the petitioner is that vide order dated 06.08.2022, the petitioner was placed under suspension in contemplation of an inquiry in exercise of powers conferred by Rule 4 of the U.P. Government Servant (Discipline

and Appeal) Rules, 1999 (Hereinafter referred to as the "Rules 1999"). It is argued that in pursuance of the suspension order, an order came to be passed against the petitioner whereby the petitioner was awarded the punishment of stoppage of two increments and censure.

3. It is argued that the punishment order passed against the petitioner on 19.10.2022 was challenged by the petitioner by filing Writ A No.7318 of 2022. The same writ petition was allowed. The order dated 19.10.2022 was quashed and liberty was granted to the respondents to proceed afresh in accordance with law and to conclude the inquiry within a period of three months.

4. It is argued that in the light of the directions given by this Court on 21.11.2022, fresh inquiry has been initiated, however, the same has not culminated and no order has been passed thereupon in accordance with law.

5. In light of the said facts, the submission of counsel for the petitioner is that the suspension order passed against the petitioner on 06.08.2022, it is still being acted upon and the petitioner is not being permitted to work. He argues that in terms of Rule 4, the suspension order is to remain live till the conclusion of the inquiry and, thus, on the conclusion of the inquiry which led to passing of the order dated 19.10.2022, the suspension order immediately came to an end. Thus, it was incumbent upon the respondents to have permitted to continue the petitioner to work.

6. He further argues that the continuance of suspension order is further unjustified in view of the first proviso to Section 4(1), which itself prescribes that the suspension should not be resorted to unless the allegations are so serious that in the event of they being established may ordinarily warrant awarding major penalty. He argues that even as per the own showing of the respondents, the allegations leveled against the petitioner ultimately led to passing of an order imposing 'minor penalty' as prescribed in Rule 3 and, thus, the continuation of suspension is also in violation of the proviso to Section 4(1).

7. Shri Ran Vijay Singh, Additional Chief Standing Counsel, appeared on behalf of the State and Shri Neeraj Chaurasiya, learned counsel for the respondent no.2 argue that the order dated 19.10.2022 was set aside by this Court on 21.11.2022 and in the said order, liberty was granted to proceed afresh. In the light of the said, he argues that as the order dated 19.10.2022 stood quashed, the suspension order would get automatically revived. He further argues that Section 4(vi) also makes a provision for automatic revival of the suspension order. He, thus, argues that the petition is liable to be dismissed.

8. In the light of the said submission, this Court is to analyze the scope of Rule 4 of the Rule of 1999 which are quoted herein below:-

"4. Suspension- *(1) A Government servant against whose conduct an inquiry is contemplated, or is proceeding* ***may be placed under suspension pending the conclusion of the inquiry*** *in the discretion of the Appointing Authority:*

Provided that suspension should not be resorted to unless the allegations against the Government servant are so serious that in the event of their being

established may ordinarily warrant major penalty:

Provided further that concerned Head of the Department empowered by the Governor by an order in this behalf may place a Government Servant or class of Government servants belonging to Group 'A' and 'B' posts under suspension under this rule:

Provided also that in the case Government servant or class of Government servants belonging to Group 'C' and 'D' posts, the appointing authority may delegate its power under this rule to the next lower authority.

(2) A Government servant in respect of, or against whom an investigation, inquiry or trial relating to a criminal charge, which is connected with his position as a Government servant or which is likely to embarrass him in the discharge of his duties or which involves moral turpitude, is pending, may at the discretion of the appointing authority or the authority to whom the power of suspension has been delegated under these rules, be placed under suspension until the termination of all proceedings relating to that charge.

(3) (a) A Government Servant shall be deemed to have been placed or as the case may be, continued to be place under suspension by an order of the authority competent to suspend, with effect from the date of his detention, if he is detained in custody, whether the detention is on criminal charge or otherwise, for a period exceeding forty eight hours.

(b) The aforesaid Government servant shall after the release from the custody, inform in writing to the competent authority about his detention and may also make representation against the deemed suspension. The competent authority shall after considering the representation in the light of the facts and circumstances of the case as well as the provision contained in this rule, pass appropriate order continuing the deemed suspension from, the date of release from custody or revoking or modifying it.

(4) Government servant shall be deemed to have placed, or as the case may be, continued to be under suspension by an order of the authority competent to suspend under these rules, with effect from the date of his conviction if in the event of a conviction for an offence he is sentenced to a term of imprisonment exceeding forty eight hours and is not forthwith dismissed or removed consequent to such conviction.

Explanation- A period of forty eight hours referred to in sub-rule (1) be computed from the commencement of the imprisonment after the conviction and for this purpose, intermittent period of imprisonment, if any, shall be taken to account.

(5) Where a penalty of dismissal or removal from service imposed upon a Government servant is set aside in appeal or on review under these rules or under rules rescinded by these rules and the case is remitted for further inquiry or action or with any other directions-

(a) if he was under suspension immediately before the penalty was awarded to him, the order of his suspension shall, subject to any such direction as aforesaid, be deemed to have continued in force on and from the date of the original order of dismissal or removal;

(b) if he was not under suspension, he shall, if so directed by the appellate or reviewing authority, be deemed to have been placed under suspension by an order of the appointing

authority on and from the date of the original order of dismissal or removal:

Provided that nothing in this sub-rule shall be construed as affecting the power of the disciplinary authority in a case where a penalty of dismissal or removal in service imposed upon a Government servant is set aside in appeal or on review under these rules grounds other than the merits of the allegations which, the said penalty was imposed but the case remitted for further inquiry or action or with any other directions to pass an order of suspension pending further inquiry against him on those allegations so however, that any such suspension shall not have retrospective effect.

(6) Where penalty of dismissal or removal from service imposed upon Government servant is set aside or declared or rendered void in consequence of or by a decision of a court of law and the appointing authority, on a consideration of the circumstances of the case, decides to hold a further inquiry against him on the allegation on which the penalty of dismissal or removal was originally imposed, whether the allegations remain in their original form or are clarified or their particulars better specified or any part thereof a minor nature omitted:

(a) if he was under suspension immediately before the penalty was awarded to him, the order of his suspension shall, subject to any direction of the appointing authority, be deemed to have continued in force on and from the date of the original order of dismissal or removal.

(b) if he was not under such suspension, he shall, if so directed by the appointing authority, be deemed to have been placed under suspension by an order of the competent authority and from the date of the original order of dismissal or removal.

(7) where a Government servant is suspended or is deemed to have been suspended (whether in connection with any disciplinary proceeding or otherwise) and any other disciplinary proceeding is commenced against him during the continuance of that suspension, the authority competent to place him under suspension may, for reasons to be recorded by him in writing direct that the Government servant shall continue to be under suspension till termination of all or any such proceedings.

(8) any suspension ordered or deemed to have been ordered or to have continued to remain in force under this rule shall continue in force until it is modified or revoked by the competent authority.

(9) A Government servant placed under suspension or deemed to have been placed under suspension under this rule shall be entitled to subsistence allowance in accordance with the provisions of Fundamental Rule 53 of the Financial Hand Book, Volume II, Parts II to IV."

9. On a plain reading of Rule 4(i), it is clear that the life of a suspension order survives only till the conclusion of the inquiry and not thereafter. In the present case, the suspension order had come to an end on 19.10.2022, the date on which the inquiry was concluded against the petitioner. Merely because the said order was set aside and liberty was granted to the respondent to proceed afresh, there can be no presumption that the suspension order would stand revived except when the same is traceable to the conditions under Rule 4(vi), where the order of dismissal or removal from services has been imposed upon the government servants.

10. In the present case, admittedly, the order dated 19.10.2022 has not imposed the

punishment of dismissal or removal from the service. As such, the submission of the counsel for the respondents based upon interpretation of Rule 4(vi) of the said Rule cannot be accepted. Even otherwise, the second submission of counsel for the petitioner merits acceptance that continuation of passing of suspension order can be justified only when the charges leveled can lead to award of a major penalty whereas in the present case the respondents themselves on the conclusion of the inquiry imposed a 'minor penalty', as such, even if for the sake of arguments, the contention of counsel for the respondents is accepted, the suspension order would be hit by the proviso to Rule 4(i).

11. Thus, on both the grounds, writ petition deserves to be **allowed.** The suspension order dated 06.08.2022 is declared to have come to an end on 19.10.2022 when an order was passed against the petitioner as conclusion of inquiry. The liberty granted by this Court to respondents to conclude the inquiry in terms of the judgment dated 21.11.2022 shall continue and the respondents shall be at liberty to pass such order as may be in accordance with law. The respondent no.2 is directed to pass fresh orders with regard to the claim of the petitioner for payment of salary and all consequential service benefits within a period of six weeks.

(2023) 3 ILRA 164
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.02.2023

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Writ A No. 19501 of 2018

U.P.P.C.L. & Anr. ...Petitioners
Versus
U.P. State Public Service Tribunal & Ors. ...Respondents

Counsel for the Petitioners:
Vikrant Raghuvanshi, Neerav Chitravanshi

Counsel for the Respondents:
C.S.C., Deo Raj Singh, P.K. Srivastava, Renu Mishra

A. Service Law – Punishment – Limitation - U.P. St. Public (Tribunals) Act, 1976 - Section 5(1)(b) - The point of limitation goes to the root of the matter. It involves a jurisdictional issue. The Limitation Act has been made applicable to the Tribunal, as it was applicable to a suit, thus, Section 5 thereof has no application to a reference filed under Section 4 of the Act. If a claim petition is barred by limitation, then irrespective of its merits, the Tribunal has no other option but to decline to entertain it. It does not have the power to condone the delay. (Para 13)

As S. 5(1)(b) provides that the provisions of the Uttar Pradesh Act 1963 shall *mutatis mutandis* apply to reference u/s 4, as the reference were a suit filed in the civil court, S. 3 of the Limitation Act would apply to it, which provides that a suit instituted after the prescribed period of limitation, shall be dismissed, although limitation has not been set up as a defence. The Tribunal has no power to condone the delay in filing the claim petition. Therefore, the claim petition filed after the expiry of the limitation period has to be dismissed and it cannot be entertained and adjudicated on its merits merely because it had been admitted. (Para 24, 25)

B. A decision as is well known, is an authority for which it decides, and not what can logically be deduced therefrom. A little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. (Para 19)

C. When a belated representation in regard to a stale or dead issue/dispute is

considered and decided, in compliance with a direction of the Court or Tribunal to do so. The date of the said decision cannot be considered as furnishing a cause-of-action for reviving the dead issue or time-barred dispute. The issue of limitation or delay and latches should be considered with reference to the original cause-of-action, and not with reference to the date on which an order is passed in compliance with a Court's direction. (Para 21, 22)

In the present case, punishment order was passed on 5.5.2006. The respondent no. 2 submitted a representation against the aforesaid order on 12.6.2006 to the U.P. Power Corporation Ltd. The representation was treated as an appeal and was rejected by means of an order dated 22.5.2008. Thereafter, the respondent no. 2 again submitted representations dated 17.11.2008 and 30.3.2016 to the same authority, without making mention of the provision under which the same were filed. The representations were disposed of by stating that as the appeal filed by the respondent no. 2 had already been rejected, no action was warranted on his representations. The representations were not filed under any Rule governing the service conditions of the respondent no. 2. In such circumstances, filing of successive representations would not extend the period of limitation. The Tribunal has erred in law in not deciding the plea of limitation merely on the ground that the claim petition had been admitted. (Para 23)

Writ petition allowed. (E-4)

Precedent followed:

1. St. of U.P. Vs Vivekanand Singh & anr., MANU/UP/1557/2015 (Para 13)

2. Regional Manager Vs Pawan Kumar Dubey, (1976) 3 SCC 334 (Para 16)

3. Commissioner of Income Tax Vs Son Engineering Works Pvt. Ltd., (1992) 4 SCC 363 (Para 17)

4. Ambica Quarry Works Vs St. of Guj., (1987) 1 SCC 203 (Para 18)

5. Bhav Nagar University Vs Palitana Sugar Mills Pvt. Ltd., (2003) 2 SCC 211 (Para 19)

6. C. Jaqab Vs Director of Geology and Mining Indus. Est. & anr., (2008) 10 SCC 115 (Para 21)

7. U.O.I. & ors. Vs M.S. Sarkar, (2010) 2 SCC 59 (Para 22)

Precedent distinguished:

U.O.I. Vs Tarsem Singh, (2008) 8 SCC 648 (Para 14)

Present petition challenges the judgment and order dated 06.02.2018, passed by the St. Public Service Tribunal, whereby the claim petition No. 1624 of 2016, which was filed by the opposite party no. 2, was allowed and punishment order was set aside.

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

1. Heard Sri Neerav Chitravanshi Advocate, the learned Counsel for the petitioner - Power Corporation, Ms. Renu Mishra Advocate, the learned Counsel for the opposite party, and Sri Anand Kumar Singh, the learned Standing Counsel for the State and and perused the records.

2. By means of the instant writ petition the petitioner- U.P. Power Corporation Ltd. has approached this court challenging the judgment and order dated 6.2.2018 passed by the State Public Service Tribunal (hereinafter referred as 'the Tribunal') whereby the claim petition No. 1624 of 2016, which was filed by the opposite party no. 2, was allowed.

3. The aforesaid claim petition had been filed by the opposite party no. 2 challenging an order dated 5.5.2006 passed by the Chairman, U.P. Power Corporation

Ltd./opp. party no. 2, whereby the punishment of Censure entry and stoppage of two annual increments with cumulative effect was imposed upon the respondent no. 2.

4. On 12.6.2006 the respondent no.2 had submitted a representation to the U.P. Power Corporation Ltd. against the punishment order dated 5.5.2006 and the said representation was treated as an appeal and the same was also rejected by means of an order dated 22.5.2008. Thereafter, the respondent no. 2 submitted two representations dated 17.11.2008 and 30.3.2016 against the aforesaid orders, which were disposed of by means of an order dated 6.6.2016 stating that the appeal filed by the respondent no. 2 had already been rejected by means of an order dated 22.5.2008 and, therefore, no action was warranted on his representation dated 17.11.2008 or 30.3.2016.

5. The respondent no.2 had filed the claim petition challenging all the aforesaid orders dated 5.5.2006 imposing punishment of Censure entry and stoppage of annual increments, order dated 22.5.2008 rejecting his appeal and the order dated 6.6.2016 on his representation, by filing Claim Petition No. 1624 of 2016 before the Tribunal.

6. The petitioner- U.P. Power Corporation Ltd., which was an opposite party in the claim-petition, opposed the claim-petition on the preliminary ground that the punishment order was passed on 5.5.2006 and the claim-petition was barred by the period of limitation provided in section 5 of the U.P. State Public (Tribunals) Act.

7. The Tribunal held that the respondent no. 2 had challenged the latest order dated 6.6.2016 and the claim-petition had been filed on 16.8.2016, which was admitted on 27.10.2016 and in such circumstances there was hardly any need to re-open the question. Thus, apparently the plea of limitation was not gone into by the Tribunal for the mere reason that the claim petition had been admitted.

8. Section 5 (1) (b) of the State Public Service Tribunal Act provides as follows: -

"(b) The provisions of the Limitation Act, 1963 shall mutatis mutandis apply to reference under section 4 as if a reference were a suit filed in civil court so, however, that:-

(i) Notwithstanding the period of limitation prescribed in the Schedule to the said Act, the period of limitation for such reference shall be one year;

(ii) In computing the period of limitation the period beginning with the date on which the public servant makes a representation or prefers an appeal, revision or any other petition (not being a memorial to the Governor), in accordance with the rules or orders regulating his conditions of service, and ending with the date on which such public servant has knowledge of the final order passed on such representation, appeal, revision or petition, as the case may be, shall be excluded"

9. From a bare perusal of the aforesaid statutory mandate it is apparent that the period of limitation for filing a claim-petition is one year and in computing the period of limitation, the period on which the employee makes a representation or prefers an appeal, revision or any other petition in accordance with the Rules or orders regulating his conditions of service and ending with the date on which such Public Servant has knowledge of the final

order passed on such representation, appeal, or revision or petition, shall be excluded.

10. In the present case, the punishment order was passed on 5.5.2006 and the period of limitation starts running from the immediate following day.

11. The petitioner had submitted a representation against the aforesaid order on 12.6.2006 and the same was rejected by means of an order dated 22.5.2008. Thereafter, the petitioner claims to have submitted repetitive representations on 17.11.2008 and on 30.3.2016. No Rule or any other provision of law has been mentioned in the representation dated 17.11.2008 under which the same was filed. After sleeping over the matter for about eight years the respondent no. 2 submitted another representation on 30.3.2016 for re-consideration of the order dated 22.5.2008. The said representations were rejected by means of the order dated 6.6.2016 stating that the representation dated 17.11.2008 had been consigned, as his appeal had already been rejected by means of an order dated 22.5.2008 and no action was warranted on the representation. The order dated 6.6.2016 further stated that no action was warranted on the request made by him through his letter dated 30.3.2016 for setting aside the punishment order.

12. Section 5 of the U.P. Public Service (Tribunals) Act provides for exclusion of time spent in decision of disposal of representation, appeal, revision or any other petition submitted **"in accordance with the Rules or orders regulating his conditions of service"** as the repetitive representations submitted by the respondent no. 2 did not refer to any Rules or orders regulating his conditions of services, the filing of repetitive representations against the punishment order dated 5.5.2006 will not extend the period of limitation prescribed under section 5(1) of the U.P. State Public Service (Tribunals) Act.

13. In this regard, Sri Neerav Chitravanshi, the petitioner's counsel, has placed before this Court the judgment dated 29.5.2015 rendered by a Coordinate Bench of this Court in the ***State of U.P. v. Vivekanand Singh & anr.,*** MANU/ UP/1557/2015 wherein this court held that the original order having been passed on 28.12.2012 and no statutory remedy having been preferred against it the period of limitation for filing a claim-petition was one year from the date of passing of the original order. This Court further held that *"The point of limitation goes to the root of the matter. It involves a jurisdictional issue. The Limitation Act has been made applicable to the Tribunal, as it was applicable to a suit, thus, Section 5 thereof has no application to a reference filed under Section 4 of the Act. If a claim petition is barred by limitation, then irrespective of its merits, the Tribunal has no other option but to decline to entertain it. It does not have the power to condone the delay."*

14. *Per contra*, Ms. Renu Mishra, learned counsel for the respondent no. 2, has opposed the writ petition and she has placed reliance on a decision of Hon'ble the Supreme Court in the case of ***Union of India v. Tarsem Singh, (2008) 8 SCC 648***, wherein the Hon'ble Supreme Court held that:-

"4. The principles underlying continuing wrongs and recurring/successive wrongs have been

applied to service law disputes. A "continuing wrong" refers to a single wrongful act which causes a continuing injury. "Recurring/successive wrongs" are those which occur periodically, each wrong giving rise to a distinct and separate cause of action. This Court Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneshwar Maharaj Sansthan explained the concept of continuing wrong (in the context of Section 23 of the Limitation Act, 1908 corresponding to Section 22 of the Limitation Act, 1963): (AIR p. 807, para 31)

"31.... It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury.'

* * *

8. In this case, the delay of sixteen years would affect the consequential claim for arrears. The High Court was not justified in directing payment of arrears relating to sixteen years, and that too with interest. It ought to have restricted the relief relating to arrears to only three years before the date of writ petition, or from the date of demand to date of writ petition, whichever was lesser. It ought not to have granted interest on arrears in such circumstances."

15. The aforesaid case initiated from the denial of Disability Pension to a person, who was invalidated out of Army Service in Medical category and the aforesaid observations were made by the Hon'ble Supreme Court with reference to denial of Disability Pension to an Ex Serviceman, which was treated to be a "continuing wrong", however, the challenge in the present case was against a punishment order of awarding a censure entry and stoppage of two annual increments with cumulative effectives, which is not the same as denial of Disability Pension.

16. In ***Regional Manager v. Pawan Kumar Dubey, (1976) 3 SCC 334,*** the Hon'ble Supreme Court held that: -

"7.... It is the rule deducible from application of law to the facts and circumstances of a case, which constitutes its ratio decidendi and not some conclusion based upon facts, which may appear to be similar. ***One additional or different fact can make a world of difference between conclusions in two cases even when principles are applied in each to similar facts."***

(Emphasis by the Court)

17. In ***Commissioner of Income Tax v. Son Engineering Works Pvt. Ltd., (1992) 4 SCC 363,*** the Hon'ble Supreme Court held that: -

"39... It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this court divulged from the context of the question under consideration and treat it to be the complete "Law declared by this court." ***The judgment must be read as a whole and the observations of the judgment have to be considered in the light of the questions which were before this court.*** *A decision of this Court takes its colour from the*

questions involved in the case in which it is rendered and while applying the decision to a later case, the Court must carefully try to ascertain the true principle laid down by a decision of this Court, and not to pick out words or sentences from the judgment, divulged from the context of the questions under consideration by this court, to support their reasonings...".

(Emphasis by the Court)

18. Again in **Ambica Quarry Works v. State of Gujrat**, (1987) 1 SCC 203, the Hon'ble Supreme Court held that *"The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it."*

19. The Hon'ble Supreme Court reiterated the aforesaid principles in **Bhav Nagar University v. Palitana Sugar Mills Pvt. Ltd. , (2003) 2 SCC 211**, by stating that - "59... A decision as is well known, is an authority for which it decides, 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."

20. Therefore, the aforesaid decision rendered in a case arising out of denial of Disability Pension to an Ex Serviceman would have no application to the instant case, which arises out of imposition of punishment of censure entry and stopage of two annual increments.

21. In **C. Jaqab v. Director of Geology and Mining Indus. Est. & anr., (2008) 10 SCC 115,** the Hon'ble Supreme Court held that "When an order is passed considering and rejecting the claim or representation in compliance with direction of the Court or Tribunal, such an order does not revive the stale claim, nor amount to some amount of "acknowledgement of a jural relationship' to give rise to a fresh cause of action."

22. In ***Union of India & ors. V. M.S. Sarkar, (2010) 2 SCC 59,*** the Hon'ble Supreme Court held that *"when a belated representation in regard to a stale or dead issue/dispute is considered and decided, in compliance with a direction of the Court or Tribunal to do so. The date of the said decision cannot be considered as furnishing a cause-of-action for reviving the dead issue or time-barred dispute. The issue of limitation or delay and latches should be considered with reference to the original cause-of-action, and not with reference to the date on which an order is passed in compliance with a Court's direction."*

23. Examining the facts of the present case in the light of the law laid down by the Hon'ble Supreme Court and mentioned above, it is apparent that the punishment order was passed on 5.5.2006. The respondent no. 2 submitted a representation against the aforesaid order on 12.6.2006 to the U.P. Power Corporation Ltd. The representation was treated as an appeal and was rejected by means of an order dated 22.5.2008. Thereafter, the respondent no. 2 again submitted representations dated 17.11.2008 and 30.3.2016 to the same authority, without making mention of the provision under which the same were filed. The representations were disposed of by stating that as the appeal filed by the respondent no. 2 had already been rejected, no action was warranted on his representations. The representations were not filed under any Rule governing the service conditions of the respondent no. 2.

In such circumstances, filing of successive representations would not extend the period of limitation. The Tribunal has erred in law in not deciding the plea of limitation merely on the ground that the claim petition had been admitted.

24. As section 5 (1) (b) of the U.P. Public Service (Tribunals) Act 1976 provides that the provisions of the Uttar Pradesh Act 1963 shall *mutatis mutandis* apply to reference under section 4, as the reference were a suit filed in the civil court, Section 3 of the Limitation Act would apply to it, which provides that a suit instituted after the prescribed period of limitation, shall be dismissed, although limitation has not been set up as a defence. The Tribunal has no power to condone the delay in filing the claim petition. Therefore, the claim petition filed after the expiry of the limitation period has to be dismissed and it cannot be entertained and adjudicated on its merits merely because it had been admitted.

25. In view of the aforesaid discussions, we are of the view that the claim petition which was filed by the respondent no. 2 before the Tribunal on 13.08.2016 challenging the punishment order dated 05.05.2006 and the appellate order dated 22.05.2008 was barred by the period of limitation prescribed under section 5 of the U.P. Public Service (Tribunals) Act 1976 and the Tribunal erred in entertaining the claim-petition and allowing the same, without deciding the plea of limitation on the ground that the claim petition had been admitted. The claim petition being barred by limitation was liable to be dismissed as such.

26. In view of the aforesaid discussion, the writ petition is **allowed**. The judgment and order dated 06.02.2018 passed by Tribunal allowing the Claim Petition No. 1624 of 2016 is hereby set aside and the claim petition is dismissed.

(2023) 3 ILRA 170
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.03.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Writ A No. 21190 of 2016

Devi Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Prabhat Kumar

Counsel for the Respondents:
C.S.C.

A. Service Law – Complying with directions/Execution of order - Promotion – Arrears of salary - Whenever the authorities are directed to extend all the benefits which the petitioner would have obtained, had he not been illegally deprived of them, it is not open for the authorities to urge that he has not worked and therefore he should not be paid salary or be granted benefits. The proper course for the authorities is to challenge that order in the appeal. They cannot take this plea in execution of that order. (Para 8)

In case the authorities are aggrieved by any order passed by the Court of law, it is always open for the authorities to challenge the same in appropriate Court. However, in the facts of the present case, the order dated 23.02.2012 has not been assailed, admittedly, by the opposite parties, hence it has become final. Without challenging the said order dated 23.02.2012, it is not open for the authorities, at the time of execution, to assert that since the

petitioner has not worked, he would not be granted the benefits. (Para 12)

Once the direction is issued by the competent court, it should be obeyed and implemented without any reservation. The authorities cannot be permitted to not comply the direction issued by the writ Court or to ignore it. The only remedy available to the party is that if he is aggrieved by the order passed by the writ Court, he may challenge the same by taking appropriate course under law. (Para 12)

The order impugned dated 03.04.2012 is hereby quashed. Respondents are directed to grant all the consequential benefits including the pensionary benefits as well as arrears of salary, to the petitioner, as directed by the writ Court in its order dated 23.02.2012. (Para 13)

Writ petition allowed. (E-4)

Precedent followed:

1. Commissioner, Karnataka Housing Board Vs C. Muddaiah, 2007 (7) SCC 689 (Para 8)

2. Food Corporation of India Vs S.N. Nagarkar, AIR 2002 Supreme Court 808 (Para 9)

3. St. of Kerala & ors. Vs E.K. Bhaskaran Pillai, (2007) 6 SCC 524 (Para 10)

Present petition challenges order dated 03.04.2012, passed by opposite party no. 2, which only provides notional promotion without arrears of salary against Subordinate Agriculture Service Group-II (Class III) post since 24.01.1980 to the petitioner.

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

1. Heard Sri Prabhat Kumar, learned counsel for the petitioner, learned Standing Counsel for the State-opposite parties and perused the record.

2. By means of this petition, the petitioner has prayed for the following final reliefs:

"a. Issue a writ, order or direction in the nature of certiorari thereby quashing the part of impugned order dated 3.4.2012 passed by opposite party no. 2 as contained in Annexure No. 1 to this writ petition, which only provides notional promotion without arrears of salary against Subordinate Agriculture Service Group-II (Class III) post since 24.01.1980 to the petitioner.

b. Issue a writ, order or direction in the nature of mandamus commanding and directing the opposite party no. 2 to provide the petitioner regular promotion in Subordinate Agriculture Service GroupII(Class-III) post since 24.01.1980 along with 12% interest."

3. Learned counsel for the petitioner submits that petitioner was appointed on 24.06.1966 in the Subordinate Agriculture Service (S.A.S.) Group-III as Assistant Soil Conservation Inspector in the office of Bhomi Sanrakshan Adhikari, Etawah. He was confirmed on 01.01.1974. He was given promotion on 20.11.1999 in the higher post of Group-II and he retired on 30.06.2005 in the pay Scale of Rs. 5000-8000/-. However, the petitioner was not considered for promotion in time. The opposite parties while considering the promotion of the petitioner, have adopted the pick and choose policy and given promotion to number of employees who were junior to the petitioner since 1980. Similarly situated some persons filed Claim Petition No. 613/(I)/(II)/80; Shiv Shanker Tripathi and others Vs.State of U.P. and others before the U.P. Public Service Tribunal, which was allowed on 07.12.1985 and a direction for promotion including pay

allowances etc. was also given with retrospective effect.

4. The order passed by the Tribunal dated 07.12.1985 was challenged before this Court by filing a Writ Petition No. 1782 of 1988; State of U.P. and another Vs. Sri Sheo Shankar Tripathi and Others which was upheld vide order dated 01.08.1991 passed by this Court. The order of this Court dated 01.08.1991 was challenged before Hon'ble Apex Court in Special Leave Petition no.10199/92 which was also dismissed on 30.08.1996 confirming the order passed by the High Court and the learned Tribunal.

5. In the meantime, some other superseded employees filed a Claim Petition No. 1079 of 2012 before the learned Tribunal and that Claim Petition was also allowed vide judgment and order dated 19.10.2012 passed by the Tribunal. The order of the Tribunal dated 19.10.2012 was again assailed by filing a Writ Petition No. 384(SB) of 2013; State of U.P. and another Vs. Satya Pal Singh and Another. The Division Bench of this Court vide order dated 18.03.2013 had again upheld the order passed by the learned Tribunal.

6. Learned counsel for the petitioner further submits that some more employees who were similarly situated, like the petitioner, had approached directly to this Court by filing Writ Petition No. 6368 (SS) of 1997; Gokaran Prasad Kanaujia and others Vs. State of U.P. and Others, which was allowed vide judgment and order dated 19th of May, 2006. The order is on record (Annexure No. 3). After this, the petitioner after representing the department had filed a Writ Petition No. 986(SS) of 2012 which was disposed of in terms of the judgment and order dated 19th of May, 2006 passed in Writ Petition No. 6368(SS) of 1997, vide order dated 23.02.2012. The order dated 23.02.2012 passed by this Court in Writ Petition No. 986(SS) of 2012 is extracted below:

"Notice on behalf of opposite parties has been accepted by the learned Chief Standing Counsel.

The petitioners have approached this Court under Article 226 of the Constitution of India with the grievance that they are entitled for the promotional pay-scale from the date their juniors were given in Subordinate Agriculture Services Group-II (Class-III).

It is not disputed at the Bar that identical controversy has been settled at rest vide judgment and order dated 19.05.2006, passed in Writ Petition No.6368 (S/S) of 1997.

The operative portion of the judgment and order dated 19.05.2006 is reproduced as under:-

"In the result, the writ petition succeeds and is allowed. The order dated 03.03.1998 are hereby quashed and the respondents are directed to consider the claim of the petitioners to the post of S.A.S. Group-II w.e.f. the date the juniors to the petitioners have been promoted. Since the petitioners have retired from service and they are losers of pensionery benefits on account of non-consideration of their promotion, their cases for promotion be considered with all consequential benefits within a period of two months, from the date a certified copy of this order is produced before the authority concerned. No order as to costs."

In view of the above, it is not necessary to deal with the entire controversy at length again.

This writ petition is, therefore, disposed of finally in terms of the judgment

& order dated 19.05.2006, passed in Writ Petition No. 6368 (SS) of 1997. The petitioners shall also be entitled for service benefits provided by this Court while deciding the controversy vide judgment and order dated 19.05.2006 (supra).

No order as to costs."

7. In compliance of the order dated 23.02.2012, the impugned order dated 03.04.2012 has been passed by making partial compliance and consequential benefits regarding arrears of salary, from the date of promotion of juniors to the petitioners, have been denied on the principal of 'no work no pay' relying on the Government Order dated 28.05.1997.

8. Learned counsel for the petitioner submits that law in this regard has been settled by plethora of judgments and it has been held time and again by the Supreme Court that whenever the authorities are directed to extend all the benefits which the petitioner would have obtained, had he not been illegally deprived of them, it is not open for the authorities to urge that he has not worked and therefore he should not be paid salary or be granted benefits. The proper course for the authorities is to challenge that order in the appeal. They cannot take this plea in execution of that order. Learned counsel for the petitioner has relied upon the judgment of Supreme Court reported in **2007(7) SCC 689; Commissioner, Karnataka Housing Board Vs. C. Muddaiah**. Para 32 and 33 of the judgment are quoted herein below:

"32. We are of the considered opinion that once a direction is issued by a competent Court, it has to be obeyed and implemented without any reservation. If an order passed by a Court of Law is not complied with or is ignored, there will be an end of Rule of Law. If a party against whom such order is made has grievance, the only remedy available to him is to challenge the order by taking appropriate proceedings known to law. But it cannot be made ineffective by not complying with the directions on a specious plea that no such directions could have been issued by the Court. In our judgment, upholding of such argument would result in chaos and confusion and would seriously affect and impair administration of justice. The argument of the Board, therefore, has no force and must be rejected.

33. The matter can be looked at from another angle also. It is true that while granting a relief in favour of a party, the Court must consider the relevant provisions of law and issue appropriate directions keeping in view such provisions. There may, however, be cases where on the facts and in the circumstances, the Court may issue necessary directions in the larger interest of justice keeping in view the principles of justice, equity and good conscience. Take a case, where ex facie injustice has been meted out to an employee. In spite of the fact that he is entitled to certain benefits, they had not been given to him. His representations have been illegally and unjustifiably turned down. He finally approaches a Court of Law. The Court is convinced that gross injustice has been done to him and he was wrongfully, unfairly and with oblique motive deprived of those benefits. The Court, in the circumstances, directs the Authority to extend all benefits which he would have obtained had he not been illegally deprived of them. Is it open to the Authorities in such case to urge that as he has not worked (but held to be illegally deprived), he would not be granted the benefits? Upholding of such plea would amount to allowing a party to take undue

advantage of his own wrong. It would perpetrate injustice rather than doing justice to the person wronged."

9. Learned counsel for the petitioner has relied upon another judgment of Supreme Court reported in **AIR 2002 Supreme Court 808; Food Corporation of India Vs. S.N. Nagarkar.** Para 15 of the judgment is as under:

"Learned counsel appearing on behalf of the appellant submitted that this was a case where notional promotion and seniority was given to the respondent. In such a case the concerned employee is entitled to the pay scale of the promotional post only with effect from the date he joins the post and not from the date of his promotion. He sought to rely on two judgments of this Court reported in : (1996) 7 SCC 533, State of Haryana and others vs. O.P. Gupta and others and (1989) 2 SCC 541, Paluru Ramkrishnajah and others etc. vs. Union of India and another. On the other hand counsel for the respondent submitted that this is not a case where this Court is called upon to consider the submission urged on behalf of the appellant. In the instant case, the writ petition filed by the respondent was allowed by judgment and order dated 6th May, 1994 passed in Civil Writ Petition No.4983 of 1993. That order attained finality as it was not appealed from. In execution proceedings, the appellant cannot go beyond the order passed by the Court in the writ petition and, therefore, what has to be considered is whether the High Court was right in holding that in terms of the order of the Court dated 6th May, 1994 passed in Civil Writ Petition No.4983 of 1993, the respondent is entitled to the arrears of pay and allowances with effect from the date of promotions. If the answer is in the affirmative, the question whether such relief ought to have been granted cannot be agitated in execution proceeding. We find considerable force in the submission urged on behalf of the respondent. In these proceedings it is not permissible to go beyond the order of the learned Judge dated 6th May, 1994 passed in Civil Writ Petition No.4983 of 1993. The execution application giving rise to the instant appeal was filed for implementing the order dated 6th May, 1994 and in such proceeding, it was not open to the appellant either to contend that the judgment and order dated 6th May, 1994 was erroneous or that it required modification. The judgment and order aforesaid having attained finality, has to be implemented without questioning its correctness. The appellant therefore, cannot be permitted to contend in these proceedings that the judgment and order dated 6th May, 1994 was erroneous in as much as it directed the appellant to pay to the respondent arrears of salary with effect from the dates of promotion, and not from the dates the respondent actually joined the promotional posts."

10. Learned counsel for the petitioner further relied upon the judgment of Supreme Court reported in **(2007) 6 SCC 524; State of Kerala and Others Vs. E.K. Bhaskaran Pillai.** Para 4 of the judgment is quoted hereunder:

"Learned counsel for the State has submitted that grant of retrospective benefit on promotional post cannot be given to the incumbent when he has not worked on the said post. Therefore, he is not entitled to any benefit on the promotional post from 15.6.1972. In support thereof, the learned counsel invited our attention to the decisions of this Court

*in Paluru Ramkrishnaiah & Ors. Vs. Union of India & Anr. [(1989) 2 SCC 541], Virender Kumar, G.M., Northern Railways Vs. Avinash Chandra Chadha & Ors.[(1990) 3 SCC 472] , State of Haryana & Ors. Vs. O.P. Gupta & Ors. [(1996) 7 SCC 533], A.K. Soumini Vs. State Bank of Travancore & Anr.[(2003) 7 SCC 238] and Union of India & Anr. Vs. Tarsem Lal & Ors. [(2006) 10 SCC 145]. As against this, the learned counsel for the respondent has invited our attention to the decisions given by this Court in Union of India & Ors. Vs. K.V. Jankiraman & Ors.[(1991) 4 SCC 109], State of A.P. Vs. K.V.L. Narasimha Rao & Ors.[(1999) 4 SCC 181], Vasant Rao Roman Vs. Union of India & Ors. [1993 Supp. (2) SCC 324] and State of U.P. & Anr. Vs. Vinod Kumar Srivastava [(2006) 9 SCC 621]. We have considered the decisions cited on behalf of both the sides. So far as the situation with regard to monetary benefits with retrospective promotion is concerned, that depends upon case to case. There are various facets which have to be considered. Sometimes in a case of departmental enquiry or in criminal case it depends on the authorities to grant full back wages or 50 per cent of back wages looking to the nature of delinquency involved in the matter or in criminal cases where the incumbent has been acquitted by giving benefit of doubt or full acquittal. Sometimes in the matter when the person is superseded and he has challenged the same before Court or Tribunal and he succeeds in that and direction is given for reconsideration of his case from the date persons junior to him were appointed, in that case the Court may grant sometime full benefits with retrospective effect and sometimes it may not. Particularly when the administration has wrongly denied his due then in that case he should be given full benefits including monetary benefit subject to there being any change in law or some other supervening factors. However, it is very difficult to set down any hard and fast rule. The principle 'no work no pay' cannot be accepted as a r*ule of thumb. There are exceptions where courts have granted monetary benefits also."

11. Learned Standing Counsel has opposed the writ petition and has submitted that since the petitioner has not worked for the period, therefore he has rightly been granted notional promotion, however he could not dispute the settled legal position as argued by learned counsel for the petitioner.

12. On due consideration to the submissions advanced, perusal of the record so also the aforesaid judgments of the Supreme Court, I am of the view that the law is settled in this regard. In case the authorities are aggrieved by any order passed by the Court of law, it is always open for the authorities to challenge the same in appropriate Court. However, in the facts of the present case, the order dated 23.02.2012 passed in Writ Petition No. 986(SS) of 2012 has not been assailed, admittedly, by the opposite parties, hence it has become final. Without challenging the said order dated 23.02.2012, it is not open for the authorities, at the time of execution, to assert that since the petitioner has not worked, he would not be granted the benefits as held by the Supreme Court in the case of **C. Muddaiah (supra).** Law in this regard has been settled time and again that once the direction is issued by the competent court, it should be obeyed and implemented without any reservation. The authorities cannot be permitted to not comply the direction issued by the writ Court or to ignore it. The only remedy

available to the party is that if he is aggrieved by the order passed by the writ Court, he may challenge the same by taking appropriate course under law.

13. In view of the aforesaid settled law, the writ petition succeeds and is **allowed.** The order impugned dated 03.04.2012 is hereby quashed. Respondents are directed to grant all the consequential benefits including the pensionery benefits as well as arrears of salary, to the petitioner, as directed by the writ Court in it's order dated 23.02.2012.

(2023) 3 ILRA 176
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.02.2023

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ A No. 2000639 of 2008

Virendra K. Singh Chauhan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Piyush Asthana, Desh Deepak Singh, Rajeev Singh, Smriti Pandey

Counsel for the Respondents:
C.S.C., Balram Yadav

A. Service Law – Disciplinary Proceedings – Recovery from Retiral Benefits - Uttar Pradesh Cooperative Societies Employees Service Regulations, 1975 - There is no provision in the Uttar Pradesh Cooperative Societies Employees Service Regulations, 1975 for initiation or continuation of disciplinary proceeding after retirement nor is there any provision stating that in case misconduct is established, a deduction could be made from the retiral benefits. (Para 19)

Once the petitioner has retired from service on 31.12.2001, there was no authority vested in the corporation for continuing the departmental proceeding even for the purpose of imposing any reduction in the retiral benefits payable to the petitioner. **In absence of such an authority, it is held that enquiry/disciplinary proceeding had lapsed and the petitioner was entitled to full retiral benefits on retirement.** As the enquiry has lapsed, it is obvious that the petitioner would have to get the balance of the emoluments payable to him. (Para 20)

Writ petition allowed. (E-4)

Precedent followed:

1. Dev Prakash Tewari Vs U.P. Co-operative Institutional Service Board, Lk & ors., (2014) 7 SCC 260 (Para 13)

2. Bhagirathi Jena Vs Board of Directors, OSFC & ors., (1999) 3 SCC 666 (Para 13)

3. Brij Mohan Vs St. of U.P. & ors., Writ-A No. 42071 of 2016, order dated 16.01.2017 (Para 13)

4. U.P. St.Sugar Corp. Ltd. Vs Kamal Swaroop Tondon, (2008) 2 SCC 41 (Para 15)

Present petition challenges order dated 20.02.2007, passed by respondent No. 3 and order dated 30.09.2003 with a further prayer to issue a writ, order or direction in the nature of mandamus commanding the respondent No. 3 to release the amount of Rs. 42,403/- along with interest of 14% that has been illegally deducted.

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Sri Desh Deepak Singh, learned counsel for the petitioner, learned Additional Chief Standing Counsel for respondent No.1- State and Sri Balram

Yadav, learned counsel for respondent Nos.2&3.

2. The present writ petition has been filed before this Court seeking a writ, order or direction in the nature of certiorari quashing the impugned order dated 20.02.2007 (Annexure No.1) passed by respondent No.3 and order dated 30.09.2003 (annexure-5) with a further prayer to issue a writ, order or direction in the nature of mandamus commanding the respondent No.3 to release the amount of Rs.42,403/- along with interest of 14% that has been illegally deducted in respect of loan case of Sri Ishaq Ali.

3. Brief facts of the case are that the petitioner was working as Branch Manager in U.P. Sahkari Gram Vikas Bank Ltd., who after completion of service on attaining the age of superannuation retired from service on 31.12.2001.

4. The petitioner filed Writ Petition No.1840 (S/B) of 2001 before this Court against his date of superannuation fixed by the bank at the age of 58 years and claimed parity of 60 years in parity with government employees. The writ petition was admitted and an interim order was passed therein on 21.12.2001, whereby following direction was issued:

"Admit.

Issue notice.

List in the week commencing 14.1.2002. In the meantime it would be open for the U.P. Cooperative Development Bank to consider the Government G.O. with regard to enhancement of age of superannuation of the petitioners to be 60 years. The retirement of the petitioners shall be subject to the decision of the writ petition."

5. The Managing Director of the Bank passed an order on 30.09.2003 on the basis of which an order was passed on 20.02.2007, whereby the disciplinary initiation against the petitioner in the year 1997 was concluded after about two years of his retirement and a recovery of Rs.1,15,000/- along with upto date interest was directed against the petitioner from the dues payable to the petitioner.

6. Against the order dated 30.09.2003, the petitioner preferred appeal before the Board of Directors on 27.10.2003, which was rejected by the appellate authority and information in this regard was furnished to the petitioner by the General Manager (Administration) vide letter No.151609/ karmik/2004-05 dated 13.12.2004.

7. For payment of retiral benefits, the petitioner preferred representation dated 18.07.2005 before the Managing Director, however, no heed was paid to the same. When, the request made by the petitioner vide representation dated 18.07.2005 was not replied with, he again filed another representation on 29.08.2006. Thereafter, he filed another representation before respondent No.3 on 19.07.2007 and when no response was received from the department, he contacted the concerned officials of the Bank, where he came to know that his all retiral benefits viz. gratuity, insurance, security and leave encashment etc. were adjusted against the liabilities fixed upon the petitioner and no amount was paid to the petitioner.

8. The petitioner filed an application under Right to Information Act asking the action taken in respect of deductions made against his retirement dues and asked to provide copy of the decisions taken in respect thereof. Thereafter, the Jan Suchna

Adhikari of the bank supplied the information sought by the petitioner vide letter dated 03.12.2007. By the information so provided, the petitioner came to know that the deductions were made against certain loan amounts disbursed by him in favour of certain persons.

9. In regard to aforesaid deductions, the petitioner made several representations / communications with the bank authorities and when there was no response, the present writ petition has been filed before this Court.

10. Submission of learned counsel for the petitioner is that the deductions made from gratuity, leave encashment, security and insurance claim of the petitioner is in violation of Rule 79(1)(d) of the Bank Service Rules, 1976. He further submitted that the gratuity cannot be adjusted / attached even against a decree obtained from a civil, criminal or revenue Court as it is protected under the Payment of Gratuity Act.

11. He further submitted that even if the version of the respondents is accepted on its face value, even then deductions made against the petitioner are premature, as the recovery proceeding is still pending at Revenue Department of R.C. sent by the bank.

12. He next submitted that the respondent - bank has illegally deducted an amount of Rs.42,403/- along with interest from dues of the petitioner against the loan of one Ishaq Ali, as the petitioner has no concern with the aforesaid loan granted.

13. He lastly submitted that there is no pension scheme in the bank and retiral dues are the only source of livelihood after the retirement and the respondent - bank has committed gross illegality in delaying / deducting the same. In support of his submissions, he placed reliance upon following judgments:

a) Dev Prakash Tewari Vs. U.P. Co-operative Institutional Service Board, Lucknow and others; (2014) 7 SCC 260.

b) Bhagirathi Jena Vs. Board of Directors, OSFG and others; (1999) 3 SCC 666.

c) Brij Mohan V. State of U.P. and 5 Ors.; Writ-A No.42071 of 2016, order dated 16.01.2017.

14. On the other hand, learned counsel for the respondent Nos. 2&3 oppose the submissions advanced by learned counsel for the petitioner and submitted that the order dated 30.09.2003 passed by the Managing Director of the respondent - bank was passed on the basis of disciplinary proceedings, in which the petitioner was found guilty for loss of Rs.1,15,000/- with interest and accordingly, recovery was directed to be made from post-retiral benefits of the petitioner.

15. He further submitted that it is settled proposition of law that the recovery of amount / loss caused to the department by the employee is recoverable from the gratuity and other payable post-retiral dues and therefore, there is no illegality in the recovery made by the respondent - bank from retiral benefits of the petitioner. In support of his submissions, he placed reliance upon following judgments:

a) U.P. State Sugar Corporation Ltd. Vs. Kamal Swaroop Tondon; (2008) 2 SCC 41.

16. Learned A.C.S.C. also adopted the submissions advanced by learned counsel for respondent Nos.2&3.

17. I have considered the submissions advanced by learned counsel for the parties and perused the material on record.

18. To resolve the controversy involved in the matter, the judgments relied upon by learned counsel for the parties are being quoted below:

a) Judgments relied upon by learned counsel for the petitioner:

i) Dev Prakash Tewari (Supra):

"5. We have carefully considered the rival submissions. The facts are not in dispute. The Hihg Court while quashing the earlier disciplinary proceedings on the ground of violation of principles of natural justice in its order dated 10-1-2006 granted liberty to initiate the fresh inquiry in accordance with the Regulations. The appellant who was reinstated in service on 26-4-2006 and fresh disciplinary proceeding was initiated on 7-7-2006 and while that was pending, the appellant attained the age of superannuation and retired on 31-3-2009. There is no provision in the Uttar Pradesh Cooperative Societies Employees Service Regulations, 1975 for initiation or continuation of disciplinary proceeding after retirement of the appellant nor is there any provision stating that in case misconduct is established a deduction could be made from his retiral benefits."

ii) Bhagirathi Jena (Supra):

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

iii) Brij Mohan (Supra):

"A perusal of the aforesaid judgment it is manifestly clear that the facts of this case are squarely covered by the judgment in Dev Prakash Tewari (Supra). Learned counsel for the petitioner has failed to point out any provision under the Regulations, 1975 or any other guidelines under the Act, 202 to continue the disciplinary proceedings after the employee has retired. Accordingly, the order dated 22.06.2016 is set aside and it is held that the disciplinary proceedings initiated vide order dated 22.06.2016 stand lapsed. Accordingly, the writ petition is allowed."

b) Judgments relied upon by learned counsel for respondent Nos.2&3:

i) U.P. State Sugar Corporation Ltd. (Supra):

"In our opinion, Mahadevan does not held the respondent. No rigid, inflexible or invariable test can be applied as to when the proceeding should be allowed to be continued and when they should be ordered to be dropped. In such cases there is neither lower limit nor upper limit. If on the facts and in the circumstances of the case, the Court is satisfied that there was gross, inordinate and unexplained delay in initiating departmental proceedings and continuation of such proceedings would seriously prejudice the employee and would result in miscarriage of justice, it may quash them. We may, however, hasten to add that it is an exception to the general rule that once the proceedings are initiated,

they must be taken to the logical end. It, therefore, cannot be laid down as a proposition of law or a rule of universal application that if there is delay in initiation of proceedings for a particular period, they must necessarily be quashed."

19. On perusal of the case laws cited by learned counsel for the parties, it is evident that there is no provision in the Uttar Pradesh Cooperative Societies Employees Service Regulations, 1975 for initiation or continuation of disciplinary proceeding after retirement nor is there any provision stating that in case misconduct is established, a deduction could be made from the retiral benefits.

20. Once the petitioner has retired from service on 31.12.2001, there was no authority vested in the corporation for continuing the departmental proceeding even for the purpose of imposing any reduction in the retiral benefits payable to the petitioner. In absence of such an authority, it is held that enquiry / disciplinary proceeding had lapsed and the petitioner was entitled to full retiral benefits on retirement. As the enquiry has lapsed, it is obvious that the petitioner would have to get the balance of the emoluments payable to him.

21. In view of reasons recorded above, the impugned orders dated 20.02.2007 (Annexure No.1) and 30.09.2003 (annexure-5) are hereby quashed.

22. The writ petition succeeds and is ***allowed.***

23. The respondents are directed to pay the allowances / post retiral benefits to the petitioner as claimed in the writ petition in accordance with the rules and regulations within a period of eight weeks from the date of production of a certified copy of this order.

(2023) 3 ILRA 180
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.02.2023

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Writ B No. 54 of 2023

Smt. Maya Singh ...Petitioner
Versus
Board of Revenue U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Prabhakar Vardhan Chaudhary, Mohammad Aslam Khan

Counsel for the Respondents:
C.S.C., Gyanendra Singh, Harish Chandra, Mohan Singh, Rakesh Kumar Singh, Ripu Daman Shahi

Civil Law - U.P. Revenue Code, 2006 – Sections 80, 80 (1), 80 (4), 116 & 210 - Constitution of India, 1950 – Article 226 – Board of Revenue - It is settled principle of law that issuance of a writ or quashing /setting aside of an order if revives another pernicious or wrong or illegal order - in that eventuality the writ court should not interfere in the matter and should refuse to exercise its discretionary power conferred upon it under Article 226 - Reference has been made to the judgment decided on 24.02.2020 in Atul Kumar Singh Vs St. of U.P. - Where orders impugned are equitable and substantial justice seems to have been done to the parties, the Writ Court would not be inclined to interfere merely on the ground that such orders are wrong in law - Hence, Court refuse to interfere in the impugned order. (Para 12, 27, 29)

Writ petition is dismissed. (E-13)

List of Cases cited:

1. Atul Kumar Singh Vs St. of U.P. (Writ Petition No.343 of 1999)

2. A.M.Allison Vs B.L.Se, AIR 1957 SC 227

3. Bux Singh Vs Joint Director of Consolidation, U.P. Lucknow & ors., AIR 1966 All 156

4. Om Prakash Vs U. P. Secondary Education Service Commission, Allenganj, Allahabad & ors., (1990) UPLBEC 983

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

1. Heard Mohammad Arif Khan, learned Senior Advocate assisted by Sri P.V.Chaudhary, learned counsel for the petitioner and Sri R.D.Shahi and Sri Rakesh Kumar Singh, learned counsel for opposite party No.3, Sri Harishchandra, learned counsel for the opposite party No.2 and Sri Mohan Singh, learned counsel for the Gaon Sabha and Avneesh Kumar, learned counsel for the State.

2. By means of present petition, petitioner has impeached the order dated 11.01.2023 passed by the respondent No.1-Board of Revenue, U.P., Lucknow in revision, registered as Revision No.REV/2686/2022/Ayodhya, Computerized Case No.R20220423002686 (Devesh Singh vs. Maya Singh) filed under Section 210 of the U.P. Revenue Code, 2006 (in short "Code of 2006").

3. Brief facts, admitted between the parties, are to the effect that the dispute relates to Gata No. 853 situated at Village-Madna Uparhar Amsin, Tehsil-Sadar, District-Ayodhya. In Gata No.853, in issue, respondent No.4-Smt. Sukhmeena Singh was having 3/4th share and Rukmani Singh was having 1/4th share. Undisputed area of the Gata in issue is 0.449 Hect., out of which, petitioner purchased 0.11225 Hectare by means of registered sale deed dated 18.03.2021 and in the said sale deed, boundaries of the property purchased by the petitioner are described as "**पूरब**–चकरोड कच्चा 1 लट्ठा बादहू खेत नं0–849, 850 आदि, **पश्चिम**–सीमा ग्राम जलालुदीन नगर, **उत्तर**–सीमा ग्राम जलालुदीननगर, **दक्षिण**–गाटा सं0 857 अन्य व्यक्ति।"

4. Further, Respondent No.4-Smt. Sukhmeena Singh also executed sale deed(s) in favour of respondent No.2-Girish Kumar Singh and respondent No.3-Devesh Singh, which were registered on 23.05.2022 and 24.05.2022, respectively. After these sale deeds, indicated hereinabove, petitioner became owner of 1/4 part of the property in issue and the respondent Nos.2 and 3 became owner of 3/4 part.

5. It would be apt to refer here that the boundaries indicated in the subsequent sale deed(s) executed on 23.05.2022 and 24.05.2022 are similar as indicated in the sale deed of the petitioner. The boundaries indicated in the sale deed(s) subsequent to the sale deed of the petitioner are as "**पूरब**–चकरोड कच्चा 1 लट्ठा बादहू खेत नं0–849, 850 आदि, **पश्चिम**–सीमा ग्राम जलालुदीन नगर, **उत्तर**–सीमा ग्राम जलालुदीननगर, **दक्षिण**–गाटा सं0 857 अन्य व्यक्ति।"

6. Petitioner preferred an application under Section 80 of the Code of 2006 for declaration of holding/for use for non-agricultural purposes on 04.01.2022, which was registered as Case No.16 of 2022, Computerized Case No.T2022423450116 (Maya Singh vs. State of U.P.), and for the purposes of disposal of the said case, a report was called for, which was subsequently submitted by the Revenue

Official on 20.04.2022 and thereafter, based upon the report of the Revenue Official, Sub Divisional Magistrate, Sadar, Ayodhya, allowed the application vide its order dated 21.04.2022.

7. It would be apt to refer here that one application was moved by the petitioner under Section 80 of the Code of 2006 with regard to Gata Nos.853 and 854, situated at Village-Madna Uparhar Amsin, Tehsil-Sadar, District-Ayodhya, with the prayer that the portion purchased by the petitioner in both these Gata(s) be declared so as to use it for non-agricultural purposes. In other words, composite application was filed for both the Gata(s).

8. On coming to know about the order dated 21.04.2022, an application for setting aside the order dated 21.04.2022 and restoration of the Case No.16 of 2022 was preferred by the respondent Nos.2 and 3, which was registered as Case No.RST/4456/2022, Computerized Case No.T202204230104456 (Devesh Singh & Others vs. Maya Singh). The Sub Divisional Magistrate, Sadar, Ayodhya, after due notice and hearing the parties dispose of the application vide its order dated 10.10.2022 in following terms:-

"पत्रावली प्रस्तुत। पत्रावली का अवलोकन किया गया। पत्रावली के अवलोकन से यह स्पष्ट है कि वादीगण देवेश सिंह पुत्र श्यामलाल सिंह व सुखमीना पत्नी स्व0 करुण कुमार सिंह द्वारा आदेश दिनाँक 21.04.2022 के विरुद्ध प्रस्तुत आपत्ति में कहा गया कि प्रश्नगत भूमि गाटा संख्या 853 का बंटवारा नहीं हुआ है तथा बिना बंटवारा हुए प्रश्नगत भूमि को अकृषिक घोषित नहीं किया जा सकता है, तत्पश्चात दिनाँक 16.06.2022 को प्रश्नगत आदेश दिनाँक 21.04.2022 का क्रियान्वयन स्थगित कर दिया गया।

ग्राम मड़ना उपरहार, परगना अमसिन, तहसील सदर, जनपद अयोध्या में स्थित गाटा संख्या 853 के बंटवारे का वाद, कम्प्यूटरीकृत वाद संख्या टी202204230104762, वाद संख्या 632 अन्तर्गत धारा 166 उ0प्र0रा0सं0 के तहत सुखमीना सिंह बनाम माया सिंह आदि योजित किया गया, जिसमें प्रारम्भिक आदेश दिनाँक 16.06.2022 को पारित किया जा चुका है। प्रारम्भिक आदेश दिनाँक 16.06.2022 के क्रम में तहसीलदार सदर द्वारा प्रस्तुत कुर्रा बंटवारा व रंगभेदी नक्शा भी न्यायालय द्वारा स्वीकार किया जा चुका है। कुर्रा बंटवारा व रंगभेदी नक्शा में, जहां पर श्रीमती माया सिंह का अंश दर्शाया गया है, उसी स्थल पर वाद संख्या 81, कम्प्यूटरीकृत वाद संख्या टी202242350116 श्रीमती माया सिंह बनाम उ0प्र0 सरकार, अन्तर्गत धारा 80 में पारित आदेश दिनाँक 21.04.2022 प्रभावी होगा। ऐसी स्थिति में स्थगन आदेश दिनाँक 16.06.2022 को वापस लेते हुए वाद की कार्यवाही को समाप्त किया जाना उचित प्रतीत होता है।

अतः उपरोक्त विवेचना के आधार पर देवेश सिंह पुत्र श्यामलाल सिंह आदि द्वारा प्रस्तुत आपत्ति निरस्त करते हुए स्थगन आदेश दिनाँक 16.06.2022 वापस लिया जाता है। आदेश की प्रति राजस्व अभिलेखों में अंकन हेतु तहसीलदार सदर को भेजी जाय। वाद अनुपालन पत्रावली राजस्व अभिलेखागार संचित हो। ठ

9. Being aggrieved by the order(s) dated 10.10.2022 and 21.04.2022, a revision under Section 210 of the Code of 2006 was filed by the respondent No.2, in which, the impugned order dated 11.01.2023 has been passed by the respondent No.1-Board of Revenue, U.P., Lucknow. The relevant portion of the order dated 11.01.2023 reads as under:-

"6– तत्क्रम में उभय पक्षों के विद्वान अधिवक्ताओं को सुना एवं पत्रावली पर उपलब्ध सुसंगत अभिलेखों का परिशीलन/परीक्षण किया। पत्रावली पर उपलब्ध सुसंगत अभिलेखों के परिशीलन/परीक्षण से विदित है कि सुखमीना सिंह ने प्रश्नगत भूमि के सम्बन्ध में धारा–116 के तहत वाद संख्या 4762/2022 कम्प्यूटरीकृत वाद संख्या–टी202204230104762 सुखमीना सिंह बनाम श्रीमती माया सिंह आदि योजित किया जिसमें दिनांक 16.06.2022 को प्रारम्भिक डिक्री का आदेश पारित किया गया तथा उप जिलाधिकारी द्वारा अन्तिम आदेश दिनांक 10.10.2022 पारित किया गया। इसके पूर्व प्रश्नगत भूमि के सम्बन्ध में श्रीमती माया सिंह ने उप जिलाधिकारी के न्यायालय में धारा–80 के तहत अकृषिक प्रख्यापित किये जाने हेतु वाद योजित किया, जिस पर तहसीलदार ने दिनांक 20.04.2022 को आख्या प्रस्तुत की। इस आख्या के आधार पर उप जिलाधिकारी ने अगले ही दिन दिनांक 21.04.2022 को

प्रश्नगत भूमि को अकृषिक प्रख्यापित करने का आदेश पारित कर दिया। स्पष्टतः बिना विधिक रुप से बटवारा हुए प्रश्नगत भूमि को अकृषिक प्रख्यापित किया गया है, जो उ0प्र0 राजस्व संहिता–2006 की धारा–80(4) का उल्लंघन है। अतः निगरानी स्वीकार की जाती है तथा उप जिलाधिकारी द्वारा पारित आदेश दिनांक 10.10.2022 व 21.04.2022 निरस्त किये जाते हैं।

7–पश्चात आवश्यक कार्यवाही पत्रावली दाखिल–दफ्तर हो।"

10. Impeaching the order dated 11.01.2023, Sri M.A.Khan, Senior Advocate assisted by Sri P.V.Chaudhari, appearing for the petitioner stated as under:-

(i) The application for recall of the order dated 21.04.2022 was not maintainable by Devesh Singh.

(ii) The property in issue i.e. Gata No. 853 was purchased by the petitioner based upon the mutual partition/family settlement. As such, no interference was required by the authority concerned in the order passed on the application under Section 80 of the Code of 2006.

(iii) The revision filed by Devesh Singh alone itself was not maintainable as he was not the recorded tenure holder. As such, the order passed by the Revisional Authority is without jurisdiction. The Revisional Authority erred in law and fact both in interfering in the order of the Sub Divisional Magistrate, Sadar, Ayodhya passed on 21.04.2022, subsequently, clarified on 10.10.2022 on the application preferred by the respondent No.3 and respondent No.4 for restoration of case.

(iv) Preliminary decree filed by respondent No.4-Smt. Sukhmeena Singh in the suit for partition, under Section 116 of the Code of 2006, was passed on 16.06.2022 and in terms of the preliminary decree, the map was prepared and thereafter, final decree was passed on 10.10.2022 against which first appeal i.e. Appeal No.2010 of 2022, Computerized Case No.C202204000002010 (Sukhmeena Singh & Others vs. Smt. Maya Singh & Others) was filed and the First Appellate Court dismissed the appeal vide its order dated 24.01.2023 and now the second appeal is pending, wherein, no interim order has been passed in favour of respondent Nos.2 and 3 and being so, the order dated 10.10.2022 based upon the order in partition suit was just and proper and interference in the same in the revision is unjustified.

(v) Map prepared by the Advocate Commissioner also proves that the land was partitioned.

(vi) If it is presume that no partition took place regarding Gata No.853 even in that event, the order regarding Gata No.854 ought not to have been interfered with.

11. Per contra, Sri R.D.Shahi and Sri Rakesh Kumar Singh, learned counsel for opposite party No.3, Sri Harishchandra, learned counsel for the opposite party No.2 stated that:-

(i) Application under Section 80 of the Code of 2006 by the petitioner alone regarding un-partitioned land itself was not maintainable, as such, no order could have been passed by any of the authorities including the Sub Divisional Magistrate, Sadar, Ayodhya. A reference has been made in this regard to Proviso to Section 80(1) and Sub Section 4 of Section 80 of the Code of 2006.

(ii) Respondent No.3-Devesh Singh, after execution of sale deed by respondent No.4-Smt. Sukhmeena Singh, in his favour entered into the shoes of Smt. Sukhmeena Singh, who admittedly, was co-sharer of the petitioner, as such, respondent No.3-Devesh Singh was having right to

move the application for restoration as also to file a revision.

(iii) Any interference in the impugned order dated 11.01.2023 by this Court would revive the illegal order dated 21.04.2022 passed by the Sub Divisional Magistrate, Sadar, Ayodhya on the application preferred by the petitioner under Section 80 of the Code of 2006 as also the subsequent order dated 10.10.2022.

12. It is settled principle of law that issuance of a writ or quashing/setting aside of an order if revives another pernicious or wrong or illegal order then in that eventuality the writ court should not interfere in the matter and should refuse to exercise its discretionary power conferred upon it under Article 226 of the Constitution of India. In this regard, a reference has been made to the judgment decided on 24.02.2020 passed by this Court in **Writ Petition No.343 of 1999 (Atul Kumar Singh vs. State of U.P.).**

(iv) The second appeal challenging the order(s) passed in the proceedings related to Section 116 of the Code of 2006 has been filed wherein records have been summoned and the matter is still sub-judice before the statutory forum. Prayer is to dismiss the petition.

13. Considered the aforesaid submissions advanced by the learned counsel for the parties and perused the records including the order impugned.

14. In order to appreciating and deciding the controversy involved in the present petition, this court is of the view that in the instant case Section 80 of the Code of 2006, as applicable on the date of preferring the application, is relevant and being so, the same is extracted hereinbelow:-

"[80] Use of holding for Industrial, Commercial or Residential purposes.-

(1) Where a bhumidhar with transferable rights uses his holding or part thereof, for industrial, commercial or residential purposes, the Sub-Divisional Officer may, suomotu or on an application moved by such bhumidhar, after making such enquiry as may be prescribed, ether make a declaration that the land is being used for the purpose not connected with agriculture or reject the application. The Sub-Divisional Officer shall take a decision on the application within forty five working days from the date of receipt of the application. In case the application is rejected, the Sub-Divisional Officer shall state the reasons in writing for such rejection and inform the applicant of his decision.

**[Provided that if the application for declaration is accompanied with the prescribed fee and in case of joint holding, no objection of co-tenure holders is attached in case of co-tenure holder and if the declaration is not made by the Sub-Divisional Officer with forty-five days as aforesaid, then the declaration shall be deemed to have been made. Tehsildar will make a record of it in the revenue records, with the comment "subject to the order of the Sub-Divisional Officer".*

If any affected party wants to file an objection in relation to the said declaration, it may file an objection in the competent court].

(2) Where a bhumidhar with transferable rights proposes to use in future his holding or part thereof, for industrial, commercial or residential purposes, the Sub-Divisional Officer may on an

application moved by such bhumidhar, after making such enquiry as may be prescribed, either make a declaration that the land may be used for the purpose not connected with agriculture or reject the application, within forty five working days from the date of receipt of the application. In case the application is rejected, the Sub-Divisional officer shall state the reasons in writing of such rejection and inform the applicant of his decision:

Provided further that if the bhumidhar fails to start the proposed non agricultural activity within a period of five years from the date of declaration under this sub-section, then the declaration under sub-section (2) for the holding or part thereof shall lapse:

Provided also that a declaration under this sub-section shall not amount to change of land use and the land shall continue to be treated as agricultural land only. However, the bhumidhar shall be entitled to obtain loan and other necessary permissions, clearances etc. for the activity or project, proposed on the holding or part thereof, for which declaration under this sub-section has been obtained.

(3) A bhumidhar possessing declaration under sub-section (2) for his holding or part thereof, may apply to Sub-Divisional officer for converting declaration under sub-section (2) to a declaration under sub-section (1), after completion of construction activity or start of the proposed non-agricultural activity, within a period of five years from declaration under sub-section (2). On receipt of such an application, the Sub-Divisional officer, after making such enquiry as necessary, shall approve or reject the application within a period of 15 days from the receipt of the application. In case of rejection, he shall record in writing the reasons for such rejection;

Provided that for conversion of declaration under sub-section (2) to a declaration under sub-section (1), the bhumidhar shall be liable to pay only the balance amount of fee payable, calculated at prevailing circle rate, after adjusting the amount already paid by him for declaration under sub-section (2) earlier.

(4) No application for a declaration under sub-section (1) or (2), moved by any co-bhumidhar having undivided interest in bhumidhari land shall be maintainable, unless application is moved by all the co-bhumidhars of such bhumidhari land. In case only one of the co-bhumidhar wants to get a declaration for his share in the land with joint interest, then such an application shall be entertained only after the respective shares of the co-bhumidhars in the land have been divided in accordance with the provisions of law.

(5) The application for declaration [under sub-section (1) or sub-section(2)] shall contain such particulars and shall be made in such manner as may be prescribed.

(6) Where the application under sub-section (1) or sub-section (2) is made in respect of a part of the holding, the sub-divisional officer may, in the manner prescribed, demarcate such part for purposes of such declaration.

(7) No declaration under this section shall be made by the sub-divisional officer, if he is satisfied that the land or part thereof is being used or is proposed to be used for a purpose which is likely to cause a public nuisance or to affect adversely public order, public health, safety or convenience or which is against the uses proposed in the master plan.

(8) In case the land or part thereof for which a declaration under this section is being sought falls within the area

notified under any Urban or Industrial Development Authority, then prior permission of the concerned Development Authority shall be mandatory.

(9) The State Government may fix the scale of fees for declaration under this section and different fees may be fixed for different purposes:

Provided that if the applicant uses the holding or part thereof, for his own residential purpose, no fee shall be charged for the declaration under this section.""

15. In view of Proviso to Section 80(1) as also Sub Section 4 of Section 80 of the Code of 2006, this Court has to see as to whether the application preferred by the petitioner under Section 80(1) of the Code of 2006 was maintainable or not.

16. It would be apt to say here that from the Proviso to Sub Section 1, it appears that to maintain an application "no objection of co-tenure holders is required" and from the Sub Section 4, it appears that "No application for a declaration by any co-bhumidhar having undivided interest in bhumidhari land shall be maintainable, unless application is moved by all the co-bhumidhars of such bhumidhari land and in case only one of the co-bhumidhar wants to get a declaration for his share n the land with joint interest, then such an application shall be entertained only after the respective shares of the co-bhumidhars in the land have been divided in accordance with the provisions of law."

17. From the above indicated facts of the case and sale deed(s), referred above, this Court finds that the boundaries indicated in all the sale deed(s) including the sale deed executed by respondent No.4-Smt. Sukhmeena Singh in favour of respondent Nos. 2 and 3 are the same and described as "**पूरब**–चकरोड कच्चा 1 लट्ठा बादहू खेत नं0–849, 850 आदि, **पश्चिम**–सीमा ग्राम जलालुदीन नगर, **उत्तर**–सीमा ग्राम जलालुदीननगर, **दक्षिण**–गाटा सं0 857 अन्य व्यक्ति।"

18. No other document, except referred above, has been placed before this Court to substantiate the fact that the petitioner purchased part of the Gata No. 853 after due partition by metes and bounds.

19. Further, if there was a partition between Smt. Sukhmeena Singh and Rukmani then the said fact ought to have been mentioned in the sale deed(s) and the same ought to have been explained by the boundaries indicated in the sale deed(s). However, the sale deed(s) are silent on this aspect. Meaning thereby that no settlement took place prior to execution of sale deed(s), indicated above.

20. Thus, from the aforesaid including the boundaries indicated in the sale deed(s), this Court is of the view that without actual partition by metes and bounds, the concerned sold their share in Gata No. 853.

21. So as the map prepared by the advocate commissioner in the injunction suit filed by respondent No.3-Devesh Singh annexed at Page No. 143 of the Paper book is concerned, this Court is of the view that the same can not be relied upon to record a finding that the property was partitioned prior to filing of application under Section 80 of the Code of 2006.

22. Regarding submissions related to Gata No.854 made by Sri Khan, this Court, from the record particularly Annexure No.3 to the petition, finds that total area of Gata No.854 appears to be 0.2870 Hect. and out

of the same, the petitioner purchased 0.10790 Hect. land and therefrom, it further appears that despite joint holding no objection of co-tenure holder was filed nor in the petition it has been specifically stated that the shares of the co-bhumidhars in the land have been divided in accordance with the provisions of law prior to filing of application under Section 80 of the Code of 2006.

23. In view of aforesaid, this Court is of firm view that prior to preferring the application under Section 80 of the Code of 2006, the land/plot(s) in issue i.e. Gata Nos.853 and 854 were not partitioned by metes and bounds, as such, the same was not maintainable in view of proviso to Section 80(1) as also 80(4) of the Code of 2006 and being so, no order could have been passed by the Sub Divisional Magistrate, Sadar, Ayodhya on the said application. The order of Sub Divisional Magistrate, Sadar, Ayodhya would be within jurisdiction under Section 80 of the Code of 2006 if the order is passed on an application which is maintainable as per Section 80 else would be without jurisdiction. In passing the order on an application which itself was not maintainable, the Sub Divisional Magistrate, Sadar, Ayodhya exceeded its jurisdiction. Thus, the order dated 21.04.2022 was an illegal and non-est order as was passed on an application which was not maintainable, as such, subsequent order dated 10.10.2022 passed on an application for setting aside the order dated 21.04.2022, registered as Case No.RST/4456/2022, though passed on the basis of decree in partition suit which is sub-judice in second appeal, can not be said to be a valid/legal order.

24. Regarding maintainability of the revision by Devesh Singh (respondent No.3) alone, this Court is of the view that revision was maintainable. It is in view of the fact that after purchasing some part of Gata No.853, Devesh Singh became the co-bhumidhar/co-tenure holder and being so as also considering the rights of a co-bhumidhar/co-tenure holder in the land in issue, in the proceedings initiated under Section 80 of the Code of 2006 an opportunity of hearing to Devesh Singh was required.

25. If the submissions of Sri Khan on the issue of maintainability are taken on its face value, even then no interference is required in the impugned order. It is for the reason that it is settled principle of law that issuance of a writ or quashing/setting aside of an order if revives another pernicious or wrong or illegal order then in that eventuality the writ court should not interfere in the matter and should refuse to exercise its power conferred upon it under Article 226 of the Constitution of India.

26. In addition to above, in **A.M.Allison vs. B.L.Sen; AIR 1957 SC 227**, an objection was raised that the Deputy Collector had no Jurisdiction to determine the question. The Supreme Court refused to entertain this objection on the ground that the order was challenged in writ petition under Article 226 of the Constitution. It was observed:-

"Proceedings by way of certiorari are "not of course". (Vide Halsbury's 'Laws of England', Hailsharn Edition, Vol. 9, paras 1480 and 1481, pp. 877-878). The High Court of Assam had the power to refuse the writs if it was satisfied that there was no failure of justice, and in these appeals which are directed against the orders of the High Court in applications under Article 226, we could refuse to interfere unless we are satisfied that the

justice of the case requires to. But we are not so satisfied. We are of opinion that, having regard to the merits which have been concurrently found in favour of the respondents both by the Deputy Commissioner, Sibsagar, and the High Court, we should decline to interfere."

27. In **Bux Singh vs. Joint Director of Consolidation, U.P. Lucknow and others; AIR 1966 All 156,** this Court observed "Where orders impugned are equitable and substantial Justice seems to have been done to the parties, the High Court would not be inclined to interfere in its writ jurisdiction merely on the ground that such orders are wrong in law."

28. In **Om Prakash vs. U. P. Secondary Education Service Commission, Allenganj, Allahabad and others, (1990) UPLBEC 983**, the Court observed as under:-

"It is well settled that a decision of an authority, even though without jurisdiction, may not be quashed in proceedings under Article 226 of the Constitution if by the decision the substantial justice is done between the parties."

29. For the reasons aforesaid, this Court is not inclined to interfere in the order impugned dated 11.01.2023 passed by the respondent No.1-Board of Revenue, U.P., Lucknow Accordingly, the petition is **dismissed**. No order as to costs.

(2023) 3 ILRA 188
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.02.2023

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Writ B No. 108 of 2023

Angad Pratap Singh & Ors. ...Petitioners
Versus
Deputy Director Consolidation/Addl. Dist. Magistrate (F/R), Lakhimpur Kheri & Ors. ...Respondents

Counsel for the Petitioners:
Nizam Ali Siddique

Counsel for the Respondents:
C.S.C.

Civil Law - U.P. Consolidation of Holding Act, 1953 - Section 48 - Revision and reference - scope/power of Deputy Director of Consolidation u/s 48 - Remand of case - Section 48 of the Act of 1953 provides ample power to the D.D.C. to examine the correctness/ legality/ propriety of any order which includes the power to examine any finding, whether of fact or law, recorded by any subordinate authority so as the power to re-appreciate any oral or documentary evidence - order remanding the case to the Consolidation Officer when the entire evidence was before him was not proper and the DDC should have decided the matter himself as he was exercising very comprehensive power under section 48 of the Act - remand of the case causes delay and prolongs litigation as well as harassment to the parties - In the instant case the remand order passed by D.D.C. was quashed and as entire material was available before D.D.C. , the matter was remanded to the D.D.C. to decide the matter afresh after affording proper opportunity of hearing to the parties (Para 26, 27)

Allowed. (E-5)

List of Cases cited:

1. Ram Udit Vs D.D.C. MANU/UP/1768/2014

2. Prem Nath & ors. Vs D.D.C., Barabanki & ors. W.P. No. 436 (Consolidation) of 2015

3. Gulab Chand Vs D.D.C. 2019 SCC OnLine All 4756

4. Sheo Nand Vs D.D.C., Allahabad, (2000) 3 SCC 103

5. Ram Jeet Vs D.D.C., Jaunpur & ors., Writ - B No. 42465 of 1999, dt 31.05.2013

6. Bashir Ahmad Vs DDC 1986 RD 164

7. Ram Autar & ors. Vs D.D.C. & ors., 1991 Supp (1) SCC 552

8. Ashwin Kumar Patel Vs Upendra J. Patel, AIR 1999 SC 1125

9. Bhagwat Prasad Vs DDC 2006 RD (101) 383

10. Pheku Vs DDC 2007 RD (103) 402

11. Sitaram Vs DDC 2007 RD (102) 113

12. Babu Lal Vs DDC 2008 RD (104) 521

13. Sheikh Nathu Vs DDC (2009) 106 RD 96

14. Deena Nath & ors. Vs Deputy Director of Consolidation and others, 2010 (110) RD 584

15. Santosh Kumar Vs D.D.C. & ors. Writ-B No.4377 of 2014 dt 29.1.2014

16. Vijay Nath & ors. Vs Deputy Director of Consolidation and others, 2019 (9) ADJ 85

17. Ram Sewak & ors. Vs D.D.C. & ors. Writ-B No. 23608 of 2014 dt 06.05.2014

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

1. Heard Sri Nazim Ali Siddique, learned counsel for the petitioners and Sri Hemant Kumar Pandey, learned State counsel appearing for the respondent Nos. 1 and 2.

2. In view of order proposed to be passed, issuance of notice to respondent Nos. 3 to 26 is hereby dispensed with. Liberty is also provided to these respondents to file an appropriate application of recall of this order, if they are aggrieved by it.

3. By means of this petition, the petitioners have assailed the order dated 22.12.2022, whereby, the respondent No. 1/Deputy Director of Consolidation/ Additional District Magistrate (F/R), Lakhimpur Kheri remanded the matter back to the Consolidation Officer concerned for deciding the case afresh after providing opportunity of hearing to the parties to the litigation. The operative portion of the order dated 22.12.2022 is quoted hereunder for ready reference:-

"मैंने निगरानीकर्तागणों व विपक्षीगणों के विद्वान अधिवक्तागणों को सुना तथा ग्राम के अभिलेखों व भूचित्र आदि का भली–भांति अवलोकन किया। अवलोकन से स्पष्ट है कि प्रश्नगत वाद गाटा संख्या–96 मि0 से संबंधित है, जिसमें मा0 उच्च न्यायालय के रिट याचिका संख्या–20 (सीलिंग)/1993 में पारित आदेश दिनांक 02.08.2004 द्वारा विपक्षीगणों के पिता तरसेम सिंह मृतक को गाटा संख्या–96/1/20.00, 94/1/1.90, 94/4/3.10 पर संक्रमणीय भूमिधर अंकित किया गया है। इस आदेश के अनुपालन में चकबन्दी अधिकारी के बाद संख्या–82/2020–21 अन्तर्गत धारा–21 (1) जोत चकबन्दी अधिनियम में पारित आदेश दिनांक 03.02.2021 द्वारा विपक्षीगण अंगद प्रताप सिंह आदि को गाटा संख्या–96/1/20.00 के सापेक्ष मूल्यांकन का चक प्रदिष्ट किया गया, परन्तु इस आदेश के अनुपालन में तैयार की गयी संशोधन तालिका में निगरानीकर्तागण जो वर्ष 1976 से प्रश्नगत भूमि के पट्टाधारक हैं, उनका चक समाप्त करके सीलिंग में दर्ज किया गया है, जिसका क्षेत्राधिकार चकबन्दी प्राधिकारियों को नहीं है। प्रश्नगत गाटा संख्या–96, जिसका बन्दोबस्ती क्षेत्रफल 44.22 एकड़ अभिलेखों में अंकित है तथा बाद में इसका क्षेत्रफल चकबन्दी में बढ़कर 48.28 एकड़ अंकित किया गया। गाटा संख्या–96 में ही वन भूमि 24.50 एकड़ सम्मिलित है। चकबन्दी अधिकारी द्वारा पारित आदेश में कितना क्षेत्रफल सीलिंग के समय वन भूमि में आरक्षित थी तथा कितनी भूमि सीलिंग से अवमुक्त हुई तथा उनमें

से कितनी भूमि पर किन–किन पट्टेदारों को कितने क्षेत्रफल का पट्टा किया गया ? इस तथ्य का कोई उल्लेख नहीं है। यद्यपि मा0 उच्च न्यायालय द्वारा पारित आदेश के अनुपालन में विपक्षीगणों को गाटा संख्या–96/1/20.00 एकड़ के सापेक्ष चक प्रदिष्ट किया जाना उचित है, परन्तु उससे प्रभावित होने वाले पट्टाधारकों के हितों को भी ध्यान रखना आवश्यक है। गाटा संख्या–96/1/20.00 एकड़ को छोड़कर शेष वन भूमि व पट्टेधारकों के सम्बन्ध में तथ्यपरक विस्तृत आदेश किया जाना आवश्यक है, जिससे कि सम्बन्धित पक्षकारों को अपना पक्ष व साक्ष्य प्रस्तुत करने का अवसर मिल सके। चकबन्दी अधिकारी द्वारा पारित आदेश में प्रभावित पट्टेदारों से आनुपातिक मूल्यांकन खारिज करने का आदेश पारित किया गया है, परन्तु अनुपालन करते समय किसी–किसी पट्टेदार का पूरा चक ही समाप्त कर दिया गया है, जो उचित नहीं है। चकबन्दी अधिकारी द्वारा पारित आदेश की पुष्टि करके बन्दोबस्त अधिकारी चकबन्दी द्वारा भी त्रुटि की गयी है। इसलिए न्यायिक दृष्टिकोण से उचित होगा कि प्रश्नगत वाद परीक्षण न्यायालय को इस निर्देश के साथ प्रत्यावर्तित किया जाये कि वह सभी सम्बन्धित पक्षकारों को सुनकर प्रत्येक बिन्दु पर तथ्यपरक विस्तृत आदेश पारित करते हुए मा0 उच्च न्यायालय द्वारा पारित आदेश का अनुपालन करना सुनिश्चित करें। तद्नुसार सभी निगरानियां स्वीकार किये जाने योग्य हैं। उपरोक्त विवेचनानुसार आदेश हुआ कि :–

आदेश

उपरोक्त सम्सत निगरानियां स्वीकार की जाती है। चकबन्दी अधिकारी के वाद संख्या–82/20–21 में पारित आदेश दिनांक 03.02.2021 एवं बन्दोबस्त अधिकारी चकबन्दी की अपील संख्या–376 लगायत 384 में पारित आदेश दिनांक 26.05.2022 निरस्त किये जाते हैं। वाद चकबन्दी अधिकारी अन्तिम अभिलेख, प्रथम, लखीमपुर–खीरी को इस निर्देश के प्रत्यावर्तित किया जाता है कि वह सम्बन्धित पक्षकारों को सुनकर प्रत्येक बिन्दु पर तथ्यपरक विस्तृत आदेश पारित करना सुनिश्चित करें। पक्षगण चकबन्दी अधिकारी (उपरोक्त) के न्यायालय में दिनांक 25.01.2023 को पेश हों। यही आदेश निगरानी संख्या– 524/202254104300002203, 525/202254104300002204, 526/202253104300002205, 527/202254104300002206, 528/202254104300002207, 529/202254104300002208 एवं 530/202254104300002209 पर भी लागू होगा। उपरोक्त समस्त निगरानी पत्रावलियां बाद आवश्यक कार्यवाही संचित अभिलेखागार हो।"

4. From the order impugned dated 22.12.2022 including the operative portion of the same, quoted above, it is apparent that the Consolidation Officer has to provide only proper opportunity of hearing to the parties to the litigation and thereafter he has to pass a reasoned order on each issue.

5. While assailing the impugned order dated 22.12.2022, learned counsel for the petitioner stated that the order of remand, under challenge, dated 22.12.2022 is unsustainable in the eye of law particularly in view of explanation given in Section 48(3) of U.P. Consolidation of Holding Act, 1953 (hereinafter referred to as the "Act of 1953"). As such, indulgence of this Court is required in the matter.

6. In continuation, it is further stated that all the material was available before the Consolidation Officer and the Act of 1953 itself provides wide power to the Consolidation Officer, as appears from the explanation given under Section 48(3) of the Act of 1953 and he ought to have decided the case of the parties on merits after providing proper opportunity of hearing to them. Thus, the respondent No. 1 erred in law and fact while passing the order impugned dated 22.12.2022.

7. Sri Pandey, learned State counsel assisted this Court on the issue involved in the present petition. He also could not dispute the power of respondent No. 1 under Section 48(3) of the Act of 1953.

Considered the submissions advanced by the learned counsel for the parties and perused the record.

8. In order to decide the present petition, this Court feels it appropriate to

reproduce Section 48 of the Act of 1953, which is as under:-

"[48. Revision and reference. - (1) The Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order] [other than an interlocutory order] passed by such authority in the case or proceedings, may, after allowing the parties concerned an opportunity of being heard, make such order in the case or proceedings as he thinks fit.

(2) Powers under sub-section (1) may be exercised by the Director of Consolidation also on a reference under sub-section (3).

(3) Any authority subordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under sub-section (1).

[Explanation. -] [(1)] For the purposes of this section, Settlement Officers, Consolidation, Consolidation Officers, Assistant Consolidation Officers, Consolidator and Consolidation Lekhpals shall be subordinate to the Director of Consolidation.

Explanation (2) - For the purposes of this section the expression 'interlocutory order' in relation to a case or proceeding, means such order deciding any matter arising in such case or proceeding or collateral thereto as does not have the effect to finally disposing of such case or proceeding.

[Explanation (3). - The power under this section to examine the correctness, legality or propriety of any order includes the power to examine any finding, whether of fact or law, recorded by any subordinate authority, and also includes the power to re-appreciate any oral or documentary evidence.]

9. At this stage, it is also appropriate to refer various pronouncements on the scope/power of Deputy Director of Consolidation under Section 48 of the Act of 1953.

10. In the judgment dated 24.09.2014 passed by this Court in the case of **Ram Udit v. D.D.C. reported in MANU/UP/1768/2014,** this Court considering the Scheme of the Act of 1953 and Section 48 observed as under:-

"10. The Scheme of the statute contemplates a tentative plan, inviting objection from stake-holder, i.e. tenure holder, and, after considering the same, finalization of plan, i.e., allotment of Chaks. There against appellate power has been conferred upon SOC under Section 21(2) of Act 1953. The power which is exercised by DDC, is termed "Revision and reference" under Section 48 of Act, 1953.

11. The original Section 48, as enacted initially, read as under:

"48. Revision.-Director of Consolidation may call for the record of any case if the Officer (other than the Arbitrator) by whom the case was decided appears to have exercised a jurisdiction not vested in him by law or to have failed to exercise jurisdiction so vested, or to have acted in the exercise of his jurisdiction illegally or with substantial irregularity and may pass such orders in the case as it thinks fit."

12. It was amended by substitution by U.P. Act No. 24 of 1956 as under:

"48. Powers of Director of Consolidation to call for records and to revise orders.-The Director of Consolidation may call for the record of any case or proceeding if the Officer (other than the Arbitrator) by whom the case was decided or proceeding taken appears to have exercised jurisdiction not vested in him by law or to have failed to exercise jurisdiction so vested, or to have acted in the exercise of his jurisdiction illegally or with substantial irregularity and may pass such orders in the case as it thinks fit."

(amendment in bold)

13. Within a short period, it was again amended by U.P. Amendment Act No. 38 of 1958 as under:

"48. Revision.-The Director of Consolidation may call for the record of any case decided or proceedings taken, where he is of opinion that a Deputy Director, Consolidation has-

(i) exercised jurisdiction not vested in him in law, or

(ii) failed to exercise jurisdiction vested in him, or

(iii) acted in the exercise of his jurisdiction illegally or with substantial irregularity, and as a result of which, substantial injustice appears to have been caused to a tenure-holder and he may 4, after affording reasonable opportunity of hearing to the parties concerned, pass such order in the case or proceeding as he thinks fit."

(amendment in bold)

14. Section 48 underwent a minor amendment vide Section 39 of U.P. (Amendment) Act No. VIII of 1963. An Explanation was added by Act No. 4 of 1969 with retrospective effect. Major amendment came to be made by U.P. Act No. 20 of 1982 inasmuch as, in sub section(1) the words "other than an interlocutory order" were inserted w.e.f. 10.11.1980. The explanation inserted in 1969 was re-numbered as Explanation- (1) by Act No. 20 of 1982 w.e.f. 10.11.1980 and then Explanation(2) was added w.e.f. 10.11.1980.

15. Presently, Section 48 reads as under:

"48. Revision and reference.-(1) The Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order [other than interlocutory order] passed by such authority in the case of proceedings and may, after allowing the parties concerned an opportunity of being heard, make such order in the case of proceedings as he thinks fit.

(2) Powers under Sub-section (1) may be exercised by the Director of Consolidation also on a reference under Sub-section (3).

(3) Any authority subordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under subsection (1).

Explanation (1)-For the purposes of this section, Settlement Officer, Consolidation, Consolidation Officers, Assistant Consolidation Officers, Consolidator and Consolidation Lekhpals shall be subordinate to the Director of Consolidation.

Explanation (2). For the purpose of this section the expression 'interlocutory order' in relation to a case or proceedings, means such order deciding any matter arising in such case or proceeding or collateral thereto as does not have the effect

of finally disposing of such case or proceeding.

Explanation (3).-The power under this section to examine the correctness, legality or propriety of any order includes the power to examine any finding, whether of fact or law, recorded by any subordinate authority, and also includes the power to re-appreciate any oral or documentary evidence."

(emphasis added)

16. Section 48 as it was initially enacted came to be considered in Sher Singh (dead) Vs. Joint Director of Consolidation and others MANU/SC/0514/1978 : (1978) 3 SCC 172. The Court observed that a bare reading show that it is pari materia with Section 115 CPC which confines revisional jurisdiction of High Court to cases of illegal or irregular exercise or non exercise or illegal assumption of jurisdiction by subordinate Courts. If a subordinate court is found to possess the jurisdiction to decide a matter, it cannot be said to exercise it illegally or with' material irregularity even it decides the matter wrongly. Relying on the cases interpreting Section 115 CPC, the Court held that whatever revisional jurisdiction was available to High Court under Section 115, the same was the scope of revisional jurisdiction of DDC under Section 48 and it has no jurisdiction to go into errors of facts. The Court said that an erroneous decision on a question of fact or of law reached by subordinate court which has no relation to question of jurisdiction of that court, cannot be corrected by High Court under Section 115 CPC and same would apply to DDC under Section 48. The Court further observed that consolidation authorities subordinate to Joint Director possess plenary jurisdiction and competence to go into the question of correctness or otherwise of entries in revenue records. If there are concurrent findings of fact of two Courts, which do not leave any ground, as observed above, in revisional jurisdiction, interference by Joint Director of Consolidation would not be competent. In para 16 of the judgment, the Court said:

"Thus the subordinate Consolidation authorities not having acted illegally in exercising their jurisdiction, the Joint Director of Consolidation was not competent to interfere with their decisions."

17. Section 48 as amended in 1963 then came to be considered in Ramakant Singh Vs. Deputy Director of Consolidation, U.P. and others MANU/UP/0026/1975 : AIR 1975 All 126 but therein the Court while considering Section 48(1), to the question, whether Deputy Director of Consolidation, once has called for record, is it incumbent on him to decide the matter on merit or it can decline and dismiss the revision on any technical ground like lack of impleadment of proper party etc.

18. Amended section 48 in 1963, then came to be considered in Shanti Prakash Gupta Vs. DDC 1981 SCC (Suppl) 73. Therein the Court observed that Section 48 as then stood, vide amendment of 1963, was wider than Section 115 CPC. However, it proceeded to hold that Director should not lightly interfere with discretion of C.O. unless the order sought to be reversed is palpably erroneous or likely to cause miscarriage of justice. To the same effect and imposing similar restriction, observations were made in Ram Dular Vs. Dy. Director of Consolidation MANU/SC/1004/1994 : (1994) Supp(2) SCC 198 as under:

"It is clear that the Director had power to satisfy himself as to the legality of the proceedings or as to the correctness of the proceedings or correctness, legality or

propriety of any order other than interlocutory order passed by the authorities under the Act. But in considering the correctness, legality or propriety of the order or correctness of the proceedings or regularity thereof it cannot assume to itself the jurisdiction of the original authority as a fact-finding authority by appreciating for itself of those facts de novo. It has to consider whether the legally admissible evidence had not been considered by the authorities in recording a finding of fact or law or the conclusion reached by it is based on no evidence, any patent illegality or impropriety had been committed or there was any procedural irregularity, which goes to the root of the matter, had been committed in recording the order or finding."

19. A slight different observation came to be made in Preetam Singh Vs. Assistant Director of Consolidation and others MANU/SC/0742/1996 : (1996) 2 SCC 270 where the Court said:

"When the matter was in revision before the Assistant director (Consolidation), he had the entire matter before him and his jurisdiction was unfettered. While in seisin of the matter in his revisional jurisdiction, he was in complete control and in position to test the correctness of the order made by the Settlement Officer (Consolidation) effecting remand. In other words, in exercise of revisional jurisdiction the Assistant Director (Consolidation) could examine the finding recorded by the Settlement Officer as to the abandonment of the land in dispute by those tenants who had been recorded at the crucial time in the Khasra of 1359 Fasli. That power as a superior court the Assistant Director (Consolidation) had, even if the remand order of the Settlement Officer had not been specifically put to challenge in separate and independent proceedings. It is noteworthy that the Court of the Assistant Director (Consolidation) is a court of revisional jurisdiction otherwise having suo moto power to correct any order of the subordinate officer. In this situation the Assistant Director (Consolidation) should not have felt fettered in doing complete justice between the parties when the entire matter was before him. The war of legalistics fought in the High Court was of no material benefit to the appellants. A decision on merit covering the entire controversy was due from the Assistant Director (Consolidation). (para-6)

(emphasis added)

20. Yet in Ram Avtar Vs. Ram Dhani, MANU/SC/0034/1997 : AIR 1997 SC 107, the Court, in para 8, observed:

"This Court has repeatedly pointed out that howsoever wide the power under statutory revision may be in contrast to Section 115 of the Code of Civil Procedure, still while exercising that power the authority concerned cannot act as a Court of appeal so as to appreciate the evidence on record for recording findings on question of fact."

21. These observations again put the things in the shape bringing the scope of jurisdiction under Section 48 nearer to jurisdiction as contained in Section 115 CPC.

22. Section 48(1) as it stood before its amendment in 1963 and subsequent thereto, both came to be noticed in Sheshmani and another vs. The Deputy Director of Consolidation, District Basti, U.P. and others MANU/SC/0079/2000 : 2000(2) SCC 523. Referring to earlier decision in Sher Singh Vs. Joint Director of Consolidation (supra) and Ram Dular Vs. DDC (supra) and the intervening amendment, the Court followed the observations made in Ram Dular, as

noticed above and then upheld the order passed by DDC holding that orders of CO. and Additional Settlement Consolidation Officer were against settled principles of law, therefore, DDC was justified in exercise of revisional power, for coming to a different conclusion.

23. It is in these circumstances, Legislature intervened by inserting Explanation-3, by U.P. Act No. 3 of 2002, giving effect from 10.11.1980 but in Karan Singh Vs. DDC 2003(94) RD 382 this Court said that even after addition of Explanation-3, DDC cannot substitute its own finding in place of subordinate authorities.

24. Recent decision in Jagdamba Prasad Vs. Kripa Shankar MANU/SC/0274/2014 : (2014) 5 SCC 707 which has also considered Section 48 as amended in 1963, in para 15, following the earlier decision in Sher Singh Vs. Joint Director of Consolidation (supra) it has said:

"15. According to the legal principle laid down by this Court in the case mentioned above, the power of the Revisional Authority under Section 48 of the Act only extends to ascertaining whether the subordinate courts have exceeded their jurisdiction in coming to the conclusion. Therefore, if the Original and Appellate Authorities are within their jurisdiction, the Revisional Authority cannot exceed its jurisdiction to come to a contrary conclusion by admitting new facts either in the form of documents or otherwise, to come to the conclusion. Therefore, we answer point no. 1 in favour of the appellants by holding that the Revisional Authority exceeded its jurisdiction under Section 48 of the Act by admitting documents at revision stage and altering the decision of the subordinate courts."

25. It is thus difficult to observe that Explanation III to Section 48 has brought the scope of revision at par with the appellate jurisdiction so as to assess the evidence on pure issue of fact and recording findings de novo. Revisional power is not a power of first or second appellate Court which are final Courts of fact and findings recorded therein would be possible to be interfered under Section 48 on the ground discussed in Ram Dular (Supra), Sheshmani (Supra) and Jagdamba Prasad (supra).

26. Impugned orders in these matters are all subsequent to 1980 and, therefore, could be governed by aforesaid provision as it is. Sub Section (1) of Section 48 in effect deals revisional power while sub sections (2) and (3) relate to reference made by an authority subordinate to Director of Consolidation. From a bare and plain reading of Section 48(1) it is evident that Director of Consolidation has been given power to call for and examine any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself (i) to the regularity of the proceedings and (ii) to the correctness, legality or propriety of any order."

11. In the judgment dated 18.06.2015 passed in **Writ Petition No. 436 (Consolidation) of 2015 (Prem Nath and others vs. D.D.C., Barabanki and others)**, this Court observed as under:-

"Appeal under Section 11 and Revision under Section 48 of Act 1953 are two distinct statutory remedies. The scope of the two remedies is also different. Powers of revision under Section 48 and appeal under Section 11 are distinct. The appellate powers are of wider amplitude. Howsoever wide the power under Section 48 may be, even after amendment made in

the year 2002, it does not permit the revisional authority to summon the records and decide the merits of an appeal pending before the SOC under Section 11 without the appellate authority having passed any order deciding the appeal or an order deciding any matter which has the effect of disposing of the appeal. Such action is destructive of the statutory remedy of appeal under the Act 1953. No doubt, the DDC has suo moto powers under Section 48 but it does not mean that he can call for the record of appeal pending before the SOC and decide the same on merits without the appellate authority having decided the same. Reference may be had in this regard to a decision of this Court in the case of Ranjeet and others Vs. Dy. Director of Consolidation Ballia and others reported in 1999(90) RD 363 wherein during pendency of appeal against an order of subordinate authority a revision was filed before the DDC under Section 48 against the same order. Reliance was placed by the respondents therein upon various decision including a Full Bench decision of this Court in the case of Ramakant Singh Vs. Deputy Director of Consolidation, reported in 1974 (suppl.) RD 262. This Court, after considering the said Full Bench and other decisions, held as under:--

"6. The facts of these three cases relied upon by the learned counsel for the respondent no. 2 are different, in all these three cases the appeal before the Settlement Officer was not pending, in the instant case, as seen above the appeal and cross-appeals were pending before the Settlement Officer (Consolidation), the petitioners specifically urged before the Deputy Director of Consolidation that in view of the pendency of the appeal, the revision was not maintainable. The present case is a case where the jurisdiction exercised by the Deputy Director of Consolidation is destructive of the statutory remedy of appeal and it is a fit case which calls for interference in petitions under Articles 226/227 of the Constitution of India."

In another case reported in [2007 (102) RD 250] Chhakku Ram and others Vs. Deputy Director of Consolidation, Varanasi and others a revision was filed under Section 48 challenging the order of SOC dismissing the appeal on the ground of limitation. The issue was as to whether while considering validity of the order passed by the SOC the revisional authority could have considered and decided the merits of the controversy also. This Court again after considering the Full Bench decision in Ramakant Singh's case (supra) held as under:--

"3. Counsel for the respondents Sri Sankatha Rai assisted by Sri Pradip Rai made two submissions on the point of maintainability. First that even if the Deputy Director of Consolidation has not given any specific finding regarding the condonation of delay the delay would be deemed to have been condoned by him when he entered into the merits of the case. On this point he relied a decision in M. B. Shah V. B. N. Agarwal (AIR 2002 SC 451). This decision has no application to the present case. It is not in dispute that the revision, which was filed by respondent No. 2 was within time against the order of the Settlement Officer Consolidation. It was the appeal before the Settlement Officer Consolidation, which had been dismissed on the ground of limitation. It is also submitted that the record of the case was before the Deputy Director of Consolidation and he could, therefore, decide the case on merits. In support reliance is placed upon the Full Bench decision of this Court in Ramakant Singh V. Deputy Director of Consolidation (AIR 1975 Alld. 126). In that case the question

referred was whether after the record is called for under section 48 the Deputy Director of Consolidation can dismiss the revision for non-impleadment of a necessary party in the memorandum of revision or he can decide the case after hearing the party not impleaded. It was held that after the record has been examined the Deputy Director of Consolidation can exercise the revisional jurisdiction suo moto and take appropriate decision after hearing the affected parties. The Full Bench further holds that if the revision application is not defective the exercise of the revisional jurisdiction shall be at the instance of the parties and not suo moto. In the present case the revision was not defective. The exercise of jurisdiction was therefore at the instance of the petitioner and not suo moto. The Deputy Director of Consolidation was therefore required to examine the correctness of the order of the Settlement Officer Consolidation dismissing the appeal on the ground of limitation, which was the order challenged and not the merits of the chak allotment. Counsel for the petitioners relied upon a decision of this Court in Bashir Ahmad Khan V. Deputy Director of Consolidation, Ghazipur and others (2005(98) RD 378) in which this Court in similar circumstances has taken the view that the proper course for the Deputy Director of Consolidation in a revision against an order of Settlement Officer Consolidation dismissing the appeal on the question of limitation is to examine the correctness of that order. It appears from the facts and circumstances of this case too the proper course to be adopted by the Deputy Director of Consolidation was to examine the correctness of the order of the Settlement Officer Consolidation, which he failed to do. As regards the merits also I find that the order of the Deputy Director of Consolidation cannot be sustained. The contention of the learned counsel for the petitioners is that the loss, which would be occasioned to the petitioners by the modification in the chaks made by the Deputy Director of Consolidation has not been considered. Reliance is placed upon the averments made in paragraph 6 of the writ petition in which it is stated that there is a house of the petitioner No. 2 adjoining plot No. 368. If it be true that the petitioner No. 2 does have his house adjoining plot No. 368 it would be a circumstance in favour of the petitioner No. 2 for allotment of a chak near his abadi. No opinion, however, is being expressed by this Court upon this point as it is proposed to remand the case to the Deputy Director of Consolidation for fresh decision."

In the case at hand there has been no adjudication by the SOC either of the appeal in entirety or of any matter/issue. Even after amendment in the year 2002 and addition of explanation 3 to Section 48 the revisional authority is not empowered to adopt the course of action as done by him in this case. Explanation 3 only empowers him to enter into the question of fact to examine any finding recorded by the subordinate authority whether on fact or law and in this context it includes the power to re-appreciate the evidence for the purpose of examination of correctness, legality or propriety of any such finding. It does not mean that the revisional authority can call for the records of the appellate authority and decide the appeal himself in exercise of his revisional powers without any finding having been recorded by the appellate authority or appeal itself having been decided. Reference may be made in this regard to the pronouncement made by this Court in the case of Karan Singh (Dead) Through L. Rs. Vs. Deputy Director of Consolidation, Aligarh and others,

reported in [2003(94) RD 382 wherein after noticing the decision of the apex court in Gaya Deen (D) through L.Rs and others Vs. Hanuman Prasad (D) through L. Rs and others reported in [2001 (92) RD 79 (SC) as also the amendment of 2002 the Court held in para 6 as under:--

"..... The amendment of Section 48 of the Act has widened the scope of the powers of the Deputy Director of Consolidation. It has given power to him to reappraise the evidence but it nowhere provided that the Deputy Director of Consolidation will have jurisdiction to reverse the findings recorded by the authorities below and can substitute his own findings. The Apex Court in Gaya Din (D) through L.Rs. and others Vs. Hanuman Prasad (D) through L.Rs. and others [(2001(92) RD 79 (SC)] specifically laid down that the Deputy Director of Consolidation has got no jurisdiction to act as the Consolidation Officer or the Settlement Officer Consolidation, otherwise there will remain no difference in the powers of the Consolidation Officer, the Settlement Officer Consolidation and the Deputy Director of Consolidation while dealing with the cases originally, in appeal and revision. In case the Deputy Director of Consolidation was of the opinion that the findings recorded were bad in law, he could set aside the same after reappraisal of the evidence and could remand the case for decision afresh."

Reference may also be made to another decision of this Court in the case of Bashir Ahmad Khan (D) through L. Rs. V. Deputy Director of Consolidation and others reported in 2005(1) AWC 924 (Alld) wherein the question which arose for consideration was regarding jurisdiction of the revisional authority to decide a revision challenging the order of the appellate authority dismissing the appeal on the ground of limitation, on merits. A learned single Judge of this Court referring to a Division Bench judgment of this Court in the case of Tirath V. Joint Director of Consolidation reported in 1985 RD 276 held as under:--

"10. A Division Bench of this Court vide judgment in the case of Tirath V. Deputy Director of Consolidation (supra), answered the question in negative. While repealing the contention that authority exercising the power under Section 48 of the Act have very wide power including suo moto power and can look into the record and if there is any defect it can be corrected by him, it was observed by the Division Bench as follows:

"In this view of the matter, the revisional authority was called upon to examine the record of the case as it pertain to the appeal before appellate authority. The principal reason given by the appellate authority for dismissing the appeal was that it was barred by time. The revisional authority had to see whether the order was justified in law or not. It had to examine whether any application has been made for condonation of delay and whether any adequate reason has been given for the same or not, and whether the order dismissing the appeal as time barred was justified in the circumstances of the case and we would observe here that in a revision under Section 48 (1) of the Act where there is no defect in the revision itself to merit its rejection in limine, the revisional authority has to confine itself to the decision in the appeal and the ground given for the decision in that order. We are further of the opinion that it was not open to the revisional authority to go into the question of merits while exercising the powers conferred under Section 48 (1) in the above circumstances."

The law laid down by the Division Bench in the case of Tirath V.

Deputy Director of Consolidation (supra) is squarely applicable to the facts of this case.

11. In the present case also the order passed by Settlement Officer Consolidation was not an adjudication of the claim of the parties on merits, but an order dismissing the appeal as barred by limitation. The Deputy Director of Consolidation without considering the legality or otherwise, of the order passed by the Settlement Officer Consolidation and without setting aside his findings straightway proceeded to decide the revision on merits. It was incumbent upon the Deputy Director of Consolidation to have considered the order of Settlement Officer Consolidation refusing to condone the delay in filing the appeal on its own merit and if satisfied about the sufficiency of the ground for delay ought to have set aside the order of the Settlement Officer Consolidation dismissing the appeal as time barred and remand the case back to him to be decided on merits. It was not open to him to proceed and decide the revision on merits."

Thus clearly the scope of revision under Section 48 and that of appeal under Section 11 being different and two separate statutory remedies having been provided, there being no adjudication of the appeal nor of any substantial issue involved therein by the appellate authority, it was not open for the Deputy Director of Consolidation to decide the merits of the pending appeal in exercise of his powers under Section 48. It was clearly not the scope of revision except to the limited extent pointed out hereinabove. The entire dispute was not available for adjudication before the revisional authority. The revision itself was not maintainable as the orders impugned were purely interlocutory."

12. This Court in the judgment dated 30.04.2019 passed in the case of **Gulab Chand v. D.D.C.** reported in **2019 SCC OnLine All 4756** has observed as under:-

"14. This Court has given a thoughtful consideration to rival submissions advanced on both sides. It is true, no doubt, that powers of the Deputy Director of Consolidation under Section 48 of the Act have always been regarded as wide, though inhibited in some regard, being a Court of Revision. The import of the powers of the Deputy Director of Consolidation under Section 48 of the Act as they have been always understood has been succinctly laid down by the Supreme Court in *Sheo Nand v. Deputy Director of Consolidation, Allahabad,* (2000) 3 SCC 103, where in para graphs 20 & 21 of the report, it has been held:

"20. The section gives very wide powers to the Deputy Director. It enables him either suo motu on his own motion or on the application of any person to consider the propriety, legality, regularity and correctness of all the proceedings held under the Act and to pass appropriate orders. These powers have been conferred on the Deputy Director in the widest terms so that the claims of the parties under the Act may be effectively adjudicated upon and determined so as to confer finality to the rights of the parties and the revenue records may be prepared accordingly.

21. Normally, the Deputy Director, in exercise of his powers, is not expected to disturb the findings of fact recorded concurrently by the Consolidation Officer and the Settlement Officer (Consolidation), but where the findings are perverse, in the sense that they are not supported by the evidence brought on record by the parties or that they are against the weight of evidence, it would be the duty of the Deputy Director to scrutinise the whole case again so as to determine the correctness, legality or propriety of the orders passed by the authorities subordinate

to him. In a case, like the present, where the entries in the revenue records are fictitious or forged or they were recorded in contravention of the statutory provisions contained in the U.P. Land Records Manual or other allied statutory provisions, the Deputy Director would have full power under Section 48 to reappraise or re-evaluate the evidence-on-record so as to finally determine the rights of the parties by excluding forged and fictitious revenue entries or entries not made in accordance with law."

13. The Supreme Court in the case of *Sheo Nand vs. D.D.C., Allahabad, (2000) 3 SCC 103* also said that, "it would be the duty of the Deputy Director to scrutinise the whole case so as to determine the correctness, legality or propriety of the orders passed by the authorities subordinate to him."

Regarding the scope of the revisional powers of the Deputy Director of Consolidation under Section 48 of the Act, this Court in *Ram Jeet v. Deputy Director of Consolidation,* Jaunpur and others, Writ - B No. 42465 of 1999, decided on 31.05.2013, observed as under:-

"17. ..... Supreme Court in Ram Dular v. DDC, 1994 Supp (2) SCC 198, Preetam Singh v. DDC, (1996) 2 SCC 270, Sheo Nand v. DDC, (2000) 3 SCC 103, Gulzar Singh v. DDC, (2009) 12 SCC 590 has consistently held that Deputy Director of Consolidation has very wide power to decide issue relating to fact and law both under Section 48 of the Act after re-appreciating the evidence on record. Apart from it Explanation III has been added in Section 48 of the Act with retrospective effect from 10.11.1980 which provides that the power under this Section to examine the correctness, legality or propriety of any order includes the power to examine any finding, whether of fact or law, recorded by any subordinate authority and also includes the power to re-appreciate any oral or documentary evidence. The case law relied upon by the counsel for the petitioner does not hold a good law and contrary to the decision of the Supreme Court."

14. As in this case, the remand order passed by Deputy Director of Consolidation is in issue, this Court also feels it appropriate to refer some judgments on this aspect.

15. In the case of Bashir Ahmad Vs. DDC reported in 1986 RD 164, it has been held that an order remanding the case to the Consolidation Officer when the entire evidence was before him was not proper and the DDC should have decided the matter himself as he was exercising very comprehensive power under section 48 of the Act.

16. In the judgment rendered in the case of Ram Autar and others vs. Deputy Director of Consolidation and others, 1991 Supp (1) SCC 552, the Supreme Court has observed that the High Court should have remanded the matter to the Deputy Director of Consolidation and not to the Consolidation Officer as that would have saved the parties from fighting at three stages and would have expedited the final disposal of the matter. The question before the Supreme Court was with regard to the objections under Section 9-A of the U.P. Consolidation of Holdings Act being decided by the Consolidation Officer in favour of one party against which, the other party went in appeal. In the appeal, the objections that were rejected by the Consolidation Officer, were said to be valid

objections and were allowed. The appellants after unsuccessfully moving the Deputy Director of Consolidation in revision filed a writ petition before the High Court, which was dismissed by the Writ Court and the appellants thereafter filed an appeal, which was also dismissed by the Division Bench. The Supreme Court observed that the case of the respondents was that no notice was ever sent to them at the final stage when the order was passed in favour of the appellants and without hearing the order being ex-parte, ought to have been set aside and the matter was rightly remanded. The Supreme Court, however, observed that the High Court should have remanded the matter to the Deputy Director of Consolidation and not to the Consolidation Officer as that would have saved the parties from fighting at three stages before the revenue officers and would have expedited the final disposal of the case.

17. Further, the Supreme Court in the judgment passed in the case of Ashwin Kumar Patel vs. Upendra J. Patel, AIR 1999 SC 1125, observed that exercising power of remand is a luxury exercise of jurisdiction. The Court should refrain from remanding the case and should make endeavour to decide the case finally instead of remanding the case.

18. This Court again in the case of Bhagwat Prasad Vs. DDC reported in 2006 RD (101) 383 has held that the revisional court is fully empowered to examine the findings on fact or on law and there is no need to remand the case. Under the circumstances, directions were issued to the revisional court to decide the revision itself. Same view has been taken in the case of Pheku Vs. DDC reported in 2007 RD (103) 402.

19. In the Case of Sitaram Vs. DDC reported in 2007 RD (102) 113, this Court set aside the order of remand and directed the DDC to decide the matter himself after taking additional evidence, if necessary.

20. In the case of Babu Lal Vs. DDC reported in 2008 RD (104) 521, this Court has held that order of remand is to be resorted to in very exceptional cases/ circumstances as it consumes precious time of the Court and causes monetary loss to both sides, besides unwarranted harassment.

21. In the case of Sheikh Nathu Vs. DDC reported in (2009) 106 RD 96, this Court has found that the Consolidation Officer and the Settlement Officer of Consolidation on the basis of the material available on record held the objection of the respondents to be meritless. The DDC remanded the matter without setting aside the findings of the subordinate authorities. This Court, therefore, held that this order of remand amounted to giving a fresh lease of life to the litigation and that remand order should not be passed in a routine manner.

22. In Deena Nath and others vs. Deputy Director of Consolidation and others, 2010 (110) RD 584, wherein it has been held that an order of remand cannot be treated as an interlocutory order within the meaning of Explanation-2 of Section 48 of the Act and a revision was maintainable and also observed that since the entire record was available, instead of remanding the matter, it should have been decided on merits by the revisional court.

23. A coordinate Bench of this Court in Writ-B No.4377 of 2014 (Santosh Kumar vs. D.D.C. and others), decided on 29.1.2014, has observed that in case the

order of the Settlement Officer of Consolidation suffered from errors, the Deputy Director of Consolidation could have considered the matter on his own and passed suitable orders instead of remanding the case. The remand of the case causes delay and prolongs litigation as well as harassment to the parties.

24. A coordinate Bench of this Court in Vijay Nath and others vs. Deputy Director of Consolidation and others, 2019 (9) ADJ 85, has observed that after insertion of Explanation 3 to Section 48 of the Act, the Deputy Director of Consolidation is empowered to examine any finding whether of fact or law recorded by the subordinate authority and also to reappreciate any oral or documentary evidence. This Court has observed that instead of remanding the matter to the Consolidation Officer, the Deputy Director of Consolidation should have exercised his jurisdiction under Section 48(3) and should have decided the matter on merits.

25. In the judgment dated 06.05.2014 passed in Writ-B No. 23608 of 2014 (Ram Sewak and others vs. D.D.C. and others), this Court refused to interfere in the order of remand after observing as under:-

"It is admitted case that two separate wills were set up by the parties. The objection was decided by the Asstt. Consolidation Officer (The ACO) on the basis of a compromise. It is settled legal position that the Asstt. Consolidation Officer is empowered to pass order only on the basis of conciliation and not on merits. Under these circumstances, it can be safely stated that the validity of the wills set up was not examined by the ACO when he passed the order on the basis of compromise. In this connection, it is also relevant to note that the compromise was not accepted as a whole.

The order passed on the basis of compromise was challenged by means of a reivision without any intermediate appeal having been preferred. The DDC remanded the matter for a decision afresh after affording opportunity to the parties to adduce evidence.

From the narration of the above facts, it is clear that no evidence was led by the parties. Even if, evidence, if any, was filed, no occasion arise for appreciation of the same. Moreover, in view of the fact that the parties were settling their dispute by means of an alleged compromise there was no occasion for them to have adduced evidence as regards their respective claims on merits.

Explanation-3 to section 48 of the Act empowers the DDC to reappreciate the evidence on record and further empowers him to record a finding contrary to one that has been recorded by the Court below. However, in the instant case that there has been no previous appreciation of evidence . Therefore, the DDC cannot be said to have failed to exercise his jurisdiction to reappreciate the evidence in the absence of any appreciation of the same by the subordinate courts.

Under these circumstances, I am of the opinion that the order of remand is not liable to be interfered with.

In my considered opinion, there is another reason on account of which the order passed by the DDC requires no interference.

While deciding WP No. 42 (Cons) of 2007; Hari Lal & others Vs. DDC, Barabanki which involved a similar controversy, I have recorded as under:

"Even otherwise, it is evident from the scheme of the Act itself that the orders passed by the first court, namely, the

Assistant Consolidation Officer or Consolidation Officer, whether in title proceedings or in allotment proceedings, are subject to appeal before the SOC and, thereafter, subject to the revisional jurisdiction of the DDC under section 48 of the Act. It is also well settled that the right of appeal is a statutory right and no appeal can be filed unless the statute provides for the same. However, once the statute provides for an appeal against any order passed in the proceedings under the Act, which is further subject to the revisional jurisdiction under section 48, in case the contention of the learned counsel for the respondent is accepted, the petitioners would stand deprived of their right to appeal or revision, as is provided under the Act. Since this statutory remedy of appeal is provided under the Act, allowing the order of the DDC to stand, in my opinion, it would deprive the petitioners not only of the statutory remedy of appeal but also a subsequent revision, which for all practical purposes is a second appeal available to a party under the scheme of the Act. In any case, every party should be provided at least one appeal in the proceedings in view of the scheme of the Act itself, and this requirement would stand fulfilled if the matter is remanded to the SOC for a fresh decision. Against the order passed by the SOC, the aggrieved party will have the remedy of filing a revision, a second innings, which would be in accordance with the general scheme of the Act itself. In view of the same and also in view of the fact that the DDC has passed the order without considering the case of the petitioners and without adverting to the evidence filed by them, the impugned order is liable to be set aside".

Thus, is the facts and circumstances of this case, setting aside the order of remand and directing the DDC to decide the case himself would, in my considered opinion, amount to doing violence to the basic scheme of the Act itself."

26. In view of the law, referred above, on the issue of power of Deputy Director of Consolidation under Section 48 of the Act of 1953 as also regarding justification of remand of a case by Deputy Director of Consolidation, this Court considered the order impugned dated 22.12.2022 and a bare perusal thereof, reflects that for the purposes of remanding the case to the Consolidation Officer, the respondent No. 1 has pointed out some errors in the order(s) impugned before him, which to the view of this Court, ought to have been looked into in exercise of power under Section 48 of the Act of 1953 by the respondent No. 1 himself, as entire material was available before him for which, as per law enunciated on the power of Deputy Director of Consolidation, he was empowered to look into. In nutshell, Section 48 of the Act of 1953 provides ample power to examine the correctness/legality/propriety of any order which includes the power to examine any finding, whether of fact or law, recorded by any subordinate authority so as the power to re-appreciate any oral or documentary evidence.

27. For the reasons aforesaid, this Court is of the view that interference in the impugned order is requuired. Accordingly, the writ petition is **allowed.** The order impugned dated 22.12.2022 is hereby **quashed**. The matter is remanded back to the respondent No. 1/Deputy Director of Consolidation/Additional District Magistrate, (F/R) Lakhimpur Kheri to decide the matter afresh after affording proper opportunity of hearing to the parties

to the litigation preferably within a period of six months from the date of production of certified copy of this order, if there is no other legal impediment in this regard. While conducting the proceedings, the Authority concerned is directed to avoid unnecessary adjournments to either party.

(2023) 3 ILRA 204
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.02.2023

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Writ B No. 778 of 2022

Jagdish Prasad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Rakesh Kumar Maurya

Counsel for the Respondents:
C.S.C.

U.P. Land Revenue Act,1901 - Section 219 - Revision - Board or the Commissioner may call for the record of any case decided or proceeding held by any revenue Court subordinate to him for the purpose of satisfying himself as to the *legality or propriety of the order passed or proceeding held* - the expression "legality or propriety of the order passed or proceeding held" in Section 219 of the Act of 1901, empowers the revisional authority to consider the legality or propriety of an order passed by the revenue court subordinate to him, if the same is allowed to stand, results in failure of justice or causes irreparable injury, to the party against whom it is made - if an order passed by subordinate revenue court on any application is allowed to stand affecting the rights of the parties, it would cause failure of justice or cause irreparable injury to the party against whom it is made - if the said condition is present, the revision against any order passed by the subordinate revenue court would be maintainable under Section 219 of the Act of 1901 - revision is maintainable against the order rejecting the application for amendment – In the instant an application for amendment in a mutation case u/s 34 of Act of 1901 to incorporate one Gata was rejected, against which a Revision u/s 219 of Act of 1901 was filed which was dismissed being not maintainable It was held that that revision was maintainable - matter remanded back to the Revisional Authority to decide the Revision, afresh, on merits (Para 13, 14)

Allowed. (E-5)

List of Cases cited:

1. Raja Ram & ors. Vs Additional Commissioner Faizabad Division Faizabad & Others rendered in Writ Petition 3 No.3301 (M/S) of 2006

2. Raj Shri Agarwal and Ors. vs. Sudheer Mohan & ors. MANU/UP/2351/2022

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

1. Heard learned counsel for the petitioner and Shri Hemant Kumar Pandey, learned standing counsel for the State-respondents.

2. In view of order proposed to be passed, notice to opposite party no.4 is dispensed with.

3. By means of the present Writ Petition, the petitioner has challenged the order dated 24.11.2020 passed in Revision Case No.1542 of 2020/Rai Bareli, Computerized Case No.R20201058001542 (Jagdish Prasad vs. Shiv Pyari) filed under Section 219, U.P. Land Revenue Act, 1901 (hereinafter referred to as ' Act of 1901').

4. The brief facts of the case to that effect are that the petitioner preferred an application for amendment before opposite party no.3, Nayab Tehsildar, Dalmau, District-Rai Bareli in a mutation case which was filed based upon the Will dated 02.04.1991 under Section 34 of Act of 1901 registered as Case No.49/SS/57158/72/102/2010 (Jagdish Prasad vs. Jhoori[died]). The said application for amendment, whereby, the amendment was sought to incorporate Gata No.265 Area 0.232 hectare, was rejected vide order dated 20.02.2020.

5. Being aggrieved by the order dated 20.02.2020, the petitioner preferred a Revision under Section 219 of Land Revenue Act, 1901, which was dismissed by the impugned order dated 24.11.2020 being not maintainable. The Revisional Court observed that the order under Revision is interlocutory in nature and as such, the same is not maintainable.

6. Learned counsel for the petitioner says that the Revisional Authority/Opposite party no.2-Board of Revenue U.P., Lucknow has erred in exercising the jurisdiction vested in it. Further, the order rejecting the application seeking amendment in the plaint/application for mutation would be covered under the expression 'case decided' and being so, taking note of the same and also the language couched under Section 219 of Act of 1901, the revision was maintainable and ought to have been decided on the merits and not on the issue of maintainability. He further submitted that the Gata No.265 Area 0.232 hectare indicated in the application for amendment in the plaint ought to have been allowed as it would avoid the multiplicity of proceedings and would not change the nature of the case, as such, also the Revisional Authority should exercise its jurisdiction vested in it by virtue of Section 219 of Act of 1901.

7. Learned Standing counsel, has assisted this Court on the issue involved in the present petition.

8. Considered the submissions made by learned counsel for the parties and perused the record.

9. In order to decide the issue involved in the present petition this Court deems it appropriate to reproduce Section 219 of Act of 1901, which reads as under:-

"219. Revision. - (1) The Board or the Commissioner or the Additional Commissioner or the Collector or the Record Officer, or the Settlement Officer, may call for the record of any case decided or proceeding held by any revenue Court subordinate to him in which no appeal lies or where an appeal lies but has not been preferred, for the purpose of satisfying himself as to the legality or propriety of the order passed or proceeding held and if such subordinate revenue Court appears to have -

(a) exercised a jurisdiction not vested in it bylaw, or

(b) failed to exercise a jurisdiction so vested, or

(c) acted in the exercise of jurisdiction illegally or with material irregularity,

The Board or the Commissioner or the Additional Commissioner or the Collector or the Record Officer, or the Settlement Officer, as the case may be, pass such order in the case as he thinks fit.

(2) If an application under this section has been moved by any person

either to the Board, or to the Commissioner, or to the Additional Commissioner, or the Collector or to the Record Officer or to the Settlement Officer, no further application by the same person shall be entertained by any other of them."

10. In the case of R**aja Ram and Ors. vs Additional Commissioner Faizabad Division Faizabad & Others** rendered in **Writ Petition No.3301 (M/S) of 2006,** this court after considering Section 219 of Act of 1901 observed as under:-

"From the bare perusal of Section 219 of U.P. L. R. Act, the position which emerges out is that "the Board or the Commissioner or the Additional Commissioner or the Collector or the Record Officer, or the Settlement Officer, may call for the record of any case decided or ***proceeding held by any revenue court subordinate to him in which no appeal lies."***

So keeping in view the above said facts, as per mandate of the Legislature as provided under Section 219 of U.P. Z.A. & L.R. Act any order passed in a proceeding held by revenue court subordinate to the opposite party no.1/Additional Commissioner (Admn.), Lucknow Division, Lucknow, revision is maintainable and if the Legislature has legislate as a mandate while framing Section 219 of the said Act, the same should be implemented in its letter and spirit because it is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or re-frame the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the Courts. The Court cannot add words to a statute or read words that are not there.

The Courts decide what the law is and not what it should be. The Courts of course adopt a construction which will carry out the obvious intention of the legislature but cannot legislate. But to invoke judicial activism to set at naught legislative judgment is sub serve of the constitutional harmony and comity of instrumentalities. (See ***Union of India and another V. Deoki Nandan Agarwal, AIR SC 96, All India Radio V Santosh Kumar and another 71 (1998) 3 SCC 237, Sakshi V. Union of India and others,(2004) 5 SCC 518, Pandian Chemicals Ltd. V. CIT (2003) 5 SCC 590, Bhavnagar University Vs. palitana Sugar Mills (P) and others, AIR 2003 SC 511 and J.P. Bansal V. State of Rajasthan, 2003) 5 SCC 134)***

In ***Nasiruddin v. Sita Ram Agarwal, (2003) 4 SCC 753,*** *the Supreme Court has held that the Court can iron cut of the creases but cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of provision is plain, unambiguous. It cannot add or subtract words to statute or read something into in which is not there. It cannot rewrite or recast the legislation. "*

11. It would be apt to refer that remedy of revision is also available in the Code of Civil Procedure (in short 'C.P.C.'). Section 115 of C.P.C. provide remedy of revision. In the judgment dated 22.04.2022 passed in the case of **Raj Shri Agarwal and Ors. vs. Sudheer Mohan and Ors.** reported in **MANU/UP/2351/2022**, this Court after considering Section 115 of C.P.C. and various judgments on the scope of the same has held that petition under Article 227 of the Constitution of India is not maintainable as remedy by way of revision is available to the petitioner. The

relevant part of the Judgment dated 25.04.2022 is reproduced hereunder:-

"8.For better appreciation of facts, Section 115 defining revision in the Code of Civil Procedure is reproduced here-inbelow:-

"(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit: [Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.]

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court."

9. It is also apt to reproduce Section 115 of C.P.C. as applicable in the State of U.P. which have been substituted w.e.f. July, 1st, 2002.

"115. Revision (1) A superior court may revise an order passed in a case decided in an original suit or other proceeding by a subordinate court where no appeal lies against the order and 4 where the subordinate court has --

(a) exercised a jurisdiction not vested in it by law ; or

(b) failed to exercise a jurisdiction so vested ; or

(c) acted in exercise of its jurisdiction illegally or with material irregularity.

(2) A revision application under sub-section (1), when filed in the High Court, shall contain a certificate on the first page of such application, below the title of the case, to the effect that no revision in the case lies to the district court but lies only to the High Court either because of valuation or because the order sought to be revised was passed by the district court.

(3)The superior court shall not, under this section, very or reverse any order made except where,--

(i) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding ; or (ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made."

10. An emphasis has been laid by the learned counsel for the petitioners that reading of proviso to Section 115 of C.P.C. of Central Act clearly suggests that revision is barred against any order of the trial Court in a suit unless and until the conditions enumerated in the proviso, namely, where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings exist. Accordingly, he submits that as the rejection of application of amendment in the plaint does not bring the suit to an end, thus, the suit being not decided, the order

rejecting the amendment application would not fall within the ambit of case decided. Therefore, the revision is barred and petition under Article 227 of the Constitution of India is maintainable.

11. Now, to appreciate the aforesaid argument of learned counsel for the petitioners, it would be apt to compare two sections as incorporated in Central Act of the C.P.C. and its applicability in the State of U.P.

12. From the comparison of proviso of Section 115 of C.P.C. in the Central Act and Section 115 (3) (i) of C.P.C. as applicable in the State of U.P., it is manifest and clear that revision is maintainable against any order if it had been in favour of the party applying for revision would have finally disposed of the suit or other proceeding. Thus, it is manifest that the proviso to Section 115 of Central Act has been adopted by the State of U.P. under sub-section (3) (i) of Section 115 of C.P.C. and are common, but by U.P. Amendment, (ii) to Section 115 (3) has been incorporated which provides that the revision will also lie against any order passed by the trial Court if the conditions elucidated in Section 115 (3) (ii) of C.P.C. exists, i.e., if the order is allowed to stand, it would occasion a failure of justice or cause irreparable injury to the party against whom it is made. So in either of the two contingencies, as referred in Section 115 (3) (i) & (ii) as applicable in U.P., revision is maintainable.

13. The learned counsel for the petitioners has laid emphasis upon paragraph no.32 of the judgment of Shiv Shakti Cooperative House Society, Nagpur (supra), to buttress his submission, paragraph no.32 is reproduced herein-below:-

"32. A plain reading of Section 115 as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is 'yes' then the revision is maintainable. But on the contrary, if the answer is 'no' then the revision is not maintainable. Therefore, if the impugned order is interim in nature or does not finally decide the lis, the revision will not be maintainable. The legislative intent is crystal clear. Those orders, which are interim in nature, cannot be the subject matter of revision under Section 115. There is marked distinction in the language of Section 97(3) of the Old Amendment Act and Section 32(2)(i) of the Amendment Act. While in the former, there was clear legislative intent to save applications admitted or pending before the amendment came into force. Such an intent is 6 significantly absent in Section 32(2)(i). The amendment relates to procedures. No person has a vested right in a course of procedure. He has only the right of proceeding in the manner prescribed. If by a statutory change the mode of procedure is altered, the parties are to proceed according to the altered mode, without exception, unless there is a different stipulation. "

14. In the opinion of the Court, the said judgment is not applicable in the facts of the present case, inasmuch as it was a case dealing with an issue where application under Order 39 Rule 1 C.P.C. has been rejected, against which revision was preferred and the Apex Court in those facts and circumstances held that no revision is maintainable against the order passed by the trial Court, if the order is interlocutory in nature.

15. So far as the judgment in the case of Uttam Chand Kothari (supra) is concerned, the said judgment is also not applicable in the facts of the present case

inasmuch as it was not considering the case under Section 115 of C.P.C. as applicable to the State of U.P. and further the judgment and arguments raised by the respondents which shall be dealt with in later part of this judgment were also not considered by the Gauhati High Court.

16. Similar is the case in the case of Punjab Small Industries and Export Corporation (supra).

17. Now coming to the judgment of Five Judges Bench of this Court in the case of Rama Shanker Tiwari Vs. Mahadeo and others, reported in 1968 A.W.R. 103 (FB) relied upon by the learned counsel for the respondents, the Full Bench considered the meaning of the 'case decided' and held that the order allowing or disallowing an application for amendment in pleading is a case decided and is revisable in this Section, if the amendment sought has or is likely to have direct bearing on the rights and obligation of the parties. Paras 23 & 24 of the said 7 judgment is reproduced here-in-below:-

"23. I am, therefore, of opinion that every order granting or dismissing an application for amendment of pleading will not give rise to a case decided revisable u/S. 115 of the Code. An order allowing or disallowing an application for amendment of pleading may however, give rise to a case decided revisable under that Section if the amendment sought has or is likely to have a direct bearing on the rights and obligations of the parties and affects or is likely to affect the jurisdiction of the Court. To this extent the decision in Mst. Suraj Pali's case can, in may opinion, be said to be no longer good law.

24. The opinion of the majority of Judges constituting the Full Bench is that an order passed u/O. VI R.17 of the CPC, either allowing an amendment or refusing to allow an amendment, is a "case decided" within the meaning of that expression in S.115, Code of Civil Procedure."

18. The five Judges Bench judgment concludes the controversy in the instant case, since the order deciding the amendment application would have a direct bearing on the right of either parties, if it is allowed or rejected. Thus, the decision on an application under Order 6 Rule 17 of C.P.C. would amount to a case decided and revision would lie. The said finding is also supported by the first line of Section 115 (1) which states that " superior Court may revise an order passed in a case decided in an original suit",reading of said line suggests that legislation has envisaged cases where there may be circumstances where an order passed in original suit may amount to a case decided, though the suit has not been decided, and revision is maintainable against the said order.

19. Similarly, para-17 of the judgment reported in 2006 (1) AWC 825 (LB) in the case of Sultan Leather Finishers Pvt. Ltd. and others Vs. A.D.J. Court no.4, Unnao and others being relevant in the context of present case is reproduced herein-below:-

"In one another case in Sambhaunath Digambar Jain v. Mohanlal and Ors. 2003 (9) SCC 219, where the application under Order VI, Rule 17 and Order VIII, Rule 6A of the Code of Civil Procedure was rejected by the trial court declining to permit the defendant to amend the written statement and counter-claim, it was held by Hon'ble Supreme Court that such application can be challenged by invoking revisional jurisdiction.

For convenience paras 3 and 4 of the judgment of Hon'ble Supreme Court in Sambhavnath's case (supra) is reproduced as under :

"The respondents herein filed a suit against the appellant for setting aside

the said order of the Registrar. On 13.9.1982, the appellant filed written statement wherein an averment was made that the portion of property where the girl's school was running was the property of the trust. It may be mentioned that the Registrar did not include the said portion of the school as trust property. On 15.9.1982, the appellant filed an application under Order VI, Rule 17 and Order VIII, Rule 6A of the Code of Civil Procedure read with Section 151 of the Code of Civil Procedure and sought to incorporate in its counter-claim the said school as a trust property. On 15.9.1982, the appellant filed an application under Order VI, Rule 17 and Order VIII, Rule 6A of the Code of Civil Procedure read with Section 151 of the Code of Civil Procedure and sought to incorporate in its counter-claim the said school as a trust property by way of an amendment to its written statement. The said application was rejected by the trial court and being aggrieved by the said order, the appellant filed a revision which was dismissed as not maintainable. That is how the parties are before us.

Learned counsel for the appellant has urged that the order passed by the trial court was revisable and view taken by the High Court is erroneous. We are of the view that the High Court for ends of justice ought to have considered the application on merit keeping in view Rule 6A of Order VIII of the Code of Civil Procedure and in accordance with the law. We, therefore, hold that the above order rejecting the application of the appellant by the trial court was revisable. "

20. In this regard, it may also be apt to refer to paragraph-8 of the judgment of this Court reported in 2006 (3) AWC 2182, Mukhtar Ahmad vs. Sirajul Haw and Others, wherein this Court has quashed the order of revisional Court rejecting the revisioin against the order passed in the amendment application. Paragraph-8 of the said judgment is reproduced herein-below:-

"8. In view of the aforesaid, the District Judge was not correct in holding that a revision against an order rejecting the amendment application is not maintainable. The District Judge was under law obliged to see as to whether the order passed by the court below rejecting the amendment application amounts to case decided or as to whether in the facts of the case revisional authority should vary or reverse the order passed by the court below in view of sub-section (3) of Section 115 of the Civil Procedure Code. It is needless to point out that this Court in the Judgment in Smt. Pushpa alias Pooja v. State of U.P. and Ors. 2005 (3) AWC 2587:AIR 2005 All 187, has taken note of the judgment in the case of Shiv Shakti Co-operative Housing Society, Nagpur v. Swaraj Developers, and has explained the legal proposition laid down by the Hon'ble Supreme Court in the case of Shiv Shakti (supra) in paragraphs 15 and 16 of the said Judgment, which may be reproduced here in below:

"15. The judgment of the Apex Court relied by the counsel for the petitioner in Shiv Shakti Cooperative Housing Society, Nagpur v. Swaraj Developers and Ors. (supra) lays down that the revision is not maintainable against an interlocutory or interim order. The Apex Court while considering provisions of Section 115 of the Code of Civil Procedure, made following observation in paragraph 32: .....(at page 2442 of AIR).

"32. A plain reading of Section 115, as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to suit or other

proceeding. If the answer is "yes" then the revision is maintainable. But on the contrary, if the answer is "no" then the revision is not^ maintainable. Therefore, if the impugned order is of interim nature or does not finally decide the lis, the revision will not be maintainable. The legislative intent is crystal clear. Those orders, which are interim in nature, cannot be the subject-matter of revision under Section 115."

16. As noted above, the order passed under Section 24 disposed of finally the issue of interim maintenance to a spouse during pendency of proceedings. After passing the order under Section 24 of the Act nothing more is required to be done with regard to question of interim maintenance during pendency of proceedings and the fact is that the order passed under Section 24 finally disposes the application for interim maintenance; hence as laid down by the Apex Court in above quoted paragraph the revision shall be maintainable against an order under Section 24 of Hindu Marriage Act, 1955."

21. Section 115 (iii) of C.P.C. as applicable in Uttar Pradesh clearly states that the order, if allowed to stand, results in failure of justice or causes irreparable injury to the party against 10 whom it is made, the revision under Section 115 of C.P.C as applicable in the State of U.P. is maintainable.

22. Viewed from this angle, if any order illegally passed by the Court below on any application is allowed to stand affecting rights of parties, it is obvious that it would cause failure of justice or cause irreparable injury to the party against whom it is made, therefore, if said condition is present, the revision against any order passed by the Court below vide Section 115 (3) (ii) of C.P.C. as applicable in U.P. would lie."

12. From the aforesaid observation(s) of the Co-ordinate Bench of this Court, it is apparent that the order allowing or rejecting the application seeking amendment would come within the purview of expression "case decided", if the amendment sought has or is likely to have direct bearing on the rights and obligations of the parties and affects or is likely to affect the jurisdiction of the Court, even if an order is passed under the proceedings initiated under the Act of 1901. The expression "case decided" finds place in Section 219 of the Act of 1901. As such, revision against an order passed on application seeking amendment would be maintainable.

13. Moreover the expression "legality or propriety of the order passed or proceeding held" in Section 219 of the Act of 1901, empowers the revisional authority to consider the legality or propriety of an order passed by the revenue court subordinate to him if the same is allowed to stand, results in failure of justice or causes irreparable injury to the party against whom it is made. Further, if an order passed by subordinate revenue court on any application is allowed to stand affecting the rights of the parties, it would cause failure of justice or cause irreparable injury to the party against whom it is made, therefore, if the said condition is present, the revision against any order passed by the subordinate revenue court would be maintainable under Section 219 of the Act of 1901. As per Section 219 of the Act of 1901, if the subordinate revenue court exceeds its jurisdiction, or exercise its jurisdiction illegally or with material irregularity, the revision would be maintainable.

14. For the foregoing reasons, this Court is of the view that revision was

maintainable against the order dated 20.02.2020 passed by Nayab Tehsildar, rejecting the application for amendment, as such, the order dated 24.11.2020 is liable to be interfered with. Accordingly, the order dated 24.11.2020 is set aside. The matter is remanded back to the Revisional Authority to decide the Revision, afresh, on merits, after giving proper opportunity of hearing to opposite party no.4-Smt. Shiv Pyari wife of late Gokaran R/o Village-Purey Valli H/o Murshidabad presently residing at Krishna Nagar, Murari ka Bagh, Pargana & Tehsil Dalmau, District- Rai Bareli, as early as possible, say within a period of six months from the date of production of certified copy of this order, if there is no other legal impediment in this regard, without giving unnecessary adjournments for the purpose of concluding the proceedings, within the stipulated time.

15. In view of the above, the present writ petition stands ***allowed.***

(2023) 3 ILRA 212
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.02.2023

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Writ B No. 23043 of 2020

Ghuru & Ors. ...Petitioners
Versus
Addl. District Magistrate Finance/Revenue Kheri & Ors. ...Respondents

Counsel for the Petitioners:
Ajey Singh

Counsel for the Respondents:
C.S.C.

A. Civil Law - Will - Indian Succession Act, 1925 - Section 63 - Indian Evidence Act, 1872 - Sections 68, 69, 90 & 90-A - Will - A Will executed u/s 63 of the Act, 1925 has to be proved, that it was executed, at least by one of the attesting witnesses u/s 68 - where attesting witnesses of the Will have died or not available to prove the execution of the Will, then the alleged Will is required to be proved by the handwriting of one of the witnesses of attesting witnesses and the executant u/s 69 - Onus - onus of proving the Will is on the propounder - in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and signature of the testator is sufficient to discharge the onus - Where, there are suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before the Will could be accepted as genuine - where the execution of a will is shrouded in suspicion, it is a matter essentially of the judicial conscience of the court and the party which sets up the will has to offer cogent and convincing explanation of the suspicious circumstances surrounding the will (Para 19, 24, 25, 28)

B. Civil Law - Will - In the instant case, petitioner stated that Will dated 26.06.1986 was duly proved by the witnesses namely Bachchu Lal and Bechan Lal before the Consolidation Authorities - Bachchu Lal stated that one Narmatta brought the Will, before him and after considering the thump impression of testator of the Will namely Kishun and signature of Jagganath (Up-Pradhan) and thump impression of Tulsiram (Panch), he put his signature over the Will - Held - Bachchu Lal cannot be considered as an atttesting witness of the Will - Bechan Lal's testimony was found unreliable due to inconsistencies, such as conflicting times for when the Will was written and discrepancies about who purchased the stamp paper – High Court held that the petitioners failed to prove the Will before the Consolidation Officer, as such, their claim based upon the Will was not

justified - writ petition is dismissed. (Para 34, 35, 36)

Dismissed. (E-5)

List of Cases cited:

1. Shashi Kumar 11 Banerjee Vs Subodh Kumar Banerjee, AIR 1964 SC 529

2. H. Venkatachala Iyengar Vs B.N. Thimmajamma, AIR 1959 SC 443

3. Babu Singh Vs Ram Sahai @ Ram Singh, (2008) 14 SCC 754

4. Bharpur Singh Vs Shamsher Singh, (2009) 3 SCC 687

5. Jagdeesh Prasad Vs State, 2015 SCC OnLine Del 14461

6. B. Venkatamuni Vs C.J. Ayodhya Ram Singh, (2006) 13 SCC 449

7. Santosh Kumar Gupta Vs Harvinder Nath Gupta, 1996 SCC OnLine All 1325

8. Rabindra Nath Mukherjee Vs Panchanan Banerjee (dead) by LRs., (1995) 4 SCC 459 :AIR 1995 SC 1684

9. Shivakumar Vs Sharanabasppa, Civil Appeal No. 6076 of 2009, dt 24.04.2020

10. Raj Kumari & ors. Vs Surinder Pal Sharma 2019 SCC OnLine SC 1747

11. Kavita Kanwar Vs Pamela Mehta reported in (2021) 11 SCC 209

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

1. Heard Sri Ajey Singh, learned counsel for the petitioners and Dr. Krishna Singh, learned counsel for the State/respondent Nos. 1 to 3 and perused the record.

2. By means of this petition, the petitioners have assailed the order(s) dated 05.09.2012, 12.10.2012 and 16.01.2020 passed by the respondent No. 2/Settlement Officer of Consolidation, Kheri, District- Kheri and respondent No. 1/Additional District Magistrate, Finance and Revenue, Kheri, District-Kheri.

3. Brief facts of the case are to the effect that based upon a Will dated 26.06.1986 written by Kishun Goria S/o Safaru R/o of Village- Jangal Matera, Pargana and Tehsil- Dhaurahara, District- Kheri, the name of the petitioners was entered in the revenue records in compliance of the order dated 05.06.1992 passed by the Tehsildar, Tehsil- Dhaurahara, District- Kheri on an application preferred under Section 34 of U.P. Land Revenue Act, 1901 (in short "Act of 1901").

4. It would be apt to notice here that regarding the claim over the property, in issue, which is the subject matter of Will dated 26.06.1986, a suit for declaration under Section 229-B of U.P. Zamidari Abolition and Land Reforms Act, 1950 (in short "Act of 1950") was filed and on account of consolidation proceedings started in the village concerned, the said suit was abated. Thereafter, an objection under Section 9-A(2) of U.P. Consolidation of Holdings Act, 1953 (in short "Act of 1953") was filed before the respondent No. 3/Consolidation Officer, Kheri, District-Kheri. The petitioners also appeared before the respondent No. 3 and raised their claim over the property, in issue, on the basis of Will dated 26.06.1986. Before the respondent No. 3, the objections of the parties concerned were registered as Case No. 504 (Surra v. Vidyawati) and 489 (Summat v. Ghuru). Both these cases were clubbed together and decided by the

common order dated 21.10.2009. This order finds favour of the petitioners.

5. Being aggrieved by the order dated 21.10.2009, an Appeal No. 736 of 2009 (Chandrakali v. Ghuru and others) was filed under Section 11(1) of the Act of 1953. The Appellate Authority/respondent No. 2 allowed the appeal vide order, in issue, dated 05.09.2012. The relevant observations of the Appellate Authority in the order dated 05.09.2012 on reproduction reads as under:-

"प्रस्तुत अपील में उभय पक्षों की ओर से दिये गये तर्क एवं अपील सहित अवर न्यायालय को पत्रावली के अवलोकन से स्पष्ट है कि प्रस्तुत अपील चकबन्दी अधिकारी के आदेश दिनांक 21–10–09 के विरूद्ध योजित की गयी है। प्रश्नगत अपील जिस आराजी के सम्बन्ध में प्रस्तुत की गयी है उसके सम्बन्ध में उल्लेख करना है ग्राम जंगलमटेरा परगना व तहसील धौरहरा के खाता सं0 70 किशुन पुत्र सकरू के नाम दर्ज था तथा खाता सं0 71 किशुन व महिपाल पुत्रगण सकरू के नाम दर्ज था। किशुन के कोई पुत्र नही था। उनके चार पुत्रियां थी विद्यावती, सुर्रा, दुर्रा व नरमत्ता थी। चारों पुत्रियों की शादी किशन के जीवन काल में हो गयी थी जो कि उभय पक्षों को स्वीकार है। किशनु के मृत्यु के उपरान्त किशुन के नाम दर्ज आराजी पर तहसील से प0क0–11 द्वारा बतौर वारिस महिपाल का नाम दर्ज हुआ। महिपाल के दो पत्नियां थी। एक का नाम सुम्मति व दूसरी का नाम चन्द्रकली था। प0क0–11 में आदेश पारित होने के उपरान्त किशुन की पुत्रियों नरमत्ता व विद्यावती द्वारा एक अपंजीकृत वसीयत तैयार कर तथा अपंजीकृत वसीयत के आधार पर धारा–34 एल0आर0एक्ट के अन्तर्गत तहसील में वाद योजित किया गया जिसकी जानकारी महिपाल को नही हो सकी तथा धारा–34 में पारित आदेश के द्वारा विवादित आराजी पर वसीयत के आधार पर महिपाल का नाम निरस्त कर किशुन के स्थान पर घुरू व लल्लू पुत्रगण कामता व विद्यावती पत्नी सुन्दरलाल का नाम दर्ज किया गया। जिसके विरूद्ध महिपाल ने धारा–229बी जमींदारी विनाश एवं भूमिव्यवस्था अधिनियम के अन्तर्गत वाद योजित किया गया तथा दौरान वाद विचाराधीन रहते ही महिपाल की मृत्यु हो गयी महिपाल की मृत्यु के उपरान्त महिपाल के स्थान पर प्रतिस्थानी नियुक्त किये जाने हेतु दिये गये प्रार्थना पत्र पर महिपाल की दोनों पत्नियों को प्रतिस्थानी नियुक्त किया गया। लेकिन उपरोक्त वाद के विचाराधीन रहते तथा ग्राम चकबन्दी क्रियाओ के प्रकाशन हेतु ग्राम अजट होकर ग्राम में चकबन्दी क्रियायें प्रारम्भ हो गयी। ग्राम में चकबंदी क्रियायें प्रारम्भ हो जाने के कारण उपरोक्त वाद को अवेट कर दिया गया तथा दौरान चकबन्दी धारा–9 के प्रकाशन के समय अपीलकर्ता व सुम्मत द्वारा एक वाद योजित किया गया तथा दूसरा वाद सुर्रा द्वारा योजित किया गया दोनो वाद चकबन्दी अधिकारी न्यायालय में योजित किये गये। चकबन्दी अधिकारी न्यायालय में उक्त दोनो वादो के विचाराधीन रहते ही वादिनी सुम्मत की मृत्यु हो गयी तथा चकबन्दी अधिकारी द्वारा सुम्मत के बाद चन्द्रकली को प्रतिस्थानी नियुक्त किया गया। तथा तदोपरान्त वाद को पैरवी चन्द्रकली द्वारा प्रारम्भ की गयी। चकबन्दी अधिकारी ने चन्द्रकला व सुर्रा की आपत्ति को सुनवाई के उपरान्त अपने पारित आदेश में प्रस्तुत दोनों आपत्तियों को निरत्त किया है तथा अपंजीकृतक वसीयत के आधार पर खाता सं0 70 रकबा 1–329 हे0 में 4 बीघा अर्थात 0–320 हे0 पर विद्यावती पुत्री किशुन का नाम तथा शेष आराजी के 1/2 भाग पर घुरू व 1/2 भाग पर लल्लू का नाम दर्ज किये जाने का आदेश किया गया है तथा इसी प्रकार खाता सं0 71 में महिपाल मृतक के स्थान पर चन्द्रकली बेवा महिपाल का नाम बतौर वारिस दर्ज होने तथा खाते से घुरू, लल्लू पुत्रगण कामता व विद्यावती पुत्री किशुन का नाम खारिज करके मृतक किशुन के वारिस के आधार पर नाम दर्ज किये जाने सम्बन्धी चन्द्रकली बेवा महिपाल को आपत्ति किया है। तथा खाता सं0 71 का विभाजन चकबन्दी बाहर भूमि को छोड़कर घुरू, लल्लू व विद्यावती प्रत्येक 1/8 तथा चन्द्रकली 1/2 अंश दर्ज किया है। इसी आदेश के विरूद्ध अपीलकर्ता चन्द्रकली द्वारा यह अपील योजित की गयी है। जिसमें अपीलकर्ता द्वारा अपंजीकृत वसीतय को जाली एवं फर्जी कहा जा रहा है तथा अपंजीकृत वसीयत के आधार पर अवर न्यायालय द्वारा विपक्षीगण का नाम विवादित आराजी पर जो दर्ज किया गया है उसे निरस्त कर खाता सं0 70 व खाता सं0 71 पर बतौर वारिस एवं उत्ताराधिकारी अपना नाम दर्ज करने की मांग की गयी है। प्रस्तुत अपील में की गयी मांग के सम्बन्ध में अवर न्यायलय को पत्रावली व उसमें संलग्न आदेश व संलग्न वसीयत जिसके आधार पर चकबन्दी अधिकारी द्वारा प्रश्नगत आदेश पारित किया गया है के अवलोकन से स्पष्ट है कि जिस वसीयत को अवर न्यायालय ने आधार पर मानकर आदेश पारित किया है वह स्टाम्प पॉच रूपये का है तथा वह स्टाम्प दिनांक 26–6–86 को घुरू पुत्र कामता के नाम खरीदा गया है तथा यह स्टाम्प तहसील नानपारा जिला बहराइच से खरीदा गया है। तथा दिनांक 26–6–86 को ही वसीयत लिखे जाने का उल्लेख है। यहां यह उल्लेखनीय है कि जिस स्टाम्प पेपर पर विपक्षीगण द्वारा वसीयत को लिखा जाना कहा गया है उस पर वसीयत शब्द का कोई उल्लेख नही किया गया है। जिस से यह स्पष्ट नहीं

होता कि इस स्टाम्प पेपर पर उल्लिखित लेखनी वसीयत के सम्बन्ध में लिखी गयी है अथवा किसी अन्य उद्देश्य से। क्योकि चाहे वह स्टाम्प पेपर हो या कोई अन्य कागज पर जब कोई व्यक्ति वसीयत, बयनामा अथवा अन्य किसी बाबत कोई बात लिखता है तो उसका स्पष्ट उल्लेख ऊपर किया जाता है लेकिन इस बावत कोई उल्लेख स्टॉम्प पेपर नहीं किया गया है। जिससे उक्त स्टाम्प पर वसीयत का लिखा जाना स्पष्ट नहीं है। साथ ही यहॉ यह भी उल्लिखित करना है कि जब कोई व्यक्ति मुत्युशया पर पड़ा है तो उस सयम वह अपनी आराजी के सम्बन्ध में किसी को कैसे वसीयत/बयनामा कर सकता है क्योंकि उस समय उसकी इन्द्रियॉ स्वस्थ्य अवस्था में नही हो सकती साथ ही यहॉ यह भी उल्लेख करना है कि जब कोई व्यक्ति अपनी आराजी की वसीयत किसी एक व्यक्ति के नाम लिखता है तो वह अपनी वसीयत में जिसके पक्ष में वसीयत निष्पादित की जा रही है उसके आचरण व सेवा भाव आदि का उल्लेख करता है तथा जिसके पक्ष में वसीयत नही निष्पादित की जाती है या जिसको अपनी आराजी से वंचित किया जाता है उसमें उसके कार्य एवं आचरण का भी उल्लेख किया जाता है। लेकिन किशन द्वारा जो वसीयत लिखी गयी है उसमें उपरोक्त किसी बात का कोई उल्लेख नहीं किया गया है। जबकि किशुन को चार पुत्रियॉ थी तथा इनके द्वारा केवल दो ही पुत्रियों के हक में वसीतय की गयी तथा दो पुत्रियों के हक में वसीयत क्यों नही की गयी इसका कोई उल्लेख नहीं किया गया है। जबकि वसीयत में उक्त तथ्य का उल्लेख पहले ही किया जाता है। तभी वसीयत स्पष्ट होती है। यहॉ यह भी उल्लेखनीय है कि अवर न्यायालय के समक्ष स्वयं घुरू जिसके पक्ष में वसीयत निष्पादित की गयी है उसके द्वारा ही अपने बयान में स्पष्ट उल्लिखित किया गया है कि स्टाम्प पेपर दो तीन दिन पहले मंगाये गये थे। तथा वसीयत लिखे जाने के समय वह उपस्थित नहीं था वह मेहमानी में गया हुआ था। वसीयत कब कहॉ लिखी गयी मालूम नहीं मेरे द्वारा घर आने पर उस पर हस्ताक्षर किये गये। इस सम्बन्ध में उल्लेख करना है कि स्वयं घुरू द्वारा उल्लिखित किया गया कि जिस स्टाम्प पर वसीयत लिखी गयी वह स्टाम्प दो तीन दिन पहले खरीदा गया जबकि जिस पर वसीयत लिखी गयी वह स्टाम्प दिनांक 26–6–86 को तहसील नानपारा जिला बहराइच से खरीदा गया है तथा घुरू के नाम से खरीदा गया है तथा उसी दिन उस पर वसीयत लिखी गयी है। इस प्रकार कि घुरू द्वारा यह कहा गया स्टाम्प दो तीन दिन पहले मंगाये गये थे यह कथन गलत है। लेकिन जब कोई व्यक्ति किसी व्यक्ति के पक्ष में वसीयत निष्पादित करता है तो उस व्यक्ति को उस समय उपस्थित रहना आवश्यक है। लेकिन उक्त वसीयत में स्वयं वसीयत धारक ही अनुपस्थित है। इससे किशुन द्वारा की गयी वसीयत औचित्यहीन प्रतीत होती है। साथ ही अवर न्यायालय के समक्ष बच्चू लाल पुत्र बृजलाल निवासी ग्राम प्रतापपुर द्वारा अपने दिये बयान में लिखा गया है कि वह वर्ष 1986 में ग्राम प्रधान था। नरमत्ता एक वसीयत मेरे पास लेकर आई थी तथा कहा था कि वसीयत मेरे पिता ने मेरे बेटों व बहन विद्यावती के पक्ष में लिखी गयी है इसे तस्दीक कर दो। नरमत्ता द्वारा लाई गई वसीयत पर उपप्रधान जगन्नाथ का हस्ताक्षर एवं किशन का निशानी अंगूठा व पंच तुलसीराम का नि0 अंगूठा पहचानता था जिस कारण मेरे द्वारा हस्ताक्षर कर दिये गये। साथ स्टाम्प खरीदे जाने का दिनांक 26–6–86 एवं लिखे जाने का समय रात्रि 10 बजे उल्लिखित किया गया है। लेकिन उक्त वसीयत को अपने सामने लिखने की बात नही कही गयी है। इस सम्बन्ध में उल्लेखनीय है कि घुरू द्वारा यह कहा जा रहा है कि स्टाम्प दो तीन पहले खरीदा गया तथा बच्चूलाल द्वारा उसी दिन दिनांक 26–6–86 को ही स्टाम्प खरीदे जाने व लिखे जाने की बात कही गयी। जब उक्त वसीयत बच्चू लाल के सामने नहीं लिखी गयी तो बच्चू लाल द्वारा यह कैसे कहा जा सकता कि वसीयत उसी दिन लिखी गयी। तथा जहॉ तक हस्ताक्षर व नि0 अंगूठा पहचानने का प्रश्न है तो कोई भी व्यक्ति एक बार हस्ताक्षर की तो पहचान कर सकता है लेकिन नि0 अंगूठा जैसा कि स्टाम्प पेपर पर लगा है उस दशा में नहीं कर सकता। अतः बच्चूलाल का यह कथन कि उनके द्वारा हस्ताक्षर व निशानी अंगूठा पहचान कर हस्ताक्षर किये गये यह कथन सन्देह से परे नहीं कहा जा सकता। प्रश्नगत आराजी के सम्बन्ध में बेचन लाल पुत्र जोधा ने जो बयान अवर न्यायालय के समक्ष दिया है उसमें उसके द्वारा उल्लिखित किया गया है कि ग्राम प्रधान व उप प्रधान मौजूद थे तथा उन्होने अपने हस्ताक्षर व मोहर लगायी थी जबकि बच्चू लाल द्वारा वसीयत का निष्पदिन अपने सामने होना नहीं कहा गया है इस प्रकार उपरोक्त सभी बयानों में आपस में विरोधाभास है। जहॉ तक बेचन लाल द्वारा यह कहा गया कि वसीयत लिखने के बाद किशुन को पढ़कर सुनाई गई तथा उसके बाद उनके द्वारा वसीयत पर नि0अंगूठा लगाया गया तथा वसीयत रात्रि 10 बजे लिखी गयी। यह कथन बिल्कुल निराधार प्रतीत होता है क्योंकि स्वयं वसीयत में उल्लिखित किया गया है वसीयत निष्पादन मे समय किशुन पुत्र सकरू मृत्यु सैया पर पड़ा था तो जो व्यक्ति मृत्यु सैया पर पड़ा हो तो वह कैसे लिखी हुई व सुनी हुई बात को समक्ष सकता है। जहॉ तक वसीयत को रात्रि 10 बजे लिखा जाने का उल्लेख है तो जो वसीतय निष्पादित की गयी है उस पर समय सांय 7 बजे लिखा हुआ है। अतः रात्रि 10 बजे की भी बात पूर्णतः गलत साबित होती है। अतः किसी वसीयत को निष्पादित कराते समय वसीयतकर्ता व वसीयतधारक एवं लेखक के साथ–साथ दो गवाहों की आवश्यकता होती है जो उस वसीयत की प्रमाणिकता को

सिद्ध कर सके। लेकिन प्रश्नगत आराजी के सम्बन्ध में जो वसीयत निष्पादित की गयी है उसमें लेखक जिला बहराइच का है जबकि ग्राम जंगलमटेरा में भी पढ़े लिखे लोग होगे तब जनपद बहराइच से लेखक को बुलाने की आवश्यकता पड़ी। अतः प्रश्नगत आराजी के सम्बन्ध में जो वसीयत विपक्षीगण द्वारा अपने पक्ष में कराई गई है वह एक सोची समझी राजनीति एवं कूट रचान कर फर्जी तौर पर तैयार की गयी प्रतीत होती है। क्योंकि वसीयत के हासिया गवाह व वसीयत धारक के द्वारा जो बयान अवर न्यायालय के समक्ष दिये गये उनमें आपस में विरोधाभाष है तथा दिये गये बयानों एवं स्टाम्प पेपर पर लिखी वसीयत की लेखनी से यही स्पष्ट होता है कि जो वसीयत विपक्षी द्वारा तैयार की गयी है वह जाली एवं फर्जी है। जिसके आधार पर विपक्षीगण को आराजी निजाई पर स्वत्य प्रदान करना उचित नहीं है। अवर न्यायालय द्वारा जो आदेश दिनांक 21–10–2009 को पारित किया गया है वह भी विपक्षीगण द्वारा प्रस्तुत उक्त अपंजीकृत एवं फर्जी वसीयत के आधार पर पारित किया गया है जो स्थिर रखे जाने योग्य नही है। अपीलकर्ता द्वारा किये गये कथन एवं विद्वान अधिवक्ता द्वारा दिये गये तर्क से स्पष्ट है कि अपीलकर्ता ही विवादित आराजी की जायज उत्तराधिकारी है। अतः अपीलकर्ता को विवादित आराजी पर स्वत्व प्रदान किया जाना उचित प्रतीत होता है। अतः उपरोक्तानुसार प्रस्तुत अपील स्वीकार किये जाने योग्य है।"

6. Thereafter, the petitioners approached the Revisional Authority/respondent No. 1 under Section 48(1) of the Act of 1953 by means of a Revision No. 677 of 2014 (Ghuru and others v. Chandrakali), computerized Case No. D2014104300677. The Revisional Authority dismissed the revision vide order dated 16.01.2020. The relevant portion of the order dated 16.01.2020 on reproduction reads as under:-

"प्रश्नगत वाद प्रकरण में मुख्य बिन्दु यह है कि खातेदार किशनु मृतक द्वारा निगरानीकर्तागण के हक में की गयी अपंजीकृत वसीयत दिनांक 26–06–1986 विधिवत सिद्ध मानी जा सकती है अथवा नहीं? इस सम्बन्ध में अपंजीकृत वसीयत के पाठन में प्रथम दृष्टया परिस्थितजन्य साक्ष्य के रूप में यह बिन्दु उभरता है कि किशुन के चार पत्रियां थी, लेकिन वसीयत में इस महव्वपूर्ण बिन्दु का कोई उल्लेख नहीं किया गया है कि किन कारणों से किशुन ने अपनी अन्य पुत्रियों को अपने उत्तराधिकार से वंचित रखा। मात्र एक नरमत्ता के दो पुत्रों एवं एक पुत्री विद्यावती को अपनी सम्पत्ति दिये जाने का उल्लेख वसीयत में है और अन्य पुत्रियों का कोई उल्लेख तक वसीयत में नही है। यह विचार बिन्दु प्रथम दृष्टया वसीयत की विश्वसनीयता पर परिस्थितिजन्य संशय उत्पन्न करता है। इसके अतिरिक्त अपंजीकृत वसीयत को सही साबित करने के लिए गवाहान घूरू, बच्चू लाल, बेचन व अशर्फी के जो बयान कराये गये है, उनमें परस्पर विरोधाभास है जो कि वसीयत को संदिग्ध बनाते है। वसीयत जिस स्टाम्प पेपर पर लिखी गयी होना बताया गया है, वह स्टाम्प जिला बहराइच से दिनांक 26.6.1986 को घूरू के द्वारा खरीदा गया, जबकि स्वयं घुरू उस स्टाम्प को वसीयत लिखे जाने के दिनांक 26–6–1986 से 2–3 दिन पहले का खरीदा जाना बताते हैं। घुरू ने वसीयत अपने सामने लिखे जाने से भी इनकार किया है और उसी के बयान अनुसार घुरू को वसीयत निष्पादन के दिन, महीना या वर्ष का भी संज्ञान नहीं है। इसलिये वसीयत के बावत् उसकी सत्यता के सम्बन्ध में उनके द्वारा दिये गये बयान वसीयत सिद्ध मानने के लिए विश्वसनीय नहीं माने जा सकते। अन्य गवाह बच्चू लाल पुत्र बृजलाल ने भी अपने बयान में स्पष्ट माना है कि वसीयत उनके सामने नहीं लिखी गयी, बल्कि घुरू व लल्लू की माता नरमत्ता वसीयत को लिखवा कर बाद में उसके पास मात्र तस्दीक कराने के लिए लेकर आयी थी। यही बच्चू लाल ने वसीयत अपने सामने लिखा जाना कहा था। स्पष्ट है कि बच्चू लाल के ही तहसील स्तर पर एवं चकबन्दी अधिकारी न्यायालय में दिये गये बयानो में परस्पर विरोधाभास है, इसलिये बच्चू लाल के बयान को वसीयत की प्रमाणिकता के लिए स्वीकार नही किया जा सकता। जहां घुरू वसीयत के लिये स्टाम्प पेपर खरीदा जाना वसीयत लिखे जाने से 2–3 दिन पहले बताते है, वही बच्चू लाल का कथन दिनांक 26–6–1986 को ही स्टाम्प खरीदे जाने व लिखे जाने का है, जबकि दोनो ही गवाहान अपने सामने वसीयत न लिखा जाना स्वीकार करते है। एक अन्य गवाह बेचन लाल का कथन है कि बच्चू लाल के सामने वसीयत लिखी गयी थी, जबकि स्वयं बच्चू लाल द्वारा अपने सामने वसीयत लिखे जाने से इनकार किया गया है। बेचन लाल के द्वारा बयान में कहा गया है कि वसीयतकर्ता किशुन ने उनके सामने वसीयत पर निशानी अंगूठा लगाया और वसीयत उन्हे पढ़कर सुनाई गयी थी, लेकिन बेचन लाल द्वारा वसीयत किये जाने का समय रात 10 बजे बताया गया है, जबकि वसीयत पर समय 7 बजे का है। इसके अतिरिक्त बेचन लाल ने वसीयत हेतु स्टाम्प पेपर की खरीदारी स्वयं किशुन द्वारा किया जाना बताया है, जबकि स्टाम्प पेपर की खरीदारी पर खरीदने वाले का नाम घुरू है, न कि किशुन। इसके अतिरिक्त बेचन लाल ने घुरू व लल्लू के पिता कामता से अपनी रिश्तेदारी होना भी स्वीकार किया है, जिससे भी वसीयत को सही

मानने के लिए उनके बयान मात्र पर निर्भर रहना उचित नहीं है। अपंजीकृत वसीयत के लिए उसकी सत्यता को जानने का एक मुख्य सूत्र वसीयत लेखक होता है। प्रश्नगत प्रकरण में वसीयत लेखक को कभी भी किसी न्यायालय के समक्ष परीक्षण के लिए निगरानीकर्तागण द्वारा प्रस्तुत नहीं किया गया है। उपरोक्त विवेचना के आधार पर मैं इस मत का हूँ कि निगरानीकर्तागण जिस अपंजीकृत वसीयत दिनांक 26–06–1986 के आधार पर प्रश्नगत भूमि पर अपना स्वत्व सम्बन्धी अधिकार मांग रहे है, उस वसीयत को सिद्ध कर सकने में असफल रहे है। इसलिये अपीलीय न्यायालय ने अपने आदेश दिनांक 05–09–2012 के द्वारा विपक्षी चन्द्रकली पत्नी स्व0 महिपाल के हक में बतौर वारिस जो आदेश पारित किया है, उसमें किसी हस्तक्षेप की आवश्यकता नहीं है। अपीलीय न्यायालय का आदेश दिनांक 12–10–2012 मात्र टंकण त्रुटि को शुद्ध करने का है, जो कि सही है। तदानुसार प्रश्नगत निगरानी बलहीन होने से निरस्त किये जाने योग्य है।

आदेश

उपरोक्तानुसार घुरू, लल्लू पुत्रगण कामता निवासीगण ग्राम प्रतापपुर मजरा जगल मटेरा व श्रीमती विद्यावती पुत्री किशुन पत्नी सुन्दर लाल निवासिनी ग्राम बबुरी द्वारा योजित निगरानी निरस्त की जाती है। बन्दोबस्त अधिकारी चकबन्दी के आदेश दिनांक 05–09–2012 व 12–10–2012 की पुष्टि की जाती है। पत्रावली बाद आवश्यक कार्यवाही दाखिल दफ्तर हो।"

7. Assailing the orders impugned dated 05.09.2012 and 16.01.2020, learned counsel for the petitioners stated that the claim of the petitioners raised on the basis of Will dated 26.06.1986 was considered and allowed by the Revenue Authority/Tehsildar concerned under the Act of 1901 vide order dated 05.06.1992 (Annexure No. 6 to this petition) and in compliance thereof, the name of the petitioners were recorded in revenue records. He submitted that before the Revenue Authority/Tehsildar concerned, the Will dated 26.06.1986, though unregistered, was duly proved by the witnesses namely Bachchu Lal s/o Brijlal and Bechan Lal and while dealing with the appeal as also the revision, the Authorities concerned ignored this aspect of the case.

8. He further submitted that before the Consolidation Officer concerned to prove the Will, the statement of witnesses namely Bachchu Lal s/o Brijlal and Bechan Lal were recorded and they proved the Will as required under the law, however, their statements were not considered by the respondent Nos. 1 and 2 while passing the orders dated 05.09.2012 and 16.01.2020. He also submitted that the entire case of the petitioners is based upon the Will dated 26.06.1986, which was proved before the Authority concerned in the proceedings under the Act of 1953, as such, claim of the petitioners is sustainable and the orders impugned in this petition are liable to the interfered with by this Court.

9. Opposing the present petition and assisting this Court on the issues involved in this petition, Dr. Krishna Singh, learned counsel for the State/respondent Nos. 1 to 3 stated that the Will dated 26.06.1986 has to be proved in view of Indian Evidence Act, 1872 (in short "Act of 1872") and in the instant case, the Will was not proved as required under the law.

10. Dr. Singh further stated that Bachchu Lal before the Consolidation Authority concerned specifically stated that one Narmatta brought the Will, in issue, before him and after considering the thump impression of testator of the Will namely Kishun and signature of Jaggannath (Up-Pradhan) and thump impression of Tulsiram (Panch), he put his signature over the Will. Thus, in this view of the matter, the alleged witnesses of the Will failed to prove it, as such, the observations made by the Consolidation Authorities in the orders impugned, in issue, dated 05.09.2012 and 16.01.2020 are justified.

11. He further submitted that the statement of Bechan Lal before the Consolidation Officer was also disbelieved by the Authorities concerned as this witness was not intact. This witness before the Consolidation Authority concerned stated that the Will was written at 10 P.M., however, the Will was written at 7 P.M. Bechan Lal stated that the Will was written in presence of one Bachchu Lal and Bachchu Lal stated that the Will was not written in his presence. Bechan Lal before the Authority concerned also stated that the testator of Will namely Kishun himself purchased the stamp for the Will, however, the stamp paper itself speaks that it was purchased by one Ghuru, in whose favour, the Will was executed by Kishun. Thus, the testimony of this witness is also not reliable and being so, the observations of the Consolidation Authorities in the orders impugned are justified and are not liable to be interfered with by this Court.

12. He further stated that Bechan Lal in his statement stated that the Will was written in presence of Bachchu Lal and as per the statement of Bachchu Lal, the Will was written in presence of Bechan Lal. Thus, both these witnesses are not truthful witnesses. For these reasons, the Will was not proved and the Authority concerned rightly interfered in the order of Consolidation Officer vide its order dated 05.09.2012 and the revision assailing this order was rightly dismissed by the Revisional Authority vide order dated 16.01.2020.

13. Considered the submissions advanced by the learned counsel for the parties and perused the records.

14. Before proceeding further, as the present case is based on the 'Will', this Court feels it appropriate to refer the relevant provisions namely Section 63 of the Indian Succession Act, 1925 (in short "Act of 1925") and Sections 68, 69, 90 & 90-A of the Act of 1872 being necessary for the better appreciation, which are extracted hereasunder:-

The Indian Succession Act, 1925

"S.***63. Execution of unprivileged wills.***- Every testator, not being a soldier employed in an expedition or engaged in actual warfare, 1 [or an airman so employed or engaged,] or a mariner at sea, shall execute his will according to the following rules:--

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence an d by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

The Indian Evidence Act, 1872

"S. 68. Proof of execution of document required by law to be attested. - If a document is required by law to be attested, it shall not be used as evidence

until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]

S. 69. Proof where no attesting witness found. - If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the hand writing of that person.

S. 90. Presumption as to documents thirty years old. - Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.- Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

S. 90A. Presumption as to electronic records five years old. - Where any electronic record, purporting or proved to be five years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the 2 [electronic signature] which purports to be the 2 [electronic signature] of any particular person was so affixed by him or any person authorised by him in this behalf.

Explanation. - Electronic records are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they naturally be; but no custody is improper if it is proved to have had a legitimate origin, or the circumstances of the particular case are such as to render such an origin probable."

15. Chapter III of Act 1925 is in regard to the execution of unprivileged Wills. Section 63 provides the manner in which a testator shall execute his Will:--

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction,

(b) The signature or mark either of the testator, or the signature of the person signing for him, shall be placed and shall appear that it was intended to give effect to the writing as a Will,

(c) the Will has to be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark on the Will. Further, each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time.

16. Thus, the Act of 1925 prescribes the methodology for execution of a Will.

The Act of 1872 is a procedural law and Section(s) 68 and 69 of the Act of 1872 provides for the proof of execution of a document which is required by law to be attested.

17. The legislature had prescribed the procedure for proving the execution of a Will through an attesting witness. In cases where the attesting witnesses are not available, as in the case of death or out of the jurisdiction of the Court or kept out of the way by the adverse party or cannot be traced despite diligence search, the Will is required to be proved in the manner provided in Section 69 of the Act of 1872.

18. The law relating to the manner and onus of proof and also the duty cast upon the court while dealing with a case based upon a Will has been examined in considerable detail in a catena of judgments. The Constitution Bench in Shashi Kumar Banerjee v. Subodh Kumar Banerjee, AIR 1964 SC 529, observed as under:

"The mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by Section 63 of the Indian Succession Act. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the Will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the Will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator. If the propounder himself takes part in the execution of the Will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the Will might be unnatural and might cut off wholly or in part near relations."

19. In the cases related to Will, the Will has to be proved by the *propounder* according to principles settled in this regard, which are no more res-integra and can be deduced from the judgments referred hereunder.

20. In the case of *H. Venkatachala Iyengar v. B.N. Thimmajamma,* AIR 1959 SC 443, the Hon'ble Supreme Court enunciated a few fundamental guiding principles that have consistently been followed and applied, the synthesis and exposition of which has been reproduced hereunder:-

"18. What is the true legal position in the matter of proof of wills? It is well known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. S. 67 and 68, Evidence Act are relevant for this purpose. Under S. 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Ss. 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Ss. 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. ***This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills****. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by S. 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.*

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of

mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

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22. It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence..."

21. The Supreme Court in *Babu Singh v. Ram Sahai @ Ram Singh,* (2008) 14 SCC 754 had the occasion to consider the effect of Sections 68 and 69 of the Act of 1872. Relevant paras 17 and 18 are extracted hereasunder:-

"17. It would apply, inter alia, in a case where the attesting witness is either dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be traced despite diligent search. Only in that event, the Will may be proved in the manner indicated in Section 69, i.e., by examining witnesses who were able to prove the handwriting of the testator or *executant*. The burden of proof then may be shifted to others.

18. Whereas, however, a Will ordinarily must be proved keeping in view the provisions of Section 63 of the Indian Succession Act and Section 68 of the Act, in the event the ingredients thereof, as noticed hereinbefore, are brought on record, strict proof of execution and attestation stands relaxed. However, signature and handwriting, as contemplated in Section 69, must be proved."

22. The Apex Court in *Bharpur Singh v. Shamsher Singh*, (2009) 3 SCC 687, held that in case, the provisions of Section 68 of the Act 1872 could not be complied with, then the other provisions contained therein, namely, Section 69 and 70 would be attracted. Relevant Paras 18 and 19 are extracted hereasunder:-

"18. Respondent was a mortgagee of the lands belonging to the testatrix. He is also said to be the tenant in respect of some of the properties of the testatrix. It has not been shown that she was an educated lady. She had put her left thumb impression. In the aforementioned situation, the question, 15 which should have been posed, was as to whether she could have an independent advice in the matter. For the purpose of proof of will, it would be necessary to consider what was the fact situation prevailing in the year 1962. Even assuming the subsequent event, viz., the appellants had not been looking after their mother as has been inferred from the fact that they received the news of her death only six days after her death took place, is true, the same, in our opinion, would be of not much significance.

19. The provisions of Section 90 of the Indian Evidence Act keeping in view

the nature of proof required for proving a Will have no application. A Will must be proved in terms of the provisions of Section 63(c) of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. In the event the provisions thereof cannot be complied with, the other provisions contained therein, namely, Sections 69 and 70 of the Indian Evidence Act providing for exceptions in relation thereto would be attracted. Compliance with statutory requirements for proving an ordinary document is not sufficient, as Section 68 of the Indian Evidence Act postulates that execution must be proved by at least one of the attesting witness, if an attesting witness is alive and subject to the process of the Court and capable of giving evidence."

23. The Division Bench of Delhi High Court in *Jagdeesh Prasad v. State,* 2015 SCC OnLine Del 14461 in paras 13, 14 and 15 observed as under:-

"13. The legislature was conscious of the fact that a situation may arise where both attesting witnesses have taken the train to the heaven before the testator died or before the beneficiary propounds the Will. The consciousness of the legislature can be found in Section 69 of the Indian Evidence Act, 1872, which reads as under:--

69. Proof where no attesting witness found - If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

14. Section 69 of the Indian Evidence Act, 1872, while dealing with a situation where no attesting witness can be found, requires evidence to be led that the signatures on a document which law requires to be attested by one or more witnesses are that of the *executant* with further proof that there is attestation in his handwriting by one attesting witness.

15. Law does not envisage that if both attesting witnesses to a Will have died or for some reason are not available, that would be the end of the Will. The way forward has been guided by the legislature under Section 69 of the Indian Evidence Act, 1872."

24. A Will executed under Section 63 of the Act, 1925 has to be proved that it was executed, at least by one of the attesting witnesses under Section 68, the requirement of Section 63 of Act, 1925 read with Section 68 of Act, 1872 has already been considered and upheld by the Apex Court in case of *B. Venkatamuni v. C.J. Ayodhya Ram Singh,* (2006) 13 SCC 449.

25. It is only in case where plaintiffs come up with a case that the attesting witnesses of the Will have died or not available to prove the execution of the Will as required under Section 68, then the alleged Will is required to be proved by the handwriting of one of the witnesses of attesting witnesses and the *executant* under Section 69.

26. No requirement to prove the execution of Will under Section 68, as presumption in favour of the execution of Will is there, under Section 90 is a fallacy and has no merit. A Co-ordinate Bench of this *Court in Santosh Kumar Gupta v. Harvinder Nath Gupta,* 1996 SCC OnLine All 1325 while deciding the testamentary suit held that in case, the attesting

witnesses are dead or not available, the execution of the Will can be proved in accordance with mode prescribed under Section 69 of the Act, then Court should not raise presumption under Section 90 of the Act and admit the document in evidence, but direct the party to prove the document by leading evidence. (See para 15 of the report).

27. A Will which has been executed under Section 63 of the Act 1925, the mandatory provision has been provided under Section 68 for proving its execution in case of non-compliance of Section 68, Section 69 is attracted.

28. It is evident that the mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by Section 63 of the Indian Succession Act. The onus of proving the Will is on the *propounder* and in the absence of suspicious circumstances surrounding the execution of the Will proof of testamentary capacity and signature of the testator as required by law is sufficient to discharge the onus. Where, however, there are suspicious circumstances, the onus would be on the *propounder* to explain them to the satisfaction of the Court before the Will could be accepted as genuine.

29. In the case of *Rabindra Nath Mukherjee v. Panchanan Banerjee (dead) by LRs.,* (1995) 4 SCC 459 : AIR 1995 SC 1684, it was observed that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the Will is to interfere with the normal line of succession and so, there is no wonder that the natural heirs would be debarred in every case of Will. A Will is executed to alter the ordinary mode of succession and by the very nature of things it is bound to result in earlier reducing or depriving the share of natural heirs. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will.

30. In the case of ***Shivakumar v. Sharanabasppa,*** **Civil Appeal No. 6076 of 2009,** decided by the Hon'ble Supreme Court on 24.04.2020, summarizes the principles governing the adjudicatory process concerning proof of a Will as follows:-

31."1. Ordinarily, a Will has to be proved like any other document; the test to be applied being the usual test of the satisfaction of the prudent mind. Alike the principles governing the proof of other documents, in the case of Will too, the proof with mathematical accuracy is not to be insisted upon.

2. Since as per Section 63 of the Succession Act, a Will is required to be attested, it cannot be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence.

3. The unique feature of a Will is that it speaks from the death of the testator and, therefore, the maker thereof is not available for deposing about the circumstances in which the same was executed. This introduces an element of solemnity in the decision of the question as to whether the document propounded is the last Will of the testator. The initial onus, naturally, lies on the propounder but the same can be taken to have been primarily discharged on proof of the essential facts which go into the making of a Will.

4. The case in which the execution of the Will is surrounded by suspicious circumstances stands on a different footing. The presence of suspicious circumstances makes the onus heavier on the propounder and, therefore, in cases where the circumstances attendant upon the execution of the document give rise to suspicion, the propounder must remove all legitimate suspicions before the document can be accepted as the last Will of the testator.

5. If a person challenging the Will alleges fabrication or alleges fraud, undue influence, coercion et cetera in regard to the execution of the Will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the Will may give rise to the doubt or as to whether the Will had indeed been executed by the testator and/or as to whether the testator was acting of his own free will. In such eventuality, it is again a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

6. A circumstance is "suspicious" when it is not normal or is "not normally expected in a normal situation or is not expected of a normal person'. As put by this Court, the suspicious features must be "real, germane and valid' and not merely the "fantasy of the doubting mind.'

7. As to whether any particular feature or a set of features qualify as "suspicious" would depend on the facts and circumstances of each case. A shaky or doubtful signature; a feeble or uncertain mind of the testator; an unfair disposition of property; an unjust exclusion of the legal heirs and particularly the dependants; an active or leading part in making of the Will by the beneficiary thereunder et cetera are some of the circumstances which may give rise to suspicion. The circumstances above-noted are only illustrative and by no means exhaustive because there could be any circumstance or set of circumstances which may give rise to legitimate suspicion about the execution of the Will. On the other hand, any of the circumstance qualifying as being suspicious could be legitimately explained by the propounder. However, such suspicion or suspicions cannot be removed by mere proof of sound and disposing state of mind of the testator and his signature coupled with the proof of attestation.

8. The test of satisfaction of the judicial conscience comes into operation when a document propounded as the Will of the testator is surrounded by suspicious circumstance/s. While applying such test, the Court would address itself to the solemn questions as to whether the testator had signed the Will while being aware of its contents and after understanding the nature and effect of the dispositions in the Will?

9. In the ultimate analysis, where the execution of a Will is shrouded in suspicion, it is a matter essentially of the judicial conscience of the Court and the party which sets up the Will has to offer cogent and convincing explanation of the suspicious circumstances surrounding the Will."

37. Having considered the provisions pertaining to the proof of Will as well as the various landmark judgments discussed hereinabove, this Court shall now proceed to apply the settled principles in the facts and circumstances of the instant case."

31. Further, the Apex Court in the judgment passed in the case of **Raj Kumari and Others v. Surinder Pal Sharma** reported in **2019 SCC OnLine SC 1747** has observed as under:-

"12. We would first expound the law relating to the execution and proof of Wills under the Indian Succession Act and the Evidence Act. Clause (c) of Section 63 of the Indian Succession Act reads as follows:

"***63. Execution of unprivileged wills.***--Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules--

(a)-(b) * * *

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

13. As per the mandate of clause (c), a Will is required to be attested by two or more witnesses each of whom should have seen the testator sign or put his mark on the Will or should have seen some other person sign the Will in his presence and by the direction of the testator or should have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person. The Will must be signed by the witness in the presence of the testator, but it is not necessary that more than one witness should be present at the same time. No particular form of attestation is necessary. Thus, there is no prescription in the statute that the testator must necessarily sign the Will in the presence of the attesting witnesses only or that the attesting witnesses must put their signatures on the Will simultaneously, that is, at the same time, in the presence of each other and the testator.

14. The need and necessity for stringent requirements of clause (c) to Section 63 of the Indian Succession Act has been elucidated and explained in several decisions. In *H. Venkatachala Iyengar v. B.N. Thimmajamma*; AIR 1959 SC 443 dilating on the statutory and mandatory requisites for validating the execution of the Will, this Court had highlighted the dissimilarities between the Will which is a testamentary instrument vis-à-vis other documents of conveyancing, by emphasising that the Will is produced before the court after the testator who has departed from the world, cannot say that the Will is his own or it is not the same. This factum introduces an element of solemnity to the decision on the question where the Will propounded is proved as the last Will or testament of the departed testator. Therefore, the *propounder* to succeed and prove the Will is required to prove by satisfactory evidence that (i) the Will was signed by the testator; (ii) the testator at the time was in a sound and disposing state of mind; (iii) the testator understood the nature and effect of the dispositions; and (iv) that the testator had put his signature on the document of his own free will. Ordinarily, when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of mind of the testator and his signature as required by law, courts would be justified in making a finding in favour of the *propounder*. Such evidence would discharge the onus on the *propounder* to

prove the essential facts. At the same time, this Court observed that it is necessary to remove suspicious circumstances surrounding the execution of the Will and therefore no hard and fast or inflexible rules can be laid down for the appreciation of the evidence to this effect.

15. In *Jaswant Kaur v. Amrit Kaur*; (1997) 1 SCC 369, it was held that suspicion generated by disinheritance is not removed by mere assertion of the *propounder* that the Will bears the signature of the testator or that the testator was in sound and disposing state of mind when the Will disinherits those like the wife and children of the testator who would have normally received their due share in the estate. At the same time, the testator may have his own reasons for excluding them. Therefore, it is obligatory for the *propounder* to remove all the legitimate suspicions before a Will is accepted as a valid last Will of the testator. Earlier, in *Surendra Pal v. Dr. (Mrs.) Saraswati Arora*; (1974) 2 SCC 600, this Court had observed that the *propounder* should demonstrate that the Will was signed by the testator and at the relevant time, the testator was in a sound and disposing state of mind and had understood the nature and effect of the dispositions, that he had put his signature on the testimony of his own free will and at least two witnesses have attested the Will in his presence. However, suspicion may arise where the signature is doubtful or when the testator is of feeble mind or is overawed by powerful minds interested in getting his property or where the disposition appears to be unnatural, improbable and unfair or where there are other reasons to doubt the testator's free will and mind. The nature and quality of proof must commensurate with such essentiality so as to remove any suspicion which a reasonable or prudent man may, in the prevailing circumstances, entertain. Where coercion and fraud are alleged by an objector, the onus is on him to prove the same and on his failure, probate of the Will must necessarily be granted when it is established that the testator had full testamentary capacity and had in fact executed the Will with a free will and mind. In *Rabindra Nath Mukherjee v. Panchanan Banerjee (Dead)* by LRs.; (1995) 4 SCC 459, this Court had observed that the doubt would be less significant if the Will is registered and the Sub-Registrar certifies that the same was read over to the executor who, on doing so, had admitted the contents. In each case, the court must be satisfied as to the mandate and requirements of clause (c) to Section 63 of the Indian Succession Act.

16. In *Jagdish Chand Sharma v. Narain Singh Saini (Dead) Through LRs.*; (2015) 8 SCC 615, this Court referring to Section 63 of the Indian Succession Act had illustrated that the provisions contemplate that in order to validly execute the Will, the testator would have to sign or affix his mark to it or the same has to be signed by some other person in his presence and on his direction. Further, the signature or mark of the testator or signature of the person signing for him has to be so placed that it was intended to give effect to the writing as a Will. Section 63 mandates that the Will should be attested by two or more witnesses each of whom has seen the testator sign or affix his mark to it or has seen some other person sign it in the presence and on the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person and each of the witnesses has signed the Will in the presence of the testator, though it is not necessary that more than one witness be present at the same time and that no particular form of attestation is

necessary. The execution and attestation of the Will are mandatory in nature and any failure and deficiency in adhering to the essential requirements would result in invalidation of the instrument of disposition of the property.

17. Sections 68 and 71 of the Evidence Act, which relate to proof of documents required by law to be attested, read as under:

"**68. Proof of execution of document required by law to be attested.**--If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

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71. **Proof when attesting witness denies the execution.**--If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

18. In *Jagdish Chand Sharma* (supra) referring to Sections 68 and 71 of the Evidence Act, it was observed:

"22.2. These statutory provisions, thus, make it incumbent for a document required by law to be attested to have its execution proved by at least one of the attesting witnesses, if alive, and is subject to the process of the court conducting the proceedings involved and is capable of giving evidence. This rigour is, however, eased in case of a document also required to be attested but not a will, if the same has been registered in accordance with the provisions of the Registration Act, 1908 unless the execution of this document by the person said to have executed it denies the same. In any view of the matter, however, the relaxation extended by the proviso is of no avail qua a will. The proof of a will to be admissible in evidence with probative potential, being a document required by law to be attested by two witnesses, would necessarily need proof of its execution through at least one of the attesting witnesses, if alive, and subject to the process of the court concerned and is capable of giving evidence.

22.3. Section 71 provides, however, that if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by the other evidence. The interplay of the above statutory provisions and the underlying legislative objective would be of formidable relevance in evaluating the materials on record and recording the penultimate conclusions. With this backdrop, expedient it would be, to scrutinise the evidence adduced by the parties.

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57.1. Viewed in premise, Section 71 of the 1872 Act has to be necessarily accorded a strict interpretation. The two contingencies permitting the play of this provision, namely, denial or failure to recollect the execution by the attesting witness produced, thus a fortiori has to be extended a meaning to ensure that the limited liberty granted by Section 71 of the 1872 Act does not in any manner efface or emasculate the essence and efficacy of Section 63 of the Act and Section 68 of the 1872 Act. The distinction between failure on the part of an attesting witness to prove

the execution and attestation of a will and his or her denial of the said event or failure to recollect the same, has to be essentially maintained. Any unwarranted indulgence, permitting extra liberal flexibility to these two stipulations, would render the predication of Section 63 of the Act and Section 68 of the 1872 Act, otiose. The *propounder* can be initiated to the benefit of Section 71 of the 1872 Act only if the attesting witness/witnesses, who is/are alive and is/are produced and in clear terms either denies/deny the execution of the document or cannot recollect the said incident. Not only, this witness/witnesses has/have to be credible and impartial, the evidence adduced ought to demonstrate unhesitant denial of the execution of the document or authenticate real forgetfulness of such fact. If the testimony evinces a casual account of the execution and attestation of the document disregardful of truth, and thereby fails to prove these two essentials as per law, the *propounder* cannot be permitted to adduce other evidence under cover of Section 71 of the 1872 Act. Such a sanction would not only be incompatible with the scheme of Section 63 of the Act read with Section 68 of the 1872 Act but also would be extinctive of the paramountcy and sacrosanctity thereof, a consequence, not legislatively intended. If the evidence of the witnesses produced by the *propounder* is inherently worthless and lacking in credibility, Section 71 of the 1872 Act cannot be invoked to bail him (the *propounder*) out of the situation to facilitate a roving pursuit. In absence of any touch of truthfulness and genuineness in the overall approach, this provision, which is not a substitute of Section 63(c) of the Act and Section 68 of the 1872 Act, cannot be invoked to supplement such failed speculative endeavour.

57.2. Section 71 of the 1872 Act, even if assumed to be akin to a proviso to the mandate contained in Section 63 of the Act and Section 68 of the 1872 Act, it has to be assuredly construed harmoniously therewith and not divorced therefrom with a mutilative bearing. This underlying principle is inter alia embedded in the decision of this Court in CIT v. Ajax Products Ltd."

19. After referring to *H. Venkatachala Iyengar* (supra), this Court in Jaswant Kaur (supra) had laid down the following propositions of law:

"(1) Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

(2) Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

(3) Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the *propounder* can be taken to be discharged on proof of the essential facts which go into the making of the will.

(4) Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the *propounder* himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the *propounder* that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the *propounder* must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

(5) It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

(6) If a caveator alleges fraud, undue influence, coercion, etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the *propounder* to remove all reasonable doubts in the matter."

20. In *M.B. Ramesh* (supra) reference was made to the view expressed by the Division Bench of the Bombay High Court in *Vishnu Ramkrishna v. Nathu Vithal;* AIR 1949 BOM 266 wherein it was observed:

"27. [...] We are dealing with the case of a will and we must approach the problem as a court of conscience. It is for us to be satisfied whether the document put forward is the last will and testament of Gangabai. *If we find that the wishes of the testatrix are likely to be defeated or thwarted merely by reason of want of some technicality, we as a court of conscience would not permit such a thing to happen.* We have not heard Mr. Dharap on the other point; but assuming that Gangabai had a sound and disposing mind and that she wanted to dispose of her property as she in fact has done, the mere fact that the *propounder*s of the will were negligent--and grossly negligent--in not complying with the requirements of Section 63 and proving the will as they ought to have, should not deter us from calling for the necessary evidence in order to satisfy ourselves whether the will was duly executed or not." (emphasis supplied)

21. The judgment in M.B. Ramesh (supra) also refers to Janki Narayan Bhoir v. Narayan Namdeo Kadam; (2003) 2 SCC 91 in which with reference to Sections 68 and 71 of the Evidence Act, it was observed:

"22. [...] 6. ... It is true that although a will is required to be attested by two witnesses it could be proved by examining one of the attesting witnesses as per Section 68 of the Evidence Act.

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11. ... Aid of Section 71 can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence. ...

12. ... Section 71 has no application when the one attesting witness, who alone has been summoned, has failed to prove the execution of the will and the other attesting witness though available has not been examined."

22. Highlighting the aforesaid aspects in M.B. Ramesh (supra), it was held that:

"28. As stated by this Court also in *H. Venkatachala Iyengar* and Jaswant Kaur, while arriving at the finding as to whether the will was duly executed, the Court must satisfy its conscience having regard to the totality of circumstances. The Court's role in matters concerning wills is limited to examining whether the instrument propounded as the last will of the deceased is or is not that by the testator, and whether it is the product of the free and sound disposing mind [as observed by this Court in para 77 of Gurdev Kaur v. Kaki]. In the present matter, there is no dispute about these factors."

23. In *Jagdish Chand Sharma* (supra) reference was made to the facts of the case in M.B. Ramesh (supra) to observe that on consideration of the totality of circumstances emerging from the narration given by the attesting witness, the omission on the part of this witness to specifically state about the signature by the other attesting witness on the Will in the presence of the testatrix would amount to failure to recollect the fact which deficiency could be replenished with the aid of Section 71 of the Evidence Act. It was observed that the validity of the Will in M.B. Ramesh (supra) was upheld in the context of the attendant singular facts.

24. On the question of need to examine the second attesting witnesses when one attesting witness falters, way back in 1921 in *Dhira Singh v. Moti Lal*; 63 Ind. Cas. 266, two judges of the Patna High Court had held that where the attesting witness was neither summoned nor examined under the provisions of Section 68 of the Evidence Act, recourse to Section 71 is impermissible. Under the provisions of Section 68 of the Evidence Act, it is incumbent on the plaintiff/*propounder* to call the attesting witness even though he may be the defendant/opposite side. It was observed:

1. [...] Section 68 requires that a document which is required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, and Section 71 enacts that if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

2. A case on all fours with the present case is that of *Tula Singh v. Gopal Singh* 38 Ind. Cas. 604 : 1 P.L.J. 389 : 2 P.L.W. 353. In that case the learned Judges decided that Section 68 of the Evidence Act was imperative and so long as there was a witness alive and subject to the process of the Court, no document which is required by law to be attested can be used in evidence until such witness has been called. The fact that, when sailed (sic - assailed), he will prove hostile, does not excuse the party producing the document from this duty. The learned Subordinate Judge was, therefore, wrong in thinking that it was not necessary to call the defendant No. 2.

25. Majority of earlier judgments like *Vishnu Ramkrishna* (supra) follow the ratio in *Dhira Singh* (supra), with a few exceptions like *Mt. Manki Kaur v. Hansraj Singh1;* AIR 1938 Pat 301. The issue was resolved beyond controversy and debate in *Janki Narayan Bhoir* (supra) wherein it has been held that clause (c) of Section 63 of the Indian Succession Act requires and mandates attestation of a Will by two or more persons as witnesses, albeit Section 68 of the Evidence Act gives concession to those who want to prove and establish a Will in the court of law by examining at least one attesting witness who could prove the execution of the Will viz., attestation by the two witnesses and its execution in the manner contemplated by clause (c) to Section 63 of the Indian Succession Act. However, where one attesting witness examined fails to prove due execution of the Will, then the other available attesting witness must be called to supplement his evidence to make it complete in all respects to comply with the requirement of proof as mandated by Section 68 of the Evidence Act. It was held:

"11. Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of Section 68 of the Evidence Act, to meet a situation where it is not possible to prove the execution of the will by calling the attesting witnesses, though alive. This section provides that if an attesting witness denies or does not recollect the execution of the will, its execution may be proved by other evidence. Aid of Section 71 can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence. Section 71 has no application to a case where one attesting witness, who alone had been summoned, has failed to prove the execution of the will and other attesting witnesses though are available to prove the execution of the same, for reasons best known, have not been summoned before the court. It is clear from the language of Section 71 that if an attesting witness denies or does not recollect execution of the document, its execution may be proved by other evidence. However, in a case where an attesting witness examined fails to prove the due execution of will as required under clause (c) of Section 63 of the Succession Act, it cannot be said that the will is proved as per Section 68 of the Evidence Act. It cannot be said that if one attesting witness denies or does not recollect the execution of the document, the execution of will can be proved by other evidence dispensing with the evidence of other attesting witnesses though available to be examined to prove the execution of the will. Yet another reason as to why other available attesting witnesses should be called when the one attesting witness examined fails to prove due execution of the will is to avert the claim of drawing adverse inference under Section 114 Illustration (g) of the Evidence Act. Placing the best possible evidence, in the given circumstances, before the Court for consideration, is one of the cardinal principles of the Indian Evidence Act. Section 71 is permissive and an enabling section permitting a party to lead other evidence in certain circumstances. But Section 68 is not merely an enabling section. It lays down the necessary requirements, which the court has to observe before holding that a document is proved. Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but driven to a state of helplessness and impossibility, cannot be let down without any other means of proving due execution by "other evidence" as well. At the same time Section

71 cannot be read so as to absolve a party of his obligation under Section 68 read with Section 63 of the Act and liberally allow him, at his will or choice to make available or not a necessary witness otherwise available and amenable to the jurisdiction of the court concerned and confer a premium upon his omission or lapse, to enable him to give a go-by to the mandate of law relating to the proof of execution of a will."

26. This judgment overruled the judgment of *Manki Kaur* (supra) and approved the ratio of *Vishnu Ramakrishna* (supra) to the effect that Section 71 of the Evidence Act can be requisitioned when the attesting witnesses who were being called have failed to prove the execution of the Will by reason of either denying their own signatures, denying the signature of the testator or due to bad recollection as to the execution of the document. Section 71 has no application when only one attesting witness who was called and examined has failed to prove the execution of the Will and the other available attesting witness was not summoned.

27. The ratio in *Janki* was reiterated in *Benga Behera v. Braja Kishore Nanda;* (2007) 9 SCC 728. This judgment also examines the issue and question whether a Sub-Registrar in the matter of registration of documents under the provisions of Indian Registration Act, 1908 can possibly be treated as a witness. Reference was made to Sections 52 and 58 of the Registration Act to observe that the duty of the Registering Officer is to endorse the signature of every person presenting the document for registration and to make an endorsement to that effect, that is, to endorse only the admission or execution by the person who presented the document for registration. The Registering Officer can also endorse and certify the payment of money or delivery of goods made in the presence of the Registering Officer in reference to the execution of the document. The expression "attesting witness' within the meaning of Section 3 of the Transfer of Property Act and Section 63 of the Indian Succession Act means "bearing witness to a fact". The two valid conditions of attestation of documents are - (i) two or more attesting witnesses have seen the *executant* sign the instrument; (ii) each of them has signed the instrument in the presence of the *executant*. Further and importantly, attestation requires *animus attestandi*, that is, a person puts his signature on a document with the intent to attest it as a witness. If a person puts his signature on a document only in discharge of a statutory duty, he may not be considered as an attesting witness as was held in *Dharam Singh v. Aso*; 1990 Supp SCC 684. Similarly, a scribe or an advocate who has drafted the document may not be the attesting witness as was held by this Court in *Jagdish Chand Sharma* (supra), for attestation requires that the witness should have put his signature *animus attestandi*, that is, for the purpose of attesting that he has seen the *executant* sign or has received from him a personal acknowledgement of his signature."

32. The Hon'ble Apex Court in the case of **Kavita Kanwar v. Pamela Mehta reported in (2021) 11 SCC 209,** has observed as under:-

"23. It remains trite that a will is the testamentary document that comes into operation after the death of the testator. The peculiar nature of such a document has led to solemn provisions in the statutes for making of a will and for its proof in a court of law. Section 59 of the Succession Act provides that every person of sound mind,

not being a minor, may dispose of his property by will. A will or any portion thereof, the making of which has been caused by fraud or coercion or by any such importunity that has taken away the free agency of the testator, is declared to be void under Section 61 of the Succession Act; and further, Section 62 of the Succession Act enables the maker of a will to make or alter the same at any time when he is competent to dispose of his property by will. Chapter III of Part IV of the Succession Act makes the provision for execution of unprivileged wills (as distinguished from privileged wills provided for in Chapter IV) with which we are not concerned in this case.

23.1. Sections 61 and 63 of the Succession Act, relevant for the present purpose, could be usefully extracted as under:

"61. Will obtained by fraud, coercion or importunity.--A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void. ...

***

63. Execution of unprivileged wills.--Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules--

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

23.2. Elaborate provisions have been made in Chapter VI of the Succession Act (Sections 74 to 111), for construction of wills which, in their sum and substance, make the intention of legislature clear that any irrelevant misdescription or error is not to operate against the will; and approach has to be to give effect to a will once it is found to have been executed in the sound state of mind by the testator while exercising his own free will. However, as per Section 81 of the Succession Act, extrinsic evidence is inadmissible in case of patent ambiguity or deficiency in the will; and as per Section 89 thereof, a will or bequest not expressive of any definite intention is declared void for uncertainty. Sections 81 and 89 read as under:

"81. Extrinsic evidence inadmissible in case of patent ambiguity or deficiency.--Where there is an ambiguity or deficiency on the face of a will, no extrinsic evidence as to the intentions of the testator shall be admitted. ...

***

89. ***Will or bequest void for uncertainty***.--A will or bequest not expressive of any definite intention is void for uncertainty."

Moreover, it is now well settled that when the will is surrounded by suspicious circumstances, the Court would expect that the legitimate suspicion should be removed before the document in question is accepted as the last will of the testator.

23.3. As noticed, as per Section 63 of the Succession Act, the will ought to be attested by two or more witnesses. Hence, any document propounded as a will cannot be used as evidence unless at least one attesting witness has been examined for the purpose of proving its execution, if such witness is available and is capable of giving evidence as per the requirements of Section 68 of the Evidence Act, that reads as under:

"68. Proof of execution of document required by law to be attested.-- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

24. We may now take note of the relevant principles settled by the consistent decisions in regard to the process of examination of a will when propounded before a court of law.

24.1. In *H. Venkatachala Iyengar* [*H. Venkatachala Iyengar v. B.N. Thimmajamma*, AIR 1959 SC 443 : 1959 Supp (1) SCR 426] , a three-Judge Bench of this Court traversed through the vistas of the issues related with execution and proof of will and enunciated a few fundamental guiding principles that have consistently been followed and applied in almost all the cases involving such issues. The synthesis and exposition by this Court in paras 18 to 22 of the said decision could be usefully reproduced as under : (AIR pp. 451-52)

"18. What is the true legal position in the matter of proof of wills? It is well known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68, Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations

to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. *Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills.* It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the Court will start on the same enquiry as in the case of the proof of documents. The *propounder* would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of the *propounder*. In other words, the onus on the *propounder* can be taken to be discharged on proof of the essential facts just indicated.

20. *There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances*. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the *propounder*'s case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. *In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence*

of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

21. Apart from the suspicious circumstances to which we have just referred in some cases the wills propounded disclose another infirmity. *Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence*. It is in connection with wills that present such suspicious circumstances that decisions of English Courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical Courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word "conscience" in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasises that, in determining the question as to whether an instrument produced before the Court is the last will of the testator, the Court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

22. It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard-and-fast or inflexible rules can be laid down for the appreciation of the evidence. *It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence.* It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Parcq in *Harmes v. Hinkson [Harmes v. Hinkson*, 1946 SCC OnLine PC 20 : AIR 1946 PC 156 : (1945-46) 50 CWN 895] , "where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth". It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect."

(emphasis supplied)

24.2. In *Purnima Debi [Purnima Debi v. Kumar Khagendra Narayan Deb*, (1962) 3 SCR 195 : AIR 1962 SC 567] ,

this Court referred to the aforementioned decision in *H. Venkatachala Iyengar* [*H. Venkatachala Iyengar v. B.N. Thimmajamma*, AIR 1959 SC 443 : 1959 Supp (1) SCR 426] and further explained the principles which govern the proving of a will as follows : *(Purnima Debi case [Purnima Debi v. Kumar Khagendra Narayan Deb*, (1962) 3 SCR 195 : AIR 1962 SC 567] , AIR p. 569, para 5)

"5. Before we consider the facts of this case it is well to set out the principles which govern the proving of a will. This was considered by this Court in *H. Venkatachala Iyengar v. B.N. Thimmajamma* [*H. Venkatachala Iyengar v. B.N. Thimmajamma*, AIR 1959 SC 443 : 1959 Supp (1) SCR 426] . It was observed in that case that the mode of proving a will did not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act. The onus of proving the will was on the *propounder* and in the absence of suspicious circumstances surrounding the execution of the will proof of testamentary capacity and signature of the testator as required by law was sufficient to discharge the onus. Where, however, there were suspicious circumstances, the onus would be on the *propounder* to explain them to the satisfaction of the Court before the will could be accepted as genuine. If the caveator alleged undue influence, fraud or coercion, the onus would be on him to prove the same. *Even where there were no such pleas but the circumstances gave rise to doubts, it was for the propounder to satisfy the conscience of the Court.* Further, what are suspicious circumstances was also considered in this case. The alleged signature of the testator might be very shaky and doubtful and evidence in support of the *propounder*'s case that the signature in question was the signature of the testator might not remove the doubt created by the appearance of the signature. The condition of the testator's mind might appear to be very feeble and debilitated and evidence adduced might not succeed in removing the legitimate doubt as to the mental capacity of the testator; *the dispositions made in the will might appear to be unnatural, improbable or unfair in the light of relevant circumstances; or the will might otherwise indicate that the said dispositions might not be the result of the testator's free will and mind.* In such cases, the Court would naturally expect that all legitimate suspicions should be completely removed before the document was accepted as the last will of the testator. *Further, a propounder himself might take a prominent part in the execution of the will* which conferred on him substantial benefits. If this was so it was generally treated as a suspicious circumstance attending the execution of the will and the *propounder* was required to remove the doubts by clear and satisfactory evidence. But even where there were suspicious circumstances and the *propounder* succeeded in removing them, the Court would grant probate, though the will might be unnatural and might cut off wholly or in part near relations." (emphasis supplied)

24.3. In *Indu Bala Bose [Indu Bala Bose v. Manindra Chandra Bose*, (1982) 1 SCC 20] , this Court again said : (SCC pp. 22-23, paras 7-8)

"7. This Court has held that the mode of proving a will does not ordinarily differ from that of proving any other document except to the special requirement of attestation prescribed in the case of a will by Section 63 of the Succession Act. The onus of proving the will is on the *propounder* and in the absence of

suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where *however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine.* Even where circumstances give rise to doubts, it is for the *propounder* to satisfy the conscience of the court. *The suspicious circumstances may be as to the genuineness of the signatures of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural, improbable or unfair in the light of relevant circumstances*, or there might be other indications in the will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. If the *propounder* himself takes a prominent part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the *propounder* is required to remove the doubts by clear and satisfactory evidence. If the *propounder* succeeds in removing the suspicious circumstances the court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. *[Ed. : See Shashi Kumar Banerjee v. Subodh Kumar Banerjee, AIR 1964 SC 529; H. Venkatachala Iyengar v. B.N. Thimmajamma*, AIR 1959 SC 443 : 1959 Supp (1) SCR 426; Rani Purnima Devi v. Kumar Khagendra Narayan Dev, AIR 1962 SC 567 : (1962) 3 SCR 195]

8. Needless to say that any and every circumstance is not a "suspicious" circumstance. A circumstance would be "suspicious" when it is not normal or is not normally expected in a normal situation or is not expected of a normal person."

(emphasis supplied and in original)

24.4. We may also usefully refer to the principles enunciated in Jaswant Kaur [*Jaswant Kaur v. Amrit Kaur*, (1977) 1 SCC 369] for dealing with a will shrouded in suspicion, as follows : (SCC p. 373, para 9)

"9. *In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant.* What, generally, is an adversary proceeding becomes in such cases a matter of the court's conscience and then *the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator.* It is impossible to reach such satisfaction unless the party which sets up the will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the will."

(emphasis supplied)

24.5. In *Uma Devi Nambiar [Uma Devi Nambiar v. T.C. Sidhan*, (2004) 2 SCC 321] , this Court extensively reviewed the case law dealing with a will, including the Constitution Bench decision of this Court in *Shashi Kumar Banerjee v. Subodh Kumar Banerjee [Shashi Kumar Banerjee v. Subodh Kumar Banerjee*, AIR 1964 SC 529] , and observed that mere exclusion of the natural heirs or giving of lesser share to them, by itself, will not be considered to be a suspicious circumstance. This Court observed, inter alia, as under : *(Uma Devi Nambiar case [Uma Devi Nambiar v. T.C. Sidhan*, (2004) 2 SCC 321] , SCC pp. 332-34, paras 15-16)

"15. Section 63 of the Act deals with execution of unprivileged wills. It lays down that the testator shall sign or shall affix his mark to the will or it shall be signed by some other person in his presence and by his direction. It further lays down that the will shall be attested by two or more witnesses, each of whom has seen the testator signing or affixing his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator and each of the witnesses shall sign the will in the presence of the testator. Section 68 of the Indian Evidence Act, 1872 (in short "the Evidence Act") mandates examination of one attesting witness in proof of a will, whether registered or not. The law relating to the manner and onus of proof and also the duty cast upon the court while dealing with a case based upon a will has been examined in considerable detail in several decisions [*H. Venkatachala Iyengar v. B.N. Thimmajamma*, AIR 1959 SC 443 : 1959 Supp (1) SCR 426] , [Purnima Debi v. Kumar Khagendra Narayan Deb, (1962) 3 SCR 195 : AIR 1962 SC 567] , [Shashi Kumar Banerjee v. Subodh Kumar Banerjee, AIR 1964 SC 529] of this Court. ... A Constitution Bench of this Court in Shashi Kumar Banerjee case [Shashi Kumar Banerjee v. Subodh Kumar Banerjee, AIR 1964 SC 529] succinctly indicated the focal position in law as follows : (AIR p. 531, para 4)

"4. ... The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act. The onus of proving the will is on the *propounder* and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the *propounder* to explain them to the satisfaction of the court before the court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the *propounder* to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the *propounder* himself takes part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the *propounder* is required to remove the doubts by clear and satisfactory evidence. If the *propounder* succeeds in removing the suspicious circumstances the court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations.'

16. A will is executed to alter the ordinary mode of succession and by the very nature of things, it is bound to result in either reducing or depriving the share of natural heirs. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a will. It is true that a *propounder* of the will has to remove all suspicious circumstances.

Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance especially in a case where the bequest has been made in favour of an offspring. As held in *P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar [P.P.K. Gopalan Nambiar v. P.P.K.* Balakrishnan Nambiar, 1995 Supp (2) SCC 664] , it is the duty of the *propounder* of the will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind. It has been held that if the *propounder* succeeds in removing the suspicious circumstances, the court has to give effect to the will, even if the will might be unnatural in the sense that it has cut off wholly or in part near relations. ... In *Rabindra Nath Mukherjee v. Panchanan Banerjee [Rabindra Nath Mukherjee v. Panchanan Banerjee,* (1995) 4 SCC 459] , it was observed that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the will is to interfere with the normal line of succession and so, natural heirs would be debarred in every case of will. Of course, it may be that in some cases they are fully debarred and in some cases partly."

24.6. In *Mahesh Kumar [Mahesh Kumar v. Vinod Kumar*, (2012) 4 SCC 387 : (2012) 2 SCC (Civ) 526] , this Court indicated the error of approach on the part of the High Court while appreciating the evidence relating to the will as follows : (SCC pp. 405-06, paras 44-46)

"44. The issue which remains to be examined is whether the High Court was justified in coming to the conclusion that the execution of the will dated 10-2-1992 was shrouded with suspicion and the appellant failed to dispel the suspicion? At the outset, we deem it necessary to observe that the learned Single Judge misread the statement of Sobhag Chand (DW 3) and recorded something which does not appear in his statement. While Sobhag Chand categorically stated that he had signed as the witness after Shri Harishankar had signed the will, the portion of his statement extracted in the impugned judgment gives an impression that the witnesses had signed even before the *executant* had signed the will.

45. Another patent error committed by the learned Single Judge is that he decided the issue relating to validity of the will by assuming that both the attesting witnesses were required to append their signatures simultaneously. Section 63(c) of the 1925 Act does not contain any such requirement and it is settled law that examination of one of the attesting witnesses is sufficient. Not only this, while recording an adverse finding on this issue, the learned Single Judge omitted to consider the categorical statements made by DW 3 and DW 4 that the testator had read out and signed the will in their presence and thereafter they had appended their signatures.

46. The other reasons enumerated by the learned Single Judge for holding that the execution of the will was highly suspicious are based on mere surmises/conjectures. The observation of the learned Single Judge that the possibility of obtaining signatures of Shri Harishankar and attesting witnesses on blank paper and preparation of the draft by Shri S.K. Agarwal, Advocate on pre-signed papers does not find even a semblance of support from the pleadings and evidence of the parties. If Respondent 1 wanted to show that the will was drafted by the advocate after Shri Harishankar and the attesting

witnesses had signed blank papers, he could have examined or at least summoned Shri S.K. Agarwal, Advocate, who had represented him before the Board of Revenue."

24.7. Another decision cited on behalf of the appellant in *Leela Rajagopal [Leela Rajagopal v. Kamala Menon Cocharan*, (2014) 15 SCC 570 : (2015) 4 SCC (Civ) 267] may also be referred wherein this Court summarised the principles that ultimately, the judicial verdict in relation to a will and suspicious circumstances shall be on the basis of holistic view of the matter with consideration of all the unusual features and suspicious circumstances put together and not on the impact of any single feature. This Court said : (SCC p. 576, para 13)

"13. A will may have certain features and may have been executed in certain circumstances which may appear to be somewhat unnatural. Such unusual features appearing in a will or the unnatural circumstances surrounding its execution will definitely justify a close scrutiny before the same can be accepted. It is the overall assessment of the court on the basis of such scrutiny; the cumulative effect of the unusual features and circumstances which would weigh with the court in the determination required to be made by it. The judicial verdict, in the last resort, will be on the basis of a consideration of all the unusual features and suspicious circumstances put together and not on the impact of any single feature that may be found in a will or a singular circumstance that may appear from the process leading to its execution or registration. This, is the essence of the repeated pronouncements made by this Court on the subject including the decisions referred to and relied upon before us."

24.8. We need not multiply the references to all and other decisions cited at the Bar, which essentially proceed on the aforesaid principles while applying the same in the given set of facts and circumstances. Suffice would be to point out that in a recent decision in *Shivakumar v. Sharanabasappa [Shivakumar v. Sharanabasappa*, (2021) 11 SCC 277] , this Court, after traversing through the relevant decisions, has summarised the principles governing the adjudicatory process concerning proof of a will as follows : (SCC pp. 309-10, para 12)

"12. ... 12.1. Ordinarily, a will has to be proved like any other document; the test to be applied being the usual test of the satisfaction of the prudent mind. Alike the principles governing the proof of other documents, in the case of will too, the proof with mathematical accuracy is not to be insisted upon.

12.2. Since as per Section 63 of the Succession Act, a will is required to be attested, it cannot be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence.

12.3. The unique feature of a will is that it speaks from the death of the testator and, therefore, the maker thereof is not available for deposing about the circumstances in which the same was executed. This introduces an element of solemnity in the decision of the question as to whether the document propounded is the last will of the testator. The initial onus, naturally, lies on the *propounder* but the same can be taken to have been primarily discharged on proof of the essential facts which go into the making of a will.

12.4. The case in which the execution of the will is surrounded by suspicious circumstances stands on a different footing. The presence of suspicious circumstances makes the onus

heavier on the *propounder* and, therefore, in cases where the circumstances attendant upon the execution of the document give rise to suspicion, the *propounder* must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

12.5. If a person challenging the will alleges fabrication or alleges fraud, undue influence, coercion et cetera in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may give rise to the doubt or as to whether the will had indeed been executed by the testator and/or as to whether the testator was acting of his own free will. In such eventuality, it is again a part of the initial onus of the *propounder* to remove all reasonable doubts in the matter.

12.6. A circumstance is "suspicious" when it is not normal or is "not normally expected in a normal situation or is not expected of a normal person'. As put by this Court, the suspicious features must be "real, germane and valid" and not merely the "fantasy of the doubting mind".

12.7. As to whether any particular feature or a set of features qualify as "suspicious" would depend on the facts and circumstances of each case. A shaky or doubtful signature; a feeble or uncertain mind of the testator; an unfair disposition of property; an unjust exclusion of the legal heirs and particularly the dependants; an active or leading part in making of the will by the beneficiary thereunder et cetera are some of the circumstances which may give rise to suspicion. The circumstances abovenoted are only illustrative and by no means exhaustive because there could be any circumstance or set of circumstances which may give rise to legitimate suspicion about the execution of the will. On the other hand, any of the circumstances qualifying as being suspicious could be legitimately explained by the *propounder*. However, such suspicion or suspicions cannot be removed by mere proof of sound and disposing state of mind of the testator and his signature coupled with the proof of attestation.

12.8. The test of satisfaction of the judicial conscience comes into operation when a document propounded as the will of the testator is surrounded by suspicious circumstance(s). While applying such test, the court would address itself to the solemn questions as to whether the testator had signed the will while being aware of its contents and after understanding the nature and effect of the dispositions in the will?

12.9. In the ultimate analysis, where the execution of a will is shrouded in suspicion, it is a matter essentially of the judicial conscience of the court and the party which sets up the will has to offer cogent and convincing explanation of the suspicious circumstances surrounding the will."

33. In the instant case, it is stated that Will dated 26.06.1986 was duly proved by the witnesses namely Bachchu Lal and Bechan Lal. Accordingly, this Court considered the statements of these witnesses, which are on record.

34. From the statements of the witnesses namely Bachchu Lal and Bechan Lal produced before the Consolidation Authorities concerned, it is apparent that Bachchu Lal before the Consolidation Authority concerned specifically stated that one Narmatta brought the written Will, in issue, before him and after considering the thump impression of testator of the Will

namely Kishun and signature of Jagganath (Up-Pradhan) and thump impression of Tulsiram (Panch), he put his signature over the Will. Thus, Bachchu Lal cannot be considered as an atttesting witness of the Will. The statement of Bechan Lal before the Consolidation Officer is also liable to be disbelieved as this witness was not intact. This witness before the Consolidation Authority concerned stated that the Will was written at 10 P.M., whereas, as per writer of Will namely Hari Prasad, the Will was written on 26.06.1986 at 7 P.M. He also stated that the Will was written in presence of one Bachchu Lal, whereas, Bachchu Lal during corss examination specifically stated that the Will was not written in his presence. Bechan Lal before the Authority concerned also stated that the testator of Will namely Kishun himself purchased the stamp for the Will, however, the stamp paper itself speaks that it was purchased by Ghuru, one of the beneficiaries. Thus, the testimony of this witness is not reliable and being so, the observations of the Consolidation Authorities in the orders impugned are justified and are not liable to be interfered with by this Court.

35. Having considered the aforesaid as also the observations made by the Hon'ble Apex Court and the relevant provisions of the Act of 1925 and the Act of 1872, this Court finds that the petitioners failed to prove the Will before the Consolidation Officer, as such, their claim based upon the Will is not justified. Accordingly, this Court is of the view that the findings recorded by the Consolidation Authorities concerned in the orders impugned herein are justified and are not liable to be interfered with by this Court under Article 226 of the Constitution of India.

36. For the foregoing reasons, the writ petition is **dismissed**.

(2023) 3 ILRA 244
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.02.2023

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ C No. 659 of 2023

The Indian Express Pvt. Ltd. A-8, Sector-7, Noida Gautambuddha Nagar ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sunil Kumar Tripathi, Sri Devesh Tripathi, Sri Sandeep Pandey

Counsel for the Respondents:
A.S.G.I., Sri Ankur Goyal, C.S.C., Sri Ramesh Chandra Tiwari

Labour Law - Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 - Section 17(1) - Recovery of money due from an employer - Where any amount is due to a newspaper employee from an employer, the newspaper employee may, make an application to the State Government for the recovery of the amount due to him - If any question arises as to the amount due to a newspaper employee from his employer, the State Government may, refer the question to Labour Court - The decision of the Labour Court shall be forwarded by it to the State Government and any amount found due by the Labour Court may be recovered - power u/s 17(1) of Act, 1955 is unambiguous - in case there is a dispute with regard to determination of amount the Prescribed Authority shall refer a reference to Labour Court. (Para 10)

Labour Law - Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 - Section 17(1) - Workmen of petitioner-Company, i.e., Indian Express Pvt. Ltd., claimed that they have provided their services during Covid-19 pandemic period however, employer deducted certain percentage of their monthly salary - amount deducted was not in dispute - No reason was afforded prior to deduction and no prior notice was issued - Controversy before the Prescribed Authority was whether or not employer has power to deduct the amount as well as whether or not deduction was legally permissible - Held - Prescribed Authority entered into arena of dispute to determine legality of deduction, therefore, it has acted beyond its jurisdiction u/s 17(1) of Act, 1955 and committed legal error by not making reference to Labour Court - impugned order set aside and the Prescribed Authority directed to refer dispute to Labour Court (Para 10)

Allowed. (E-5)

List of Cases cited:

1. Ficus Fax Private Ltd. & ors. Vs U.O.I. & ors.Writ Petition (C) Diary No. 10983 of 2020, dt 20.06.2020

2. Pradhan Prabandhak/Union head M/s Amar Ujala vs. State of U.P. & ors.(Writ-C No. 11856 of 2018), decided on 31.05.2018.

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. The issue which requires consideration in present case is, "whether Prescribed Authority under Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 *(hereinafter referred to as "Act, 1955")* can consider a claim filed by workmen under Section 17(1) of Act, 1955 despite the it being a disputed claim?"

2. Learned counsel for parties have not seriously disputed the legal position with regard to above referred issue that application by a newspaper employees is to be filed under sub-section (1) of Section 17 of Act, 1955 as per Rule 36 of Working Journalists (Conditions of Service) and Miscellaneous Provisions Rules, 1957 *(hereinafter referred to as "Rules, 1957")*. That application can be filed before State Government or such authority, as the State Government may specify in that behalf. Where there exists no dispute, the State Government or authority, so specified, upon being satisfied that any amount is so due, shall issue a certificate for that amount to Collector and Collector would, thereafter, recover that amount as an arrears of land revenue. Where a question or dispute arises then a reference is to be made to Labour Court for adjudication of dispute. After adjudicating the dispute, Labour Court has to forward its decision to State Government or authority which made the reference, upon which the amount is to be recovered in the manner provided by sub-section (1) of Section 17 of Act, 1955. Since Section 17, as a whole, creates a single seamless scheme, the State Government, in exercise of its power under sub-section (1) can specify an authority to do all acts which it has power to do under Section 17 of Act, 1955.

3. Respondents-workmen of petitioner-Company, i.e., Indian Express Pvt. Ltd., have claimed that they have provided their services even during period in question, i.e., 01.04.2020 to 28.02.2021, when the country was facing adverse situation due to Covid-19 Pandemic, however, still employer has deducted certain percentage of their monthly salary and since amount was pre-determined, therefore, Prescribed Authority under Section 17(1) of Act, 1955 has jurisdiction to allow claim.

4. Sri Sunil Kumar Tripathi, learned counsel for petitioner has vehemently argued that it is not the question about determination of amount deducted as there is no dispute that said amount was deducted. Question before Prescribed Authority was that when employer has come up with a case that deduction was legal and contrary to it respondents-workmen have submitted that it was an illegal deduction, therefore, a dispute arose about legality of deduction, which could not be decided by Prescribed Authority under Section 17(1) of Act, 1955 and correct procedure was to refer a reference to Labour Court for adjudication of dispute.

5. Learned counsel for petitioner has further submitted that petitioner has also challenged notification dated 29.03.2020 issued by Ministry of Home Affairs, New Delhi in exercise of powers conferred under Section 10(2)(I) of Disaster Management Act, 2005 that District Magistrate shall take measures that all the employees, be it in industry or in the shops and commercial establishments, shall make payment of wages of their workers, at their work places, on due date, without any deduction, for the period their establishments are under closure during lockdown.

6. Learned counsel has further submitted that impugned notification is arbitrary and without considering that employer has suffered financial loss due to irregular publication of newspapers and magazines during lockdown period, therefore, they cannot be forced not to deduct any salary. He, however, fairly submitted that direction in impugned notification was not considered either directly or indirectly in impugned order.

7. Sri Ramesh Chandra Tiwari, learned counsel for respondents-workmen, also vehemently argued that workmen have continuously worked even during the period of lockdown and thereafter also and ensured that publication may not be discontinued and that newspapers were published and circulated effectively initially through online mode and thereafter by physical circulation. Period of deduction of salary was beyond the lockdown period also. No reason was afforded prior to deduction and no prior notice was issued. Amount was not disputed as well as employer has not disputed that during relevant period publication was regular and in this regard he referred the finding returned in impugned order. Learned counsel also referred a gazette notification dated 12.11.2014 that Prescribed Authority has power to consider application filed under Section 17(1) of Act, 1955. In support of above submission learned counsel has placed reliance on Supreme Court's judgment in **Ficus Fax Private Ltd. and others vs. Union of India and others (Writ Petition (C) Diary No. 10983 of 2020, decided on 20.06.2020** and this Court's judgment in **Pradhan Prabandhak/ Uniot head M/s Amar Ujala vs. State of U.P. and others (Writ-C No. 11856 of 2018)**, decided on 31.05.2018.

8. Heard learned counsel for parties and perused the material available on record.

9. As referred above, position of law with regard to power under Section 17(1) of Act, 1955 is unambiguous that in case there is a dispute with regard to determination of amount the Prescribed Authority shall refer a reference to Labour Court.

10. In the present case, it is not in dispute that certain percentage of salary was deducted for relevant period, therefore, amount deducted was not in dispute. However, since a controversy was arose before Prescribed Authority that, whether or not employer has power to deduct the amount as well as whether or not deduction was legally permissible and for that parties before Prescribed Authority have exchanged pleadings and led oral evidence also. Prescribed Authority has entered into arena of disputed questions and considered pleadings and oral evidence and recorded a finding that since undisputedly publication was regular and respondents-workmen were working regularly, therefore, deduction was illegal or not permissible and proceeded to pass order against petitioner and in favour of respondents-workmen. Since Prescribed Authority has entered into arena of dispute to determine legality of deduction, therefore, it has acted beyond its jurisdiction provided under Section 17(1) of Act, 1955 and committed legal error by not making reference to Labour Court.

11. Accordingly, impugned order dated 07.12.2022 is hereby set aside. Prescribed Authority is directed to refer dispute to Labour Court within a period of two weeks from today in accordance with provisions of Act, 1955 for its determination. The Labour Court is also directed to conclude proceedings within a period of six months thereafter, subject to other business of Court.

12. Petitioner-Employer is also at liberty to have a meeting with respondents-workmen, who have supported their employer during Covid-19 Pandemic, to settle the dispute with regard to deduction of salary even beyond lockdown period and if possible refund a proximate money to them.

13. So far as challenge to notification dated 29.03.2020 is concerned, no reference was made during impugned proceedings and there is no challenge to power under which said notification was issued. Nothing has been brought on record that any adverse order has been passed in pursuance of said notification. Accordingly, prayer to quash notification dated 29.03.2020 is hereby rejected.

14. With aforesaid directions/ observations the writ petition is disposed of.

(2023) 3 ILRA 247
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.02.2023

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ C No. 1350 of 2023

Smt. Subodh Kanti ...Petitioner
Versus
Distt. Judge Unnao & Ors. ...Respondents

Counsel for the Petitioner:
Ashish Kumar Rastogi

Counsel for the Respondents:
Purusottam Awasthi, Ashish Kumar

A. Civil Law - U.P. Panchayat Raj Act, 1947 – Section 12C - U.P. Panchayat Raj (Settlement of Election Disputes) Rules, 1994 - Election Petition - issue for consideration - whether framing of issues in an election petition is a sine qua non prior to deciding an election petition ? - Held - in an election petition filed under Section 12C of the Act 1947 the issues are

to be framed by the prescribed authority unless the prescribed authority proceeds to dismiss the election petition on a preliminary objection raised on behalf of the respondents (Para 24)

Dismissed. (E-5)

List of Cases cited:

1. Makhan Lal Bangal Vs Manas Bhunia & Ors (2001) 2 SCC 652

2. Kailas Vs Nanhku & ors.(2005) 4 SCC 480

3. Kalyan Singh Chouhan Vs C. P. Joshi AIR 2011 Supreme Court 1127

4. Samar Singh Vs Kedar Nath @ K. N. Singh & Ors 1987 (supp) SCC 663

5. Tarlok Singh Vs Municipal Corporation of Amritsar and another (1986) 4 SCC 27

6. K Venkateswara Rao & anr. Vs Bekkam Narasimha Reddi & Ors (1969) 1 SCR 679

7. Kulsum Vs State of U.P. & ors.2018 (8) ADJ 182

8. Uttamrao Shivdas Jankar Vs Ranjitsinh Vijaysinh Mohite Patil (2009) 13 SCC 131

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

1. Heard learned counsel for the petitioner and Shri Purusottam Awasthi, learned counsel for the respondent no. 2.

2. The instant petition has been filed praying for the following main relief:

"(i) Issue writ, order or direction in nature of certiorari, this Hon'ble Court may graciously be pleased to set aside / quash the impugned order dated 05.01.2023 passed by the opposite party no. 1 in revision no. 15/2022 (Murali Prasad Verma vs Smt Subodh Kanti and others) as contained in annexure no. 1 to this petition."

3. The case set forth by the petitioner is that the petitioner was declared elected as Gram Pradhan of Village Fatehur, Block Pargana and Tehsil Safipur, District Unnao in the elections of the year 2021. The respondent no. 2 was one of the candidates in the said election. The respondent no. 2 filed an election petition before the prescribed authority under provisions of Section 12C of the U.P. Panchayat Raj Act, 1947 (hereinafter referred to as the Act, 1947) challenging the election of the petitioner. The election petition was dismissed vide the order dated 23.05.2022, a copy of which is annexure 9 to the petition. The respondent no. 2, being aggrieved, filed a revision before the learned District Judge, Unnao vide Civil Revision No. 15 of 2022 in re: Murali Prasad Verma vs Subodh Kanti and others and learned revisional court vide the order impugned dated 05.01.2023, a copy of which is annexure 1 to the petition, set aside the order passed by the prescribed authority and remanded back the matter to the prescribed authority for deciding afresh in the light of the given directions.

4. The ground which prevailed on the revisional court in setting aside the order of the prescribed authority was that prior to passing of the order dated 23.05.2022 by the prescribed authority, no issues were framed. In this regard learned revisional Court has placed reliance on the judgement of Hon'ble the Apex Court in the case of **Makhan Lal Bangal vs Manas Bhunia and others** reported in **(2001) 2 SCC 652.**

5. Raising a challenge to the order impugned by which the revisional court has remanded the matter to prescribed authority

for deciding afresh on the ground of non framing of issues, the argument is that framing of issues is not a sine qua non to an election petition being decided in as much as the provisions of Civil Procedure Code are not strictly applicable on an election petition filed under the provisions of the Act, 1947. In this regard reliance has been placed on judgements of Hon'ble the Apex Court in the case of **Kailas vs Nanhku and others reported in (2005) 4 SCC 480, Kalyan Singh Chouhan vs C. P. Joshi reported in AIR 2011 Supreme Court 1127, Samar Singh vs Kedar Nath @ K. N. Singh and others reported in 1987 (supp) SCC 663, Tarlok Singh vs Municipal Corporation of Amritsar and another reported in (1986) 4 SCC 27 and K Venkateswara Rao and anothers vs Bekkam Narasimha Reddi and others reported in (1969) 1 SCR 679.**

6. Placing reliance on the aforesaid judgments the argument is that in all the aforesaid cases Hon'ble the Apex Court has held that provisions of the C.P.C. are not strictly applicable in an election petition and consequently the order of the revisional court whereby the matter has been remanded to the prescribed authority simply on the ground that no issues were framed prior to the prescribed authority dismissing the election petition calls for interference by this Court.

7. On the other hand, Shri Purusottam Awasthi, learned counsel appearing for the respondent no. 2 contends that the provisions of the Act 1947 read with the rules which have been framed for deciding of the election petition namely the U.P. Panchayat Raj (Settlement of Election Disputes) Rules, 1994 (hereinafter referred to as the Rules 1994) categorically provide the manner in which hearing of an election petition is to take place. He contends that this aspect of the matter has been considered by this Court in the case of **Kulsum vs State of U.P. and others** reported in **2018 (8) ADJ 182** wherein this Court after placing reliance on the Supreme Court judgement in the case of **Makhan Lal Bangal (supra)** as well as **Uttamrao Shivdas Jankar vs Ranjitsinh Vijaysinh Mohite Patil** reported in **(2009) 13 SCC 131** has held that the prescribed authority has to first frame issues prior to deciding of an election petition or prior to directing for recounting as was the case involved in the case of **Kulsum (supra)**.

8. Placing reliance on the judgement of Hon'ble the Apex Court in the case of **Makhan Lal Bangal (supra)** the argument of Shri Purusottam Awasthi, learned counsel for the respondent no. 2 is that the Apex Court has categorically held that an election petition is like a civil trial and the stage of framing of issues is an important one in as much as on that day the scope of trial of the case is determined by laying a path on which the trial shall proceed excluding divergence and departure. The Apex Court has also held that the issues shall be framed and recorded on which the decision of the case shall depend.

9. Placing reliance on the aforesaid observations of Hon'ble the Apex Court in the case of **Makhan Lal Bangal (supra)** the argument of Shri Purusottam Awasthi, learned counsel for the respondent no. 2 is that unless and until the issues were framed by the prescribed authority on which the election petition filed by the respondent no. 2 was to be decided, the summary and cursory dismissal of the election petition filed by the respondent no. 2 could not be said to be in accordance with law and as such the learned revisional court has not

erred in law in remitting back the matter to the prescribed authority for framing of issues and for deciding the election petition.

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

11. From a perusal of record it is apparent that upon the petitioner being declared elected as the Gram Pradhan of the village in question, an election petition was filed by the respondent no. 2 challenging the election of the petitioner. The prescribed authority, vide the order dated 23.05.2022 without admittedly framing issues, dismissed the election petition. The respondent no. 2, being aggrieved, filed a revision and the learned revisional court, vide order impugned dated 05.01.2023, after considering the law laid down by the Apex Court in the case of **Makhan Lal Bangal (supra)** and holding that as no issues have been framed by the prescribed authority prior to dismissing the election petition, has remitted back the matter to the prescribed authority for passing of a fresh order.

12. The issue for consideration before the Court is that as to whether framing of issues in an election petition is a sine qua non prior to deciding an election petition?

13. The said issue is no longer res-integra having been decided by a three judges bench of Hon'ble the Apex Court in the case of **Makhan Lal Bangal (supra)** where it has been held as under:

"An election petition is like a civil trial. The stage of framing the issues is an important one inasmuch as on that day the scope of the trial is determined by laying the path on which the trial shall proceed excluding diversions and departures therefrom. The date fixed for settlement of issues is, therefore, a date fixed for hearing. The real dispute between the parties is determined, the area of conflict is narrowed and the concave mirror held by the court reflecting the pleadings of the parties pinpoints into issues the disputes on which the 'two sides differ. The correct decision of civil lis largely depends on correct framing of issues, correctly determining the real points in controversy which need to be decided. *The scheme of order XIV of the Code of Civil Procedure dealing with settlement of issues shows that an issue arises when a material proposition of fact or law is affirmed by one party and denied by the other. Each material proposition affirmed by one party and denied by other should form the subject of distinct issue. An obligation is cast on the court to read the plaint/petition and the written statement/counter, if any, and then determine with the assistance of the learned counsel for the parties, the material propositions of fact or of law on which the parties are at variance.* ***The issues shall be framed and recorded on which the decision of the case shall depend. The parties and their counsel are bound to assist the court in the process of framing of issues.*** *Duty of the counsel does not belittle the primary obligation cast on the court.* ***It is for the Presiding Judge to exert himself so as to frame sufficiently expressive issues. An omission to frame proper issues may be a ground for remanding the case for retrial subject to prejudice having been shown to have resulted by the omission.*** *The petition may be* ***disposed of*** *at the first hearing if it appears that the parties are not at issue on any material question of law or of fact and the court may at once pronounce the*

judgment. If the parties are at issue on some questions of law or of fact, the suit or petition shall be fixed for trial calling upon the parties to adduce evidence on issues of fact. The evidence shall be confined to issues and the pleadings. No evidence on controversies not covered by issues and the pleadings, shall normally be admitted, for each party leads evidence in support of issues the burden of proving which lies on him. The object of an issue is to tie down the evidence and arguments and decision to a particular question so that there may be no doubt on what the dispute is. The judgment, then proceeding issue-wise would be able to tell precisely how the dispute was decided."

(emphasis by the Court)

14. Likewise Hon'ble the Apex Court in the case of **Uttamrao Shivdas Jankar (supra)** has held as under:

"48. In an election petition, the High Court acts as a Court of original jurisdiction and the ***election petition is a civil trial and the jurisdiction in such a trial, stricto sensu cannot be said to be appellate in nature.*** *Clearly, the High Court acted illegally in treating its power only as an appellate authority and not as an original authority for it only proceeded to try and determine as to whether or not the decision making process is legal. That approach of the High court in our considered opinion was illegal and unjustified.*

49. ***The High court was duty bound to treat the matter on merits by framing issues and thereafter calling for production of evidence in support of their respective cases.*** *The High court should have examined the veracity of the rival claims based on the evidence produced by the parties and should have tested the correctness of the affidavits. The opinion of the hand writing expert in that regard would have been sufficient and on the basis of the same it could be possible for the High court to decide the entire lis between the parties. The High Court despite being the Court of original jurisdiction acted as a court of appellate jurisdiction and dismissed the petition without allowing the parties to produce evidence in support of their contention."*

(emphasis by the Court)

15. Considering the judgments of Hon'ble the Apex Court in the cases of **Makhan Lal Bangal (supra)** and **K Venkateswara Rao (supra)** this Court in the case of **Kulsum (supra)** has held as under:

"Therefore, in view of the law laid down by the Supreme Court in the case of Uttamrao Shivdas Jankar ***(supra)*** *and Makhan Lal Bangal* ***(supra)****, in my opinion,* ***the order of the prescribed authority directing the recounting of votes without first framing of issues is wholly illegal and unsustainable in law and is accordingly, set aside."***

(emphasis by the Court)

16. Thus from a perusal of the aforesaid judgments it emerges that while trying an election petition, the election tribunal is required to frame issues prior to deciding the election petition.

17. The Apex Court in the judgement of **Kailash (supra)**, over which much reliance has been placed by learned counsel for the petitioner has held, while considering the provisions of Section 87(1) of the Representation of People Act, 1950 that the applicability of the procedure provided for the trial of elections petition is

not attracted with all its rigidities and technicalities and the rules of procedure contained in C.P.C. apply to the trial of election petitions under the Act 1947 with flexibility and only as guidelines.

18. From a perusal of the provisions of the Act 1947 more particularly Section 12-C(5) it comes out that sub-section (5) of Section 12-C of the Act 1947 has provided that without prejudice to the generality of the powers to be prescribed under sub-section (4) of Section 12-C of the Act 1947, the rules may provide for summary hearing and disposal of an application under sub-section (1) of Section 12-C of the Act, 1947. Subsequent thereto, the Rules 1994 have been framed which give the procedure for hearing of the election petition. Nowhere do the rules or Act prohibit the election tribunal from framing issues prior to deciding the election petition which has been filed before it.

19. Hon'ble the Apex Court in the case of **Kalyan Singh Chouhan (supra)** over which reliance has been placed by the petitioner, after considering the earlier judgement of **Kailash (supra)**, has held as under:

"24. Therefore, in view of the above, it is evident that the party to the election petition must plead the material fact and substantiate its averment by adducing sufficient evidence. ***The court cannot travel beyond the pleadings and the issue cannot be framed unless there are pleadings to raise the controversy on a particular fact or law.*** *It is, therefore, not permissible for the court to allow the party to lead evidence which is not in the line of the pleadings. Even if the evidence is led that is just to be ignored as the same cannot be taken into consideration."*

20. Thus, in effect the judgement of **Kalyan Singh Chouhan (supra)** supports the order passed by the revisional court instead of supporting the argument of learned counsel for the petitioner.

21. The case of **Samar Singh (supra)** was a case in which the Apex Court has held that where a complaint or an election petition does not disclose any cause of action it does not stand to reason as to why the defendants of the respondents should incur cost in wasting public time producing evidence when the proceedings can be **disposed of** on preliminary objections.

22. It is not the case of the petitioner, from the pleadings on record, that there were certain preliminary objections that were raised before the prescribed authority on which basis the election petition should have been dismissed summarily. Moreover, the judgement of Samar Singh **(supra)** does not pertain to an election petition and as such does not have relevance to the facts of the instant case.

23. The judgements of Hon'ble the Apex Court in the case of **K Venkateswara Rao (supra)** and **Tarlok Singh (supra)** are judgements of two Hon'ble judges and obviously would have to give way to the three judges judgement of **Makhan Lal Bangal (supra)**.

24. Keeping in view the aforesaid discussion as well as the judgments of Hon'ble the Apex Court in the case of **Makhan Lal Bangal (supra)** and **Uttamrao Shivdas Jankar (supra)** and the judgement of this Court in the case of **Kulsum (supra)**, it is apparent that in an election petition filed under Section 12C of the Act 1947 the issues are to be framed by the prescribed authority unless the

prescribed authority proceeds to dismiss the election petition on a preliminary objection raised on behalf of the respondents.

25. Keeping in view the aforesaid discussion, no illegality and infirmity is found with the order impugned, as such no interference is required in the order impugned. Accordingly, the writ petition is **disposed of** directing the prescribed authority to proceed to decide the matter in terms of the directions issued by the revisional court.

(2023) 3 ILRA 253
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.03.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ C No. 2478 of 2022

M/S Radhika Constructions ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Mr. Shishir Chandra

Counsel for the Respondents:
C.S.C., Mr. Tushar Verma

A. Civil Law - Mining - Illegal Mining - Uttar Pradesh Minor Minerals (Concessions) Rules, 1963 - Rule 58, 60 & 67 - Consequences of non-payment of royalty rent or other dues- State Government may terminate the mining lease after serving a notice on the lessee to pay within thirty days of the receipt of the notice any amount due to the State Government if it was not paid within fifteen days next after the date fixed for such payment - in the instant case thirty days from the date of notice expired on 11.05.2021 and fifteen days beyond the said date expired on 26.05.2021, however the order of cancellation was passed on 26.4.2021 before the expiry of the statutory period - Rule 58 flagrantly violated by the respondents in cancellation of the lease - Cancellation order set aside(Para 30)

B. Civil Law - Mining - Illegal Mining - Uttar Pradesh Minor Minerals (Concessions) Rules, 1963, Rule 58, 60, 67 - Consequences of contravention of rules and conditions of lease - If the allegations are of illegal mining beyond the leased area, the inspection report must provide the GPS coordinates of both the inspected area and the area beyond the lease alleged to have been illegally mined - It must be established that illegal mining had, in fact, been done on area beyond the leased area (Para 19, 23)

C. Civil Law - Illegal Mining - cancellation of the Mining lease licenses - *Violation of Principles of Natural Justice* - show cause notice issued to the petitioner contained only allegations of illegal mining recorded by the inspection team - culpability of the petitioner was decided solely on the inspection report, however, the inspection report was never supplied to the petitioner - inquiry proceedings were conducted in clear violation of the principles of natural justice, severely prejudicing the petitioner's defense - No other evidence or statements were recorded during the inquiry, and no documents were taken on record – the inspection report did not mention when and where the inspection was carried out, who was present, or whether it was conducted at the location allotted to the petitioner - there was no mention of GPS coordinates used for identifying the plot - There was no sufficient and cogent material linking the petitioner to the charge of illegal mining - cancellation order passed by the District Magistrate, without application of any mind at the dictates of the higher authority i.e. of Director, Mining and Geology - the grounds / defence taken by the petitioner

in the reply have not even been considered either by the appellate or revisional authority rendering the impugned order illegal and arbitrary (Para 20, 23, 24)

D. Civil Law - Illegal Mining - cancellation of the Mining lease licenses - *Bias* - Dr. Roshan Jacob, who was the Director, Geology and Mining directed the District Magistrate to proceed against the petitioner and to cancel his mining lease, which order was duly complied - subsequently she herself as the revisional authority, against the order of cancellation of the mining lease, proceeded to hear and reject the revision - Held Revisional order hit by the vice of bias (Para 27)

Allowed. (E-5)

List of Cases cited:

1. Ranveer Singh Vs St. of U.P. & ors., 2017 (1) ADJ 240

2. Mustafa Vs .U.O.I., (2022) 1 SCC 294

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Mr. Shishir Chandra, learned counsel for the petitioner as well as Sri Rakesh Bajpai, learned Standing counsel, Sri Tushar Verma, Special Counsel and Sri Ramesh Kumar Singh, Additional Advocate General for the respondents.

2. By means of the present writ petition the petitioner has challenged the order dated 16.3.2022 passed by the State Government thereby rejecting the revision preferred by the petitioner against the cancellation of mining lease vide orer dated 26.4.2021 passed by District Magistrate, Banda.

FACTS OF THE CASE :-

3. The facts in brief necessary for adjudication of the present case are that the petitioner in response to an e-tender/e-auction for mining participated in the auction and his bid was adjudged to be the highest and lease deed was executed in favor of the petitioner on 6.6.2020 for the period from 6.6.2020 to 5.6.2025. After execution of the mining lease the petitioner started mining operations but suddenly the One Time Password (O.T.P.) was stopped by the District Magistrate, Banda on 19.3.2021. Subsequently, it is stated that an inspection was conducted by a team of officers of the Directorate, Mining and Geology, Uttar Pradesh between 13.3.2021 and 18.3.2021 and some allegations with regard to the irregularities pertaining to illegal mining were found correct and on the basis of the aforesaid inspection report a show cause notice was served on the petitioner on 22.3.2021. According to the said show cause notice issued by the District Magistrate, Banda it was mentioned that an inspection was conducted by a team where it has been found that the petitioner is involved in illegal mining and he has extracted minor minerals from the area not allotted to him and extracted mineral to a depth which was not permissible as per the lease deed. Accordingly, a notice was given as to why the lease be not cancelled. In the said show cause notice, penalty for the same offence has also been fixed as Rs.50,000/- and recovery of royalty for an amount of Rs.7,81,61,400/- has also been proposed in the said notice.

4. The petitioner in pursuance of the aforesaid show cause notice submitted reply on 30.3.2021 where they have denied the allegations leveled in the show cause notice and have stated that apart from the show cause notice no material was

provided to the petitioner as directed by the court in the case of ***Ranveer Singh Vs. State of U.P. and others, 2017 (1) ADJ 240*** passed in writ C No.51986 of 2016 and further submitted that there was no credible evidence in support of the allegations and, hence, requested for setting aside the show cause notice.

5. After considering the reply of the petitioner the District Magistrate by means of its order dated 26th April, 2021 has cancelled the mining lease of the petitioner. While rejecting the reply of the petitioner the District Magistrate has recorded that the petitioner has extracted minor minerals from an area not allotted to him and extracted 12,970 cubic meters of sand/maurang in excess and 73,876 cubic meters illegally which fact has been reported by the Enforcement Team in its report dated 19.3.2021. He has further noticed that the petitioner was asked to deposit the amount of royalty of an amount of Rs.7,81,61,400/- but even the said amount has not been deposited by the petitioner and accordingly he was of the view that the said outstanding amount needs to be recovered from the petitioner along with penalty as provided under Rule 41 (H) (1) and 59 (2) of Uttar Pradesh Minor Minerals (Concessions) Rules, 1963. He has further considered the fact that the Director, Mining and Geology, Uttar Pradesh had constituted enforcement team for physical inspection which conducted the spot inspection on 14.3.2021 which submitted report on 19.3.2021 where it was found that the petitioner had conducted mining operations of an area 3.358 hect. and extracted 73,876 cubic meters of sand beyong the area allotted to him apart from other illegal mining alleged in the said order and even the bank of the river has been extracted to a depth which is beyond the prescribed limit. In this regard a first information report was also lodged against the petitioner.

6. The District Magistrate has relied upon the inspection report and has stated that the petitioner could not produce any evidence or prove his case contrary to the findings recorded by the inspection team and, hence, rejected the reply of the petitioner and proceeded to pass order for recovery of an amount of Rs.7,81,61,400/- and also cancelled the lease deed issued in favour of the petitioner and further placed him in black list for a period of two years.

7. The petitioner being aggrieved by the order of the District Magistrate dated 26th April, 2021 had preferred a revision before the State Government which has also been decided and rejected by means of the impugned order dated 16.3.2022. The revisional authority while rejecting the revision of the petitioner and passing the impugned order has noticed the fact that an inspection was carried out on which the mining lease was granted to the petitioner and certain allegations have come forth on the basis of which the show cause notice was given to the petitioner to which reply was submitted by him on 30.3.3021. The reply of the petitioner was not found satisfactory and merely on account of the fact that the allegations against the petitioner stood concluded by the inspection team no infirmity was found in the order of District Magistrate and accordingly the revision was rejected.

8. The petitioner in the present petition has assailed the cancellation of the lease deed as well as revisional order dated 16.3.2022 and the recovery as well.

GROUNDS OF CHALLENGE :-

9. Learned counsel for the petitioner has firstly submitted that no proper opportunity of hearing was given to the petitioner before passing the order of cancellation and recovery against the petitioner. In support of his submissions he has submitted that, in fact, no inspection was actually carried out and a perusal of the show cause notice dated 22.3.2021 would indicate that no material including the copy of inspection report was supplied to the petitioner along with the show cause notice and in absence of the relevant documents and material constituting the basis of the allegationsagainst the petitioner the entire proceedings was conducted in violation of the principles of natural justice and accordingly the same are illegal, arbitrary and deserve to be set aside.

10. Learned Standing counsel Sri Rakesh Bajpai, on the other hand, supporting the impugned orders submitted that a perusal of the show cause notice indicates that entire contents of the inspection report have been reproduced in the show cause notice. He does not dispute the fact that copy of the inspection report dated 19.3.2021 was never supplied to the petitioner.

11. Learned counsel for the petitioner has further submitted that the inspection report and all other relevant documents have been annexed by the State Government along with the counter affidavit. It is further submitted that the inspection report was submitted on 19.3.2021 to the Director, Mining and Geology, Government of Uttar Pradesh who by means of letter dated 20.3.2021 addressed to the District Magistrate, Banda forwarded a copy of the inspection report for proceedings against the petitioner. Along with the said report he had categorically given directions to the District Magistrate to pass orders as mentioned therein. The name of the petitioner finds mention at serial No.15 of the said letter where the District Magistrate was directed to register F.I.R. against the petitioner, cancel his mining lease and place his name in the black list and with regard to the allegations of illegal mining recovery be made from him. For the sake of convenience the directions of the Director are reproduced as under:-

''स्वीकृत क्षेत्र से बाहर एवं सटे खण्ड के क्षेत्र में अवैध खनन तथा अन्य अनियमितता पाये जाने पर पट्टेधारक के विरूद्ध थ्र दर्ज कराते हुए नियमानुसार पट्टा निरस्तीकरण एवं पट्टेधारक का नाम काली सूची में डाला जाय तथा अवैध खनन के विरूद्ध पट्टाधारक से नियमानुसार राजस्व क्षति की धनराशि वसूल किये जाने की कार्यवाही की जाय।

12. It has also been submitted by the petitioner that entire proceedings have been held without any application of mind by the District Magistrate and from a perusal of the directions issued by the Director, Mining and Geology, the District Magistrate, who is the subordinate to the Secretary (Mining and Geology) was duty bound to comply and, in fact, complied with the directions and consequently it is a clear case of bias and non application of mind by the District Magistrate.

13. Learned counsel for the petitioner has further assailed the impugned orders on the ground that the inspection was conducted by Team A with regard to 19 persons who were the lease holders of the lease licenses issued in their favour and in pursuance of inspection report dated 19.3.2021 action was taken against all the 19 persons and in all the cases the directions / dictates of the Director, Mining and Geology, as contained in his letter

dated 20.3.2021 were duly followed and complied by the District Magistrate and the leases of all the persons included in the said list was cancelled. It is further stated that against all the cancellation orders the respective persons had filed revisions before the State Government which were again decided by the Director (Mining and Geology), the same officer who had authored the letter dated 20.3.2021 in his capacity as Secretary (Mining and Geology) of Government of Uttar Pradesh and rejected all the revisions except the revision of the revisionist at serial No.16, namely of VAR Enterprises Pvt. Ltd. A copy of the order passed in Revision No.128 (R)/SM/2021 filed by VAR Enterprises Pvt. Ltd has been annexed along with writ petition wherein on he basis of the same report the revision of VAR Enterprises Pvt. Ltd. has been allowed holding that the inspection report had clear infirmity and could not be relied upon and there is no material to indicate that the delinquent lease holder had, in fact, was involved or has indulged in any illegal mining and in the aforesaid circumstances, the Secretary, Government of Uttar Pradesh (Mining and Geology) in exercise of the power of the revisional authority on the basis of the same material allowed the said revision vide order dated 24.2.2022.

14. Learned counsel for the petitioner claims parity of the order dated 24.2.2022 and submits that the revisional authority has discriminated against the petitioner in as much as while considering the revision in the case of of VAR Enterprises Pvt. Ltd. on the basis of the same facts and for the same reason the revision of the petitioner has been dismissed.

15. Sri Rakesh Bajpai, *per contra*, has submitted that due opportunity of hearing was given to the petitioner before passing the impugned orders. He submits that as per the provisions contained under Rule 60 and 67 of Uttar Pradesh Minor Mineral (Concession) Rules, 1963 reasonable opportunity of hearing has to be given to the petitioner before passing any cancellation or blacklisting order. He submits that the inspection was conducted by the authority prescribed under the said Rules and according to the said inspection it can safely be stated that as per the inspection report the petitioner was found to have indulged in illegal mining and, hence, was subjected to show cause notice and it is only after receiving the reply to the said show cause notice that action has been taken in accordance with the provisions contained in the said Act for cancellation of the lease deed and for imposition of the penalty. He submits that due opportunity of hearing was given to the petitioner and consequently it cannot be said that the proceedings are dehors the law and thus supported the entire proceedings as well as the impugned orders. He has further vehemently submitted that not providing copy of the inspection report dated 19.3.2021 has not prejudiced the case of the petitioner nor prejudice has been caused to the petitioner by not supplying the inquiry report and, as such, it cannot be said that there is any violation of the principles of natural justice.

DISCUSSION :-

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

17. The State Government after receiving certain complaints with regard to illegal mining by various persons in District Banda proceeded to constitute three

enforcement teams for inspecting various areas for which the lease was granted for the purpose of mining. The order dated 12.3.2021 passed by Director, Mining & Geology, which is on record, indicates that the said team consisted of three officers from the same department along with Surveyor. It is further submitted that the said teams conducted inspection and submitted their inspection reports on 19.3.2021 to the Director. In the said report only finding is limited to the extent of area which has been mined and the quantity of mineral extracted with regard to each of the leases has been indicated. It is further noticed that there is no mention in the said report as to when the said inspection was carried out or as to whether the lease holders were ever informed about the said inspection or the manner in which the inspection was carried out are some of the factors which did not find mention in the said inspection reports. The inspection report with regard to each of the license holders in an extremely cryptic manner has only recorded that the license holders are involved in illegal mining and the quantities have been mentioned which have been illegally extracted by all the lease holders.

18. Learned Standing counsel, on the other hand, has stated that the said inspection was carried out and entries made in the diary of the surveyorwhich have also included in the counter affidavit. It is noticed that only the surveyor has signed on the reprot. It is surprising that even if this fact is accepted that certain irregularities with regard to the petitioenr was found on 17.3.2021 why the remaining members of inspection team did not sign on the said survey report is one aspect whose answer has neither been given by the respondents in the counter affidavit nor has been satisfactorily responded by the Standing counsel and, therefore, the inspection itself becomes doubtful. It is on the basis of the said inspection report which was submitted to the Secretary, Mining and Geology that the entire proceedings have been conducted against the petitioner and also against all other lease holders. It is further noticed that as per lease deed dated 6th June, 2020 the petitioner was allotted following areas:-

बिन्दु	अक्षान्तर	देशान्तर
A	25º43.419 N	80º 33.858 E
B	25º43.350 N	80º 33.977 E
C	25º 43.074 N	80º 33.810 E
D	25º43.157 N	80º 33.701 E

19. Further, the said mining area was described with reference to the other plots on the North, South, East and West of the leased area which has been described therein. It is noticed that the inspection report only records that the petitioner has made excavation and extracted minor minerals from the areas outside the mining area. It is nowhere mentioned when and where the inspection was carried out, who were present during the inspection and most importantly whether the inspection was carried out at the location allotted to the petitioner is also doubtful as the plot is identifiable by G.P.S. Coordinates and there is no mention that G.P.S. Coordinates were used for identification of the plot. These are the essential facts which go to the root of the matter. If the allegations against the petitioner is that they have illegally mined beyond the leased area then it was the duty of the inquiry team to have identified/pointed out the same but there is no attempt to establish the case that illegal mining had, in fact, been done on area beyond the leased area. All these facts

should have been given in detail as the report recorded a finding that the said extraction have been conducted in the area beyond the leased area then it should have been described by giving their coordinates in the inspection report which was not done.

20. It is in the aforesaid facts and circumstances that this Court is of the view that the allegations against the petitioner for illegal mining could not be clearly established and merely stating that large quantity of the minerals have been extracted by them would not *ipso facto* prove that the petitioner had been involved in illegal mining. It is the duty of the State to obtain and produce credible evidence in support of th eallegations to bring home the charges. The arguments in this regard have force, specially, relying on the judgment of this Court in the case of ***Ranveer Singh Vs. State of U.P. and others, 2017 (1) ADJ 240*** where this Court has held as under:-

"33. Once the liability was to be fastened on the shoulder of the petitioner, then it was the obligation of the State to prove by way of credible evidence available that it was the petitioner, who has indulged in illegal mining and in the said direction, apart from issuing show-cause notice, all the evidence that was sought to be relied upon, i.e., the incumbents who have carried out the search and survey and the incumbents who have come forward to depose against the petitioner their names ought to have been disclosed and they ought to have been produced to support the case of the State that petitioner, in fact, has indulged in illegal mining. Not only this, as a part of process, the petitioner was entitled to have reasonable opportunity of defending himself by questioning the veracity of evidence produced against him and by adducing his own evidence, if any. Decision maker is bound to act fairly, as under the scheme of things provided for the determination made by him will entail civil consequences, as qua the person charged with illegal mining, on charges being proved, financial liability would be shouldered and in contra situation, the State would be at loss."

21. It is further noticed that no further evidence was adduced during the proceedings apart from the inspection report which could indicate that the petitioner or the other persons were involved in illegal mining. No evidence in this regard has either been placed on record before this Court or during the course of inquiry conducted by the respondents culminating into cancellation of the lease licenses.

NON-SUPPLY OF DOCUMENT :-

22. With regard to non-supply of the inspection report in the present case, it is not disputed that show cause notice contained only allegations with regard to illegal mining as recorded by the inspection team. Copy of the inspection report was never supplied to the petitioner. Though there are several judgments including the judgments cited by the Standing counsel in the case of ***Gorkha Security Services Vs. Government (NCT of Delhi) and others, (2014) 9 Supreme Court Cases 105*** where it has been held that in case inquiry report is not supplied to the delinquent then the proceedings would not *ipso facto* be illegal and arbitrary and in violation of principles of natural justice but delinquent will have to show that prejudice was caused to him by not supplying a copy of the inquiry report.

23. It is noticed that in the present case the proceedings have been conducted against the petitioner only on the basis of inspection report. Undisputedly, no other material was adduced during the said inquiry nor any evidence or statement was recorded during the inquiry. No documents were ever taken on record during the said inquiry and the culpability of the petitioner with regard to illegal mining and other allegations has been decided only on the basis of inspection report. Needless to say that the inspection report, in the present circumstances of the case, constitutes an essential material / document which ought to have been supplied to the petitioner as even in the impugned orders the petitioner has been held guilty of illegal mining relying upon the inspection report dated 19th March, 2021. Once it is noticed that action is taken solely on the basis of inspection report then non supply of the said report to the person against whom proceedings are to be carried out necessarily constitutes miscarriage of justice in as much as he has a right to receive all the material which constitutes the charge/allegations against him so as to adequately respond to the charges and defend himself effectively, while in the present case the only material/document on the basis of which the petitioner has been proceeded against has not been provided to him and, hence, it can be safely concluded that the inquiry proceedings against the petitioner in this regard are in clear violation of the principles of natural justice and the defence of the petitioner has been severely prejudiced. Even though the sum and substance of the allegations did find mention in the show cause notice but inspection report apart from establishing the allegations against the petitioner also does not explain about other aspects as to how and where (location) the inspection was conducted, as to in what manner the inspection was undertaken by the committee and as to whether the persons allegedly involved in the illegal mining were ever put to notice before conducting the said inspection, are certain factors which are very material facts for the persons, who have been proceeded against have a right to defend their actions and they have right to know all material facts and only thereafter ssail the said report. In absence of inspection report their defence was seriously prejudiced and as vested right has been snatched away which undoubtedly has civil consequences. It is not clear from perusal of the records as to what were the coordinates, where the inspection was conducted and merely recording that inquiry was conducted on the plots on which the lease has been executed are some of the factors which are necessarily to be proved by the prosecution before saddling the delinquent lease holders with penal consequences like cancellation of their leases and recovery of penalty. In the lease the area allottted for mining has been described with G.P.S. coordinates and, therefore, it was incumbent to provide the G.P.S. coordinates of the area on which inspectdion was carried out and also the coordinates of area beyond the leased area on which the petitioner has been alleged to hvae illegally mined. In absence of any cogent material or document the charge of illegal mining has sought to be proved. This Court is of the considered view that there was no sufficient cogent material linking the petitioner with the charge of illegal mining and as per the judgment of ***Ranveer Singh Vs. State of U.P. (supra),*** the onus on the State has not been discharged and consequently the proceedings against the petitioner only on

the basis of inspectdion report is arbitrary.

BIAS :-

24. Apart from violation of the principles of natural justice, it is further noticed that the proceedings itself became doubtful the moment the Director, Geology & Mining directed the District Magistrate to proceed against the lease holders in a particular manner and to cancel the license and place them in black list. It would have been appropriate for the Director, Mining and Geology to have merely forwarded the inspection report and directed the competent authority i.e. the District Magistrate to proceed in accordance with law after giving reasonable opportunity of hearing to the lease holders but by specifically directing the District Magistrate to proceed to cancel the lease of the petitioner and other similarly situated persons and put them under the black list, clearly reveals that the respondents had premeditated and preordained the result of the inquiry proceedings which the District Magistrate obediently complied with and, hence, the cancellation order has been passed without application of any mind and at the dictates of the higher authority and a perusal of the same clearly indicates that the grounds / defence taken by the petitioner in the reply have not even been considered either by the appellate or revisional authority rendering the impugned orders illegal and arbitrary.

25. While assailing the impugned order dated 16.03.2022 passed in revision by the Secretary, Government of U.P. it is submitted that the same has been decided by Dr. Roshan Jacob, who was also holding the charge of Director, Geology & Mining at the time when she had issued later dated 20.03.2021 whereby clear directions were issued to the District Magistrate to proceed against and to blacklist him. To consider the argument regarding bias, it would be fruitful to consider the rendition of the Supreme Court in this regard.

26. In the case of ***Mustafa v. Union of India,*** **(2022) 1 SCC 294** the Apex Court has held as under :-

36.More appropriate for our case would be an earlier decision inG. Saranav.University of Lucknow[G. Saranav.University of Lucknow, (1976) 3 SCC 585 : 1976 SCC (L&S) 474] , wherein a similar question had come up for consideration before a three-Judge Bench of this Court as the petitioner, after having appeared before the selection committee and on his failure to get appointed, had challenged the selection result pleading bias against him by three out of five members of the selection committee. He also challenged constitution of the committee. Rejecting the challenge, this Court had held : (SCC p. 591, para 15)

"15. We do not, however, consider it necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee. This view gains strength from a decision of this Court inManak Lal case[Manak Lalv.Prem Chand Singhvi, AIR 1957 SC 425] where in more or less similar

circumstances, it was held that the failure of the appellant to take the identical plea at the earlier stage of the proceedings created an effective bar of waiver against him. The following observations made therein are worth quoting : (AIR p. 432, para 9)

"9. ... It seems clear that the appellant wanted to take a chance to secure a favourable report from the tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point.' "

37.The aforesaid judgment inG. Sarana[G. Saranav.University of Lucknow, (1976) 3 SCC 585 : 1976 SCC (L&S) 474] was referred inMadras Institute of Development Studiesv.K. Sivasubramaniyan[Madras Institute of Development Studiesv.K. Sivasubramaniyan, (2016) 1 SCC 454 : (2016) 1 SCC (L&S) 164] , in which selection to the post of Assistant Professor was challenged on the ground that shortlisting of candidates was contrary to the Faculty Recruitment Rules. The challenge was declined on the ground of estoppel as the respondent, without raising any objection to the alleged variations in the contents of the advertisement and the Rules, had submitted his application and participated in the selection process by appearing before the committee of experts.

38.Equally appropriate would be a reference to the decision of this Court inP.D. Dinakaran (1)v.Judges Inquiry Committee[P.D. Dinakaran (1)v.Judges Inquiry Committee, (2011) 8 SCC 380] , in which the allegation was that one of the members of the committee constituted by the Chairman of the Council of States (Rajya Sabha) under Section 3(2) of the Judges (Inquiry) Act, 1968 was biased. This judgment extensively recites and assimilates from both domestic and foreign judgments on the question of bias and prejudice and quotes the following observations inG. Sarana[G. Saranav.University of Lucknow, (1976) 3 SCC 585 : 1976 SCC (L&S) 474] case : (G. Sarana case[G. Saranav.University of Lucknow, (1976) 3 SCC 585 : 1976 SCC (L&S) 474] , SCC p. 590, para 11)

"11. ... the real question is not whether a member of an administrative board while exercising quasi-judicial powers or discharging quasi-judicial functions was biased, for it is difficult to probe the mind of a person. What has to be seen is whether there is a reasonable ground for believing that he was likely to have been biased. In deciding the question of bias, human probabilities and ordinary course of human conduct have to be taken into consideration."

39.Thereafter, reference is made to*Ashok Kumar Yadavv.State of Haryana[Ashok Kumar Yadavv.State of Haryana, (1985) 4 SCC 417 : 1986 SCC (L&S) 88]* , which refers to the Constitution Bench judgment in*A.K. Kraipakv.Union of India[A.K. Kraipakv.Union of India, (1969) 2 SCC 262] .Ashok Kumar Yadav[Ashok Kumar Yadavv.State of Haryana, (1985) 4 SCC 417 : 1986 SCC (L&S) 88]* was a case of selection by UPSC and following extract from this judgment is of some significance : *(Ashok Kumar Yadav case[Ashok Kumar Yadavv.State of Haryana, (1985) 4 SCC 417 : 1986 SCC (L&S) 88] , SCC pp. 442-43, para 18)*

"18. We must straightaway point out thatA.K. Kraipak[A.K. Kraipakv.Union of India, (1969) 2 SCC 262] is a landmark in the development of administrative law and it has contributed in a large measure to the strengthening of the rule of law in this country. We would not like to whittle down in the slightest measure the vital principle laid down in this decision which has

nourished the roots of the rule of law and injected justice and fair play into legality. There can be no doubt that if a Selection Committee is constituted for the purpose of selecting candidates on merits and one of the members of the Selection Committee is closely related to a candidate appearing for the selection, it would not be enough for such member merely to withdraw from participation in the interview of the candidate related to him but he must withdraw altogether from the entire selection process and ask the authorities to nominate another person in his place on the Selection Committee, because otherwise all the selections made would be vitiated on account of reasonable likelihood of bias affecting the process of selection. But the situation here is a little different because the selection of candidates to the Haryana Civil Service (Executive) and Allied Services is being made not by any Selection Committee constituted for that purpose but it is being done by the Haryana Public Service Commission which is a Commission set up under Article 316 of the Constitution. It is a Commission which consists of a Chairman and a specified number of members and is a constitutional authority. We do not think that the principle which requires that a member of a Selection Committee whose close relative is appearing for selection should decline to become a member of the Selection Committee or withdraw from it leaving it to the appointing authority to nominate another person in his place, need be applied in case of a constitutional authority like the Public Service Commission, whether Central or State. If a member of a Public Service Commission were to withdraw altogether from the selection process on the ground that a close relative of his is appearing for selection, no other person save a member can be substituted in his place. And it may sometimes happen that no other member is available to take the place of such member and the functioning of the Public Service Commission may be affected. When two or more members of a Public Service Commission are holding a viva voce examination, they are functioning not as individuals but as the Public Service Commission. Of course, we must make it clear that when a close relative of a member of a Public Service Commission is appearing for interview, such member must withdraw from participation in the interview of that candidate and must not take part in any discussion in regard to the merits of that candidate and even the marks or credits given to that candidate should not be disclosed to him."

40."Real likelihood test" applied inRanjit Thakurv.Union of India[Ranjit Thakurv.Union of India, (1987) 4 SCC 611 : 1988 SCC (L&S) 1] , is elucidated in the following words : (SCC pp. 617-18, paras 15-17)

"15. ... The test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely and whether Respondent 4 was likely to be disposed to decide the matter only in a particular way.

16. It is the essence of a judgment that it is made after due observance of the judicial process; that the court or tribunal passing it observes, at least the minimal requirements of natural justice; is composed of impartial persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial "coram non judice"....

17. As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that

regard in the mind of the party. The proper approach for the Judge is not to look at his own mind and ask himself, however, honestly, "Am I biased?"; but to look at the mind of the party before him."

27. In light of the settled law and the pronouncements of the Supreme Court on bias, examining the facts of the present case, this Court is of the view that Dr. Roshan Jacob, who was also the Director, Geology and Mining had directed the District Magistrate to proceed against the petitioner and to cancel his mining lease, which order was duly complied, and subsequently she herself as the revisional authority against the order of cancellation of the mining lease proceeded to hear and reject the revision, which order would certainly be hit by the vice of bias. It is the particular officer who initiated proceedings against the petitioner and other similarly situated persons, who can be said to have already made up her mind with regard to the penalty to be imposed upon the petitioner which is evident from her letter dated 20.03.2021 and further proceeded to decide the revision and, therefore, she was a Judge of her own cause deciding a matter which was initiated by her and also the revision challenging the order of District Magistrate which was passed on her dictates.The ground of bias squarely applies to the facts of the present case and the order dated 16.03.2022 rejecting the revision is clearly illegal, arbitrary and is hit with vice of bias.

28. This Court has also examined the revisional order passed in the case of VAR Enterprises Private Limited in Revision No.128 (R)/SM/2021. It is noticed that the revisionist therein was also confronted with the same inspection report where he was also held guilty of illegal mining in an area beyond the leased area allotted to him. The revisional authority has allowed the revision only on the ground that there is no material to indicate that the lease holder was, in fact, involved in or has indulged in illegal mining. It is clear that the same revisional authority in one case has sought to distinguish the inspection report and declined to fasten any liability upon VAR Enterprises Private Limited while on the basis of the same material have held the petitioner to be guilty of illegal mining. This clearly shows the discriminatory nature in which the impugned order of punishment has been passed and, as such, the action of the administrative authority cannot be sustained.

VIOLATIONS OF RULE 58 OF THE RULES OF 1963 :-

29. The impugned order has also been assailed on the ground that the same is in violation of Rule 58 of the Rules of 1963. By means of the impugned order the District Magistrate has passed final orders in pursuance of the show cause notice dated 25.2.2021, 20.3.2021 and 12.4.2021. It is stated that the said notice was only with regard to recovery of the outstanding amount of royalty, for non payment of 2 per cent TCS amounting to Rs. 1,52,400/- and also 10 per cent of the District Mining Fund (D.M.F.) amounting to Rs.7,62,000/-.

30. In this regard Rule 58 of the Rules of 1963 provides that in consequence of non - payment of royalty or other dues the same can be recovered by the respondents only after service of notice to the lessee, to pay within thirty days of the receipt of the notice and if not paid within thirty days then on expiry of fifteen days of the notice the lease can be cancelled. In this regard it has been submitted that thirty days from the

date of notice would expire only on 11.05.2021 and fifteen days beyond the said date would expire on 26.05.2021 and even according to the statutory provisions cancellation of the lease of the petitioner could not have been ordered prior to expiry of the said period i.e. 26.05.2021 while in the present case the order of cancellation has been passed on 26.4.2021 before the expiry of statutory period, as such, it is clearly noticed that Rule 58 of the Rules of 1963 has been flagrantly violated by the respondents in cancellation of their lease in pursuance of the show cause notice dated 12.4.2021. Therefore, on this ground also the cancellation order is illegal, arbitrary and violative of Rule 58 of the Rules of 1963.

31. In view of the aforesaid facts and circumstances, this Court is of the considered view that the impugned order dated 16.3.2022 passed by the State Government in Revision No.104 (R)/SM/2021 as well as order 26.4.2021 passed by opposite party No.3 i.e. District Magistrate, Banda are illegal and arbitrary, hence, set aside.

32. Considering the seriousness of the allegations and the amount of recovery the respondents are given liberty to proceed against the petitioner in accordance with law, if they so choose.

33. In view of the above, the writ petition stands **allowed.**

(2023) 3 ILRA 265
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.02.2023

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

THE HON'BLE MANISH KUMAR, J.

Writ C No. 2835 of 2008

M/S Vaid Organics & Chemical Industries Ltd. ...Petitioner

Versus

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

Counsel for the Petitioner:
Akhilesh Kalra, Akhilesh Kumar Kalra, Jyotiresh Pandey, Narendra Shanker Shukla, Narendra Shukla, Pooja Singh

Counsel for the Respondents:
C.S.C., A.K Chaturvedi, Alka Verma, Kartikey Dubey, Manoj Sahu

Civil Law - Lease - Cancellation - U.P. State Industrial Development Authority - land in question was allotted to the petitioner on lease by statutory Corporation Uttar Pradesh State Industrial Development Corporation Ltd. under the fixed terms of the lease agreement, having been signed in 1992 - Petitioner had to make construction and start manufacturing within a period of two years from the date of lease agreement - two years' period expired on 30.4.1994 - on the request of the petitioner, twice the time was extended but the petitioner neither made any construction nor started manufacturing in violation of Clause 4(e) and Clause 5 of the lease agreement - By the impugned order the Corporation cancelled the lease agreement in the year 2008 - Held - The Corporation has been created for encouraging industrialisation coupled with the aim to generate employment and for betterment of the economy - Due to the non-adherence to the conditions in the lease deed by the petitioner, the industrial development for which the land was allotted to the petitioner has been affected - No infirmity in impugned order.

Dismissed. (E-5)

List of Cases cited:

1. St. Of U.P. & ors. vs Maharaja Dharmander Prasad Singh [1989 SCC (2) 505]

2. ITC Limited Vs St. of U.P. [2011 (7) SCC 493]

3. Rakesh Kumar Garg Vs St. of U.P. & ors., Writ - C No. 68500 of 2015, dt 7.1.2016

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

1. Heard Shri Akhilesh Kumar Kalra, learned counsel for the petitioner and Shri Kartikey Dubey, learned counsel for the respondents and perused the record.

2. This petition has been filed by the petitioner for quashing of the order dated 10.3.2008, as contained in Annexure-1 to the petition and for the direction to the respondent not to interfere in the peaceful possession of the land in the license agreement dated 30.4.1992, as contained in Annexure-4 to the petition.

3. It is the case of the petitioner as argued by his counsel that the respondent-Uttar Pradesh State Industrial Development Corporation Ltd. (hereinafter referred to as the "Corporation") had, for the purpose of encouraging industrialization in the backward District of Hardoi, developed an industrial area, in which the petitioner company with an intent to establish a chemical industry applied for allotment of an industrial plot for the said purpose. Respondent-Corporation allotted Plot No. B-9-10-11 & D-11 to the petitioner company on 17.7.1991. Although the petitioner had applied for 72 acres of land but final area of 119416.30 sq. mt. was allotted, for which a total amount of Rs. 14,76,601.25 was deposited by the petitioner in lump-sum before the respondent. Pursuant to such deposit, the lease agreement was executed on 30.4.1992. Subsequently, the Chemical Industry which the petitioner intended to set up could not established because of ban on import of finished goods. Later on, the Export Import Policy of the Government of India was liberalized and the Central Government permitted such import of finished products which resulted in the steep fall in the prices of the product. Thus, the industry which the petitioner was going to set up became unviable.

4. The petitioner informed the respondent-Corporation that the industry which was initially intended to be set up could not be set up because of various reasons and the project had become unviable. They had communicated the decision to put up some other project in the field of horticulture which would require some time. The petitioner applied for extension which was given. Subsequently, the petitioner was issued a notice by the respondent-Corporation in 2005 to show cause as to why its allotment may not be cancelled as the petitioner had not complied with the terms of the agreement and had not utilized the industrial plot for the purpose for which it was allotted to it. The petitioner immediately replied to the said notice and communicated that it was now intending to set up a Medicinal and Aromatic Crop based industry and the necessary soil testing, etc. would be carried out which would need sometime. Accordingly, a further time of three years may be permitted to it for utilizing the land as per the new proposal made by it. The petitioner made all efforts to set up the new industry but the respondent by the impugned order dated 10.3.2008 informed the petitioner that it had cancelled the allotment made in their favour on

17.7.1991 and also the license agreement dated 30.4.1992 as the petitioner had failed to comply with stipulation under Clause 4(e) of the agreement. It was also informed by the said impugned order that the Junior Engineer posted at the site has been directed to re-enter in the plot and submit the re-entry memo within a week.

5. It has been argued by the learned counsel for the petitioner that when the petitioner had made an application for extension of time in 2005 in response to show cause notice issued to it, it was under the bonafide impression that respondent-Corporation would consider and decide such application for extension of time and the Corporation would follow the due process for re-enter. Even thereafter, the impugned order was passed. However, the employees of the Corporation came on the site on 31.3.2008 and informed the petitioner that it should immediately dismantle the barbed wire fencing and harvest its crop so that the possession of the plot may be taken by the respondent-Corporation.

6. It has been argued by the learned counsel for the petitioner that when the matter was brought before this Court as fresh on 1.4.2008, the Court directed the counsel for the respondent to seek instruction and in the meantime if crops are there, the Court observed that the same shall not be removed or cut. When the matter was taken up on 30.4.2008, the protection given on 1.4.2008 was directed to be continued till the next date of listing. The writ petition was dismissed for want of prosecution twice but had been restored thereafter and interim order was still continue in favour of the petitioner and it is still in possession of the plot in question.

7. It has been argued on the basis of judgment rendered by the Hon'ble Supreme Court in **State Of U.P. & Ors vs Maharaja Dharmander Prasad Singh [1989 SCC (2) 505]** that once a lease agreement is signed, then it could be only cancelled through a civil suit and by adopting due process of law for resuming the possession. The respondents could not have cancelled the allotment when the application of the petitioner for extension of time was pending.

8. Shri Kartikey Dubey, learned counsel for the respondents, on the other hand, has taken this Court through the contents of the counter affidavit filed on behalf of respondent no. 3. In the said counter-affidavit, it has been stated that the petitioner had submitted an application dated 18.4.1991 for allotment of plot in Sandila Industrial Area, Hardoi for setting up of an Alcohol based Chemical Industry along with a project report. Four plots of land were allotted to the petitioner on 17.7.1991. Four plots of land were initially allotted and the petitioner made an application for surrender of one plot, the same was accepted. The petitioner and the Corporation signed an agreement on 30.4.1992, the petitioner had to commence construction of the manufacturing unit within nine months from the date of giving possession. The possession was handed over to the petitioner on 9.7.1992. The petitioner made no attempt to construct the manufacturing unit which ought to have been started within nine months and manufacturing was to be started within two years of the same. The petitioner has been issued show cause notice dated 8.2.1996 for showing cause within thirty days as to why allotment in favour of the petitioner be not cancelled. In reply to the same, the petitioner requested for extension of time

for three years further time to start manufacturing an Alcohol based Chemical Industry. Copies of the representation of the petitioner and its reply have been annexed as Annexure No. C-4 and C-5 respectively to the counter affidavit. The petitioner's application was considered and the Managing Director of the Corporation allowed one years' time to the petitioner to set up Alcohol based Chemical Industry through its letter dated 27.6.1996 communicated to the Regional Office, Lucknow.

9. The petitioner was accordingly granted extension of time through letter dated 17.7.1996 but just before the expiry of the said period, the petitioner submitted another representation on 25.6.1997 requesting therein for extension of time for completion of construction and commencement of manufacturing and production of Alcohol based Chemical Industry within a period of three years. The representation of the petitioner was considered and an order passed on 19.11.1997 granting further one year period as extension. When the petitioner did not start any construction on the land in question, a show cause notice was again issued to the petitioner on 6.10.2005 to show cause within a period of sixty days why the allotment as well as the agreement dated 30.4.1992 be not cancelled because of violation of terms of the agreement. In reply thereof, the petitioner did not make any representation and at last the Regional Office, Lucknow sent a proposal to Head Office, Kanpur for cancellation of the allotment and agreement dated 30.4.1992 through letter dated 30.6.2006. The Head Office took sometime to clarify the situation and the order impugned had not passed after survey of the plot in question was made and it was found that petitioner had not made any attempt to raise any construction on the plots allotted to it and the aforesaid plots are lying vacant.

10. It has also been submitted by the learned counsel for the Corporation that the Corporation is a statutory corporation established by the State Government for industrial development of the State of Uttar Pradesh. The land is acquired by the State for the Corporation for allotment to deserving applicants for setting up Small and Medium Scale Industries. The land which is acquired has been given at subsidized rate to applicants who are genuinely interest for raising industrial units as stipulated in the agreement. Learned counsel for the respondent has taken this Court through a relevant clauses of the agreement which have been quoted in the order impugned. Clause 4(e) and Clause 5 of the agreement signed between the parties are relevant for the purpose herein and are being quoted here-in-below.

4(e). That the Licensee at his own cost shall erect on the plot of land in accordance with the lay out plan, elevation and design and in a position to be approved both by the Grantor and the municipal or other authority in writing and in a substantial and workman like manner a building to be used as industrial factory, with all necessary out houses, sewers drains and other appurtenances and proper conveninces thereto according to the local authority's rules and bye-laws in respect of building, drains latrines and communication with severs and will commence such construction within a period of nine months or within such extended time as may be allowed by the Grantor in writing in its discretion at the request of the Licensee from the date hereof and shall completely finish the same fit for

use and start the manufacturing and production with in the period of 24 months from the date of these presents or within such extended time as may be allowed by the Grantor in writing in its discretion or the request of the Licensee.

5. If the Licensee fails to commence and complete the building fit for use and start the manufacturing and production in the time and manner herein before provided (time in this respect being essence of contract) or shall not proceed with the works with due diligence or shall have failed to make payment of the interest installment of premium on or before the due date, the Grantor shall have the right and power to re-enter upon and resume possession of the said land and everything thereon, and thereupon this Agreement shall cease and terminate and all erection and materials, plant and things upon the said plot and land shall belong to the Grantor without payment of any compensation or allowance to the Licensee for the same without prejudice nevertheless to all other legal right and remedies of the Grantor, against the licensee the Grantor may permit the continuation of the occupation of the Licensee upon the said land on payment of such money and/or on such terms and conditions, as may be decided upon by the Grantor and/or to direct removal or alteration of any building or structure errected or used contrary to the conditions of the grant within the time prescribed, cause the same to be carried out and recover the cost of carrying out the same from the licensee and an amount equal to 20% of the total premium together with out standing interest due till date, use and occupational charges due, and other dues, if any, shall stand forfeited to the Grantor and the licensee shall not be entitled to any compensation whatsoever.

Provided that the Licensee shall be at liberty to remove and appropriate to himself all building, erections and structures, if any, made by him and all material thereof from the plot of the land after paying up all dues, rent and all municipal and other taxes, rates and assessment then due and all damages and other dues, occurring to the Grantor and to remove the materials from the plot of land within three months of the date of revocation or termination of this Agreement.

11. It has been argued by the learned counsel appearing on behalf of the respondent that after the cancellation of allotment and agreement by the order dated 10.3.2008, the land in question was taken in re-possession thereof on 17.3.2008 at 12:30 P.M., the copy of re-entry memo has been filed as Annexure C-10 to counter affidavit filed by the respondent no. 3. The interim order that was granted by this Court did not stay the order impugned but only directed the crop of the petitioner if they were standing thereon. It cannot be said that the petitioner is in possession of the plots in question.

12. The learned counsel for the respondent-Corporation has placed reliance on judgment rendered the judgment of the Hon'ble Supreme Court in **ITC Limited Vs. State of U.P. [2011 (7) SCC 493]** and the order dated 7.1.2016 passed by the Division Bench of this Court in **Writ - C No. 68500 of 2015 (Rakesh Kumar Garg Vs. State of U.P. and Others)**. The question before the Court was with regard to leases of plot allotted by New Okhla Industrial Development Authority (hereinafter referred to as "NOIDA") for construction of hotels in District Gautam Buddh Nagar. NOIDA is constituted under the UP Industrial Area Development Act, 1976 for development of industrial and

urban township in Uttar Pradesh and neighboring city New Delhi to encourage tourism. Certain plots were allotted but because of non-compliance with the conditions of the lease agreement, a cancellation order was issued. The Court was considering the question whether "plot leased can be cancelled?" The Court observed in Para 21, 22, 23 as follows:

21. A lease governed exclusively by the provisions of Transfer of Property Act, 1882 (`TP Act' for short) could be cancelled only by filing a civil suit for its cancellation or for a declaration that it is illegal, null and void and for the consequential relief of delivery back of possession. Unless and until a court of competent jurisdiction grants such a decree, the lease will continue to be effective and binding. Unilateral cancellation of a registered lease deed by the lessor will neither terminate the lease nor entitle a lessor to seek possession. This is the position under private law.

22. But where the grant of lease is governed by a statute or statutory regulations, and if such statute expressly reserves the power of cancellation or revocation to the lessor, it will be permissible for an Authority, as the lessor, to cancel a duly executed and registered lease deed, even if possession has been delivered, on the specific grounds of cancellation provided in the statute.

23. NOIDA is an authority constituted for development of an industrial and urban township (also known as Noida) in Uttar Pradesh under the provisions of the Act. Section 7 empowers the authority to sell, lease or otherwise transfer whether by auction, allotment or otherwise, any land or building belonging to it in the industrial development area, on such terms and conditions as it may think fit to impose, on such terms and conditions and subject to any rules that may be made. Section 14 provides for forfeiture for breach of conditions of transfer. The said section empowers the Chief Executive Officer of the Authority to resume a site or building which had been transferred by the Authority and forfeit the whole or part of the money paid in regard to such transfer, in the following two circumstances: a) non-payment by the lessee, of consideration money or any installment thereof due by the lessee on account of the transfer of any site or building by the Authority; or b) breach of any condition of such transfer or breach of any rules or regulations made under the Act by the lessee. Sub-section (2) provides that where the Chief Executive Officer of the Authority resumes any site or building under sub-section (1) of section 14, on his requisition, the Collector may cause the possession thereof to be taken from the transferee by use of such force as may be necessary and deliver the same to the Authority. This makes it clear that if a lessee commits default in paying either the premium or the lease rent or other dues, or commits breach of any term of the lease deed or breach of any rules or regulations under the Act, the Chief Executive Officer of NOIDA can resume the leased plot or building in the manner provided in the statute, without filing a civil suit. The authority to resume implies and includes the authority to unilaterally cancel the lease.

13. This Court finds that the facts as mentioned in this Case before us are almost the same as the land in question has been given to the petitioner on lease by statutory Corporation under the fixed terms of the lease agreement and twice extension was granted to the petitioner. The allotment of these plots having been done in 1991 and

lease agreement having been signed in 1992, The Corporation waited till 2008 for cancellation of the lease agreement. The petitioner had to make construction and start manufacturing within a period of two years from the date of lease agreement, as admittedly the lease agreement was executed on 30.4.1992 and the two years' period expired on 30.4.1994. Even after that on the request of the petitioner, twice the time was extended but the petitioner has neither made any construction nor started manufacturing which is in violation of Clause 4(e) and Clause 5 of the lease agreement.

14. The Corporation has been created for encouraging industrialisation coupled with the aim to generate employment and for betterment of the economy. Due to the non-adherence to the conditions in the lease deed by the petitioner, the industrial development for which the land was allotted to the petitioner has been affected..

15. This Court finds no infirmity in such order impugned.

16. Accordingly, the Writ Petition stands **dismissed.**

(2023) 3 ILRA 271
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.02.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ C No. 3175 of 2023

Rajesh Kumar Gupta & Ors. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sri Krishna Mohan Misra, Sri H.R. Mishra

Counsel for the Respondents:
C.S.C.

A. Civil Law - Urban Land (Ceiling & Regulation) Act 1976- Section 10(4) - During the period commencing on the date of publication of the notification under sub-section (1) and ending with the date specified in the declaration made under sub-section (3)- (i) no person shall transfer by way of sale any excess vacant land specified in the notification and any such transfer made in contravention of this provision shall be deemed to be null and void - excess land declared surplus pursuant to notification under Section 10(1) could not be transferred in view of Sub-clause (4) of Section 10 (Para 17, 18)

B. Civil Law - Urban Land (Ceiling & Regulation) Act 1976 - Notification u/s 10(1) was notified on 17.07.1982 followed by notification u/s 10(3) notified on 28.07.1990 - Predecessor in interest of the petitioner purchased the property in 1985, i.e., after notification issued under Section 10(1) - Petitioners are subsequent purchaser having purchased the surplus land after issuance of notification under Section 10(1) – In the representation, petitioner sought release of the property from the ceiling proceedings on a bald statement that petitioners are in possession of the declared excess land, in view of Section 3 of the Urban Land (Ceiling and Regulation) Repeal Act, 1999 - Held - in view of Sub-section 4 of Section 10 of the Act, the transfer of the declared excess land is a nullity and does not confer any right, title or authority upon the petitioners - Also instant writ petition filed after 22 years from the date of the Repeal Act and after a lapse of over three decades since notice under Section 10(5) (Para 17, 21)

Dismissed. (E-5)

List of Cases cited:

1. St.of U.P. Vs Hari Ram 2013 (120) RD 241

2. Ram Singh Vs St.of U.P. & ors. 2020 (147) RD 1

3. Ikrar & ors. Vs St.of U.P. & ors. 2020 (2) AWC 1288

4. St.of U.P. Vs Jagdish Chandra 2014 (1) AWC 864

5. St.of Assam Vs Bhaskar Jyoti Sharma & ors. (2015) 5 SCC 321

6. Shiv Ram Singh Vs St.of U.P. & ors. 2015 (7) ADJ 630

7. Shivgonda Anna Patil Vs St.of Mah. (1999) 3 SCC 5

8. Municipal Council, Ahmednagar Vs Shah Hyder Beig (2000) 2 SCC 48

9. Kapilaben Ambalal Patel & ors. Vs St.of Guj. 2021 (12) SCC 95

10. U.A. Basheer Thr. G.P.A. Holder Vs St.of Karn. & anr. Civil Appeal No. 3032 of 2010, decided on 17 February, 2021

(Delivered by Hon'ble Suneet Kumar, J.
&
Hon'ble Rajendra Kumar-IV, J.)

1. Heard learned counsel for the Shri H.R. Mishra, learned counsel assisted by Shri Krishna Mohan Mishra, learned counsel for the petitioner and learned Standing Counsel.

2. Petitioners by the instant writ petition seek a direction to the State-respondent/competent authority to release 3,480 square feet of land of arazi (khasra) No. 24, situated in Village-Muhai Sugharpur, Tappa Haveli, Post Haveli, (Parwatia Shivpuri Colony), Tehsil Sadar, District Gorakhpur, declared surplus under the Urban Land (Ceiling & Regulation) Act 1976, (for short "Act'), in view of the Repeal Act No. 15 of 1999, w.e.f., 31 March 1999.

3. The facts giving rise to the instant writ petition, as pleaded are that the petitioners are subsequent purchasers of the land declared excess, i.e., arazi khasra No. 24. The original land owner was one Ram Kisun, son of Kodai, duly recorded in the revenue record.

4. It appears the original land owner submitted statement under Section 6(1) of the Act, being case No. 3658, wherein, khasra No. 62 and 85 at Village-Chilmapur; khasra No. 42 and 43 at Village-Mohai Sugharpur, and khasra No. 43 and 44, at Mirzapur, was filed in the return, including the residential building. Upon survey and inspection, a draft statement came to be prepared under Section 8(1) which was duly served upon the land owner on 17 June 1979, by registered post which appears to have return undelivered, consequently, another notice along with the draft statement was issued on 3 June 1981, duly served on the land owner on 25 June 1981. The land owner did not file any objections with respect to the draft statement. The competent authority noted that the name of the original land owner is recorded in khasra No. 24 of Village-Mohai Sugharpur. Similarly, in respect of other plots, the competent authority passed an order under Section 8(4). Thereafter, final statement came to be issued under Section 9 on 24 August 1981. After the stage of Section 9 of the Act, notifications under Section 10(1) was published in the State Gazette on 17 July 1982, followed by notification under Section 10(3) on 28 July 1990. Consequently, the excess vacant land came to vest with the State, including, khasra No. 24. Thereafter, notice came to

be issued under Section 10(5) by the competent authority on 19 December 1992. The authorized representative of the competent authority on 3 August 1996, had taken possession of the surplus vacant land from the original land owner.

5. In paragraph 6 of the writ petition, it is pleaded that arazi khasra No. 24, came to be transferred to the mother of the petitioner, i.e., Smt. Ahilya Devi, in 1985, by registered sale-deed. It is alleged that the name of the Ahilya Devi, came to be mutated in the revenue record, it is claimed that since then petitioners are in possession and have constructed their residential house. It is further submitted that the mother of the petitioner died in 2020, thereafter, petitioners approached the Nagar Mahapalika, Gorakhpur, to get their names mutated in the revenue record. However, since the land in question which originally belonged to Ram Kisun, was declared surplus and vested in the State Government vide notification dated 28 July 1990, it appears that the name of the petitioner was not mutated.

6. Aggrieved, petitioners approached the District Magistrate, Gorakhpur, claiming to be owner in possession of the disputed land over which residential house was constructed in 1985, after purchasing the plot from a Housing Society in the name and style Parvati Housing Co-operative Society Limited. In the representation, petitioner sought release of the property from the ceiling proceedings.

7. In this factual backdrop, it is submitted that in view of Section 3 of the Urban Land (Ceiling and Regulation) Repeal Act, 1999 (for short "Repeal Act'), which came into effect on 18 March 1999, the land and property of the petitioner be released.

8. Learned counsel for the petitioner submits that petitioner is in possession of the plots even after repeal of the principal Act. It is urged that at this stage, petitioner cannot be dispossessed from the land declared surplus. Reliance has been placed on the decisions rendered by Supreme Court in **State of U.P. Vs. Hari Ram1**, as well as, decisions rendered by this Court in **Ram Singh Vs. State of U.P. and Others2, Ikrar & Others Vs. State of U.P. and Others3** and **State of U.P. Vs. Jagdish Chandra4.**

9. It is not the case of the petitioner that the original land owner at any stage had protested with the declaration of surplus land or had objected before the authorities with regard to dispossession not being in accordance with the law.

10. In **State of Assam vs. Bhaskar Jyoti Sharma and others5,** the Supreme Court was of the view that any grievance based on Section 10(5) ought to have been made within a reasonable time of dispossession and the land owner in not doing so must be deemed to have waived his right under Section 10(5) of the Act. Paragraph 16, 17, and 19 is extracted:

"16. The issue can be viewed from another angle also. Assuming that a person in possession could make a grievance, no matter without much gain in the ultimate analysis, the question is whether such grievance could be made long after the alleged violation of Section 10(5). If actual physical possession was taken over from the erstwhile land owner on 7th December, 1991 as is alleged in the present case any grievance based on

Section 10(5) ought to have been made within a reasonable time of such dispossession. ***If the owner did not do so, forcible*** *taking over of possession would acquire legitimacy by sheer lapse of time.* ***In any such situation the owner or the person in possession must be deemed to have waived his right under Section 10(5) of the Act. Any other view would, in our opinion, give a licence to a litigant to make a grievance not because he has suffered any real prejudice that needs to be redressed but only because the fortuitous circumstance of a Repeal Act tempted him to raise the issue regarding his dispossession being in violation of the prescribed procedure.***

17. ***Reliance was placed by the respondents upon the decision of this Court in Hari Ram's case (supra). That decision does not, in our view, lend much assistance to the respondents. We say so, because this Court was in Hari Ram's case (supra) considering whether the word 'may' appearing in Section 10(5)gave to the competent authority the discretion to issue or not to issue a notice before taking physical possession of the land in question under Section 10(6). The question whether breach of Section 10(5)and possible dispossession without notice would vitiate the act of dispossession itself or render it non est in the eye of law did not fall for consideration in that case.*** *In our opinion, what Section 10(5)prescribes is an ordinary and logical course of action that ought to be followed before the authorities decided to use force to dispossess the occupant under Section 10(6). In the case at hand if the appellant's version regarding dispossession of the erstwhile owner in December 1991 is correct, the fact that such dispossession was without a notice under Section 10(5) will be of no consequence and would not vitiate or obliterate the act of taking possession for the purposes of Section 3 of the Repeal Act. That is because Bhabadeb Sarma-erstwhile owner had not made any grievance based on breach of Section 10(5) at any stage during his lifetime implying thereby that he had waived his right to do so.*

19. In support of the contention that the respondents are even today in actual physical possession of the land in question reliance is placed upon certain electricity bills and bills paid for the telephone connection that stood in the name of one Mr. Sanatan Baishya. It was contended that said Mr. Sanatan Baishya was none other than the caretaker of the property of the respondents. There is, however, nothing on record to substantiate that assertion. The telephone bills and electricity bills also relate to the period from 2001 onwards only. There is nothing on record before us nor was anything placed before the High Court to suggest that between 7th December, 1991 till the date the land in question was allotted to GMDA in December, 2003 the owner or his legal heirs after his demise had continued to be in possession. All that we have is rival claims of the parties based on affidavits in support thereof. We repeatedly asked learned counsel for the parties whether they can, upon remand on the analogy of the decision in the case of Gyanaba Dilavarsinh Jadega (supra), adduce any documentary evidence that would enable the High Court to record a finding in regard to actual possession. They were unable to point out or refer to any such evidence. ***That being so the question whether actual physical possession was taken over remains a seriously disputed question of fact which is not amenable to a satisfactory determination by the High Court in proceedings under Article 226 of***

the Constitution no matter the High Court may in its discretion in certain situations upon such determination. *Remand to the High Court to have a finding on the question of dispossession, therefore, does not appear to us to be a viable solution."*

(Emphasis supplied by us)

11. In **Bhaskar Jyoti Sharma** (supra) followed by a coordinate Bench of this Court in **Shiv Ram Singh vs. State of U.P. and others6**, the writ petition was dismissed on the ground of laches, observing as under:

"We must also advert to another aspect of the matter particularly having regard to the recent decision of the Supreme Court in Bhaskar Jyoti Sarma (supra). The petitioner moved the first writ petition in 2002 nearly three years after the Repeal Act had come into force. After the earlier writ petition was disposed of by directing the District Magistrate to pass an order on the representation of the petitioner, an order was passed by the District Magistrate on 10 May 2007. The petitioner thereafter waited for a period of over two years until the present writ petition was filed in July 2009. ***If the petitioner had been dispossessed of the land without due notice under Section 10(5), such a grievance could have been raised at the relevant time.*** *As a matter of fact, it has been the case of the State all along that a notice under Section 10(5) was, in fact, issued in the present case which would be borne out from the original file which has been produced before the Court.* ***The issue is whether such a grievance could be made long after, before the Court. The petitioner had waited for nearly three years after the Repeal Act came into force to file the first writ petition and thereafter for a period of over two years after the disposal of the representation despite the finding of the District Magistrate that possession was taken over on 25 June 1993. In our view, such a belated challenge should not, in any event, be entertained."***

(Emphasis supplied by us)

12. In **Shivgonda Anna Patil Vs. State of Maharashtra,** 7wherein, the Supreme Court while dealing with Section 10 of the Act held that the writ petition under Article 226 for reopening the proceeding on the ground that the competent authority had not taken into consideration certain fact, filed after ten years, after the excess land was vested in the State Government was rightly summarily dismissed by the High Court.

13. While deciding the question of delay and laches in preferring the petition under Article 226, the Supreme Court in **Municipal Council, Ahmednagar Vs. Shah Hyder Beig8,** held that the equitable doctrine, namely, "delay defeats equity" has its fullest application in the matter of grant of relief under Article 226 of the Constitution. The discretionary relief can be had provided one has not by his act or conduct given a go-by to his rights. Equity favours a vigilant rather than an indolent litigant and this being the basic tenet of law.

14. Recently, in **Kapilaben Ambalal Patel and Others Vs. State of Gujarat9,** Supreme Court declined to accept the pleas setup by the legal heirs/representatives of the original land holder on the ground of inordinate delay. The Court noted the submission of the land owner:

"Feeling aggrieved, the landowners have approached this Court. It

is urged that there is no tittle of evidence to substantiate the fact asserted by the respondent State that physical possession of the land in question has been taken over on 20-3-1986. It was merely a paper-possession in the form of possession panchnama. According to the appellants, de facto possession of the subject land as on the date of the Repeal Act is crucial and entails in abatement of all the actions of the State authorities under the 1976 Act. Mere issuance of notification under Section 10(3) of the 1976 Act regarding deemed vesting of the land in the State is not enough for the purposes of the Repeal Act. Reliance has been placed on ***Vinayak Kashinath Shilkar Vs. Collector & Competent Authority, (2012) 4 SCC 718, State of U.P. Vs. Hari Ram (2013) 4 SCC 280, Gajanan Kamlya Patil vs. Additional Collector & Competent Authority (ULC) (2014) 12 SCC 523 and Mangalsen Vs. State of U.P. (2014) 15 SCC 332.*** *The consistent view of this Court is that physical possession must be taken by the State authorities, failing which the proceedings shall abate on account of the Repeal Act. The appellants have relied on revenue records to show that the continued possession remained with the appellants/landowners even after the possession panchnama was made on 20-3-1986. The revenue entries have presumptive value and the respondent State had failed to rebut the same."*

15. In Paragraph 25 of **Kapilaben Ambalal Patel** (supra), the Court noted the delay and declined to interfere with the order of the High Court. Relevant portion reads thus:

"Furthermore, in the grounds all that is asserted is that the High Court erred in holding that there was delay of 14 years in filing of writ petition and in not appreciating that the notice under Section 10(5) of the 1976 Act dated 23-1-1986, was not served upon Ambalal Parsottambhai Patel as he had already expired on 31-12-1985 and notice sent to him was returned bacy on 2-2-1986 unserved with remark "said owner has expired". Further, the legal heirs of Ambalal Parsottambhai Patel ought to have been served with the said notice.....Be that as it may, we are not inclined to reverse the conclusion recorded by the Division Bench of the High court that the writ petition filed by the appellants was hopelessly delayed and suffered from laches. That is a possible view in the facts of the present case."

16. The decisions relied upon by the learned counsel for the petitioner rendered by the co-ordinate Bench of this Court is based on the decision of the Supreme Court in **Hari Ram** (supra). The Supreme Court in Bhaskar Jyoti Sharma (supra), on considering **Hari Ram** (supra), was of the view that the word "may' appearing in Section 10(5) gave the competent authority the discretion to issue or not to issue a notice before taking physical possession of the land in question under Section 10(6). The question whether breach of Section 10(5) and possible dispossession without notice would vitiate the act of dispossession itself or render it non est in the eye of law did not fall for consideration in **Hari Ram** (supra). Thereafter, the Court proceeded that even taking a case of the appellant regarding dispossession was without a notice under Section 10(5) will be of no consequence and would not vitiate or obliterate the act of taking possession for the purposes of Section 3 of the Repeal Act. That is because the erstwhile land owner had not made any grievance based on

breach of Section 10(5) at any stage during his lifetime implying thereby that he had waived his right to do so.

17. The predecessor in interest of the petitioners is a subsequent purchaser, probably, from a Housing Society. In any case, the excess land declared surplus pursuant to notification under Section 10(1) could not have been transferred in view of Sub-clause (4) of Section 10. The transfer is a nullity in the eye of law.

18. The relevant portion of Section 10(4) is extracted:

"10(4) During the period commencing on the date of publication of the notification under sub-section (1) and ending with the date specified in the declaration made under sub-section (3)-

(i) no person shall transfer by way of sale, mortgage, gift, lease or otherwise any excess vacant land (including any part thereof) specified in the notification aforesaid and any such transfer made in contravention of this provision shall be deemed to be null and void; and

(ii) no person shall alter or cause to be altered the use of such excess vacant land."

19. It is evident from the facts pleaded by the petitioners themselves that the notification under Section 10(1) was notified on 17 July 1982, followed by notification under Section 10(3) notified on 28 July 1990. The predecessor in interest of the petitioner purchased the property in 1985, i.e., after notification issued under Section 10(1). Accordingly, the transfer would be null and void, no right would accrue to the petitioners in respect of the said property. As per the Scheme of the Act, the excess land beyond the ceiling limit is to be determined on the date when the Act came into force, requiring every person holding vacant land in excess of ceiling limit to file statement of his holding (Section 6). The other persons/third party/subsequent purchasers have no locus or authority to file objection until then. The provisions of Section 8 and Section 9 of the Act, make it incumbent on the competent authority to issue notice to or provide opportunity to be heard only to the "person concerned', i.e., person who has filed the statement under Section 6 of the Act, (Refer paragraph 14 of **U.A. Basheer Thr. G.P.A. Holder Vs. State of Karnataka and Another10).** It is only after notification under Section 10(1) of the Act, the claim of other persons/subsequent purchasers are to be considered.

20. In the given facts, petitioners are subsequent purchasers of the declared excess land after notification under Section 10(1). They have no locus, nor, the transfer of excess land after the stage of Section 10(1) is permissible in law [Section 10(4)]. The possession/reoccupation of the excess surplus land at the hands of the petitioners is of on consequence.

21. The instant writ petition has been filed after 22 years from the date of the Repeal Act and after a lapse of over three decades since notice under Section 10(5). The only stand taken is based on a bald statement that petitioners are in possession of the declared excess land. Petitioners admittedly are subsequent purchaser having purchased the surplus land after issuance of notification under Section 10(1), in view of Sub-section 4 of Section 10 of the Act, the transfer of the declared excess land is a

nullity and does not confer any right, title or authority upon the petitioners.

22. Having regard to the facts and circumstances of the case, petition being devoid of merit is, accordingly, **dismissed.**

(2023) 3 ILRA 278
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.03.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ C No. 4537 of 2022

M/S Jhv Steel Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Pushpila Bisht

Counsel for the Respondents:
C.S.C., Tushar Verma

A. Civil Law - Mining - Illegal Mining - Uttar Pradesh Minor Minerals (Concessions) Rules, 1963 - Rules 58, 60 & 67 - Consequences of non-payment of royalty rent or other dues- State Government may terminate the mining lease after serving a notice on the lessee to pay within thirty days of the receipt of the notice any amount due to the State Government if it was not paid within fifteen days next after the date fixed for such payment - in the instant case thirty days from the date of notice expired on 11.05.2021 and fifteen days beyond the said date expired on 26.05.2021, however the order of cancellation was passed on 26.4.2021 before the expiry of the statutory period - Rule 58 flagrantly violated by the respondents in cancellation of the lease - Cancellation order set aside(Para 30)

B. Civil Law - Mining - Illegal Mining - Uttar Pradesh Minor Minerals (Concessions) Rules, 1963, Rule 58, 60, 67 - Consequences of contravention of rules and conditions of lease - If the allegations are of illegal mining beyond the leased area, the inspection report must provide the GPS coordinates of both the inspected area and the area beyond the lease alleged to have been illegally mined - It must be established that illegal mining had, in fact, been done on area beyond the leased area (Para 19, 23)

C. Civil Law - Illegal Mining - cancellation of the Mining lease licenses - *Violation of Principles of Natural Justice* - show cause notice issued to the petitioner contained only allegations of illegal mining recorded by the inspection team - culpability of the petitioner was decided solely on the inspection report, however, the inspection report was never supplied to the petitioner - inquiry proceedings were conducted in clear violation of the principles of natural justice, severely prejudicing the petitioner's defense - No other evidence or statements were recorded during the inquiry, and no documents were taken on record – the inspection report did not mention when and where the inspection was carried out, who was present, or whether it was conducted at the location allotted to the petitioner - there was no mention of GPS coordinates used for identifying the plot - There was no sufficient and cogent material linking the petitioner to the charge of illegal mining - cancellation order passed by the District Magistrate, without application of any mind at the dictates of the higher authority i.e. of Director, Mining and Geology - the grounds / defence taken by the petitioner in the reply have not even been considered either by the appellate or revisional authority rendering the impugned order illegal and arbitrary (Para 20, 23, 24)

D. Civil Law - Illegal Mining - cancellation of the Mining lease licenses - *Bias* - Dr. Roshan Jacob, who was the Director,

Geology and Mining directed the District Magistrate to proceed against the petitioner and to cancel his mining lease, which order was duly complied - subsequently she herself as the revisional authority, against the order of cancellation of the mining lease, proceeded to hear and reject the revision - Held Revisional order hit by the vice of bias (Para 27)

Allowed. (E-5)

List of Cases cited:

1. Ranveer Singh Vs State of U.P. & ors., 2017 (1) ADJ 240

2. Mustafa Vs U.O.I., (2022) 1 SCC 294

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Ms. Pushpila Bisht, learned counsel for the petitioner as well as Sri Rakesh Bajpai, learned Standing counsel, Sri Tushar Verma, Special Counsel and Sri Ramesh Kumar Singh, Additional Advocate General for the respondents.

2. By means of the present writ petition the petitioner has challenged the order dated 29.6.2022 passed by the State Government thereby rejecting the revision preferred by the petitioner against the cancellation of mining lease vide order dated 26.4.2021 passed by District Magistrate, Banda.

FACTS OF THE CASE :-

3. The facts in brief necessary for adjudication of the present case are that the petitioner in response to an e-tender/e-auction for mining participated in the auction and his bid was adjudged to be the highest and lease deed was executed in favor of the petitioner on 1.6.2020 for the period from 1.6.2020 to 31.5.2025. After execution of the mining lease the petitioner started mining operations but suddenly the One Time Password (O.T.P.) was stopped by the District Magistrate, Banda on 19.3.2021. Subsequently, it is stated that an inspection was conducted by a team of officers of the Directorate, Mining and Geology, Uttar Pradesh between 13.3.2021 and 18.3.2021 and some allegations with regard to the irregularities pertaining to illegal mining were found correct and on the basis of the aforesaid inspection report a show cause notice was served on the petitioner on 22.3.2021. According to the said show cause notice issued by the District Magistrate, Banda it was mentioned that an inspection was conducted by a team where it has been found that the petitioner is involved in illegal mining and he has extracted minor minerals from the area not allotted to him and extracted mineral to a depth which was not permissible as per the lease deed. Accordingly, a notice was given as to why the lease be not cancelled. In the said show cause notice, penalty for the same offence has also been fixed as Rs.50,000/- and recovery of royalty for an amount of Rs.10,39,68,500/- has also been proposed.

4. The petitioner in pursuance of the aforesaid show cause notice submitted reply on 30.3.2021 where it has denied the allegations leveled in the show cause notice and has stated that apart from the show cause notice no material was provided to the petitioner as directed by this Court in the case of ***Ranveer Singh Vs. State of U.P. and others, 2017 (1) ADJ 240*** passed in writ C No.51986 of 2016 and further submitted that there was no credible evidence in support of the allegations and, hence, requested for setting aside the show cause notice.

5. After considering the reply of the petitioner the District Magistrate by means of its order dated 26th April, 2021 has cancelled the mining lease of the petitioner. While rejecting the reply of the petitioner the District Magistrate has recorded that the petitioner has extracted minor minerals from an area not allotted to him and extracted 1,15,465 cubic feet of sand/maurang illegally which fact has been reported by the Mining Officer in its report dated 12.11.2020. He has further noticed that the petitioner was asked to deposit the amount of royalty of Rs.10,39,68,500/- but even the said amount has not been deposited by the petitioner and accordingly he was of the view that the said outstanding amount needs to be recovered from the petitioner along with penalty as provided under Rule 41(H)(1) and 59 (2) of Uttar Pradesh Minor Minerals (Concessions) Rules, 1963. He has further considered the fact that the Director, Mining and Geology, Uttar Pradesh had constituted an enforcement team for physical inspection which conducted the spot inspection on 19.3.2021 and submitted report on 19.3.2021 where it was found that the petitioner had conducted mining operations of an area 7.555 hect. and extracted 1,88,875 cubic feet of sand beyond the area allotted to him apart from other illegal mining alleged in the said order and even the bank of the river has been extracted to a depth which is beyond the prescribed limit. In this regard a first information report was also lodged against the petitioner.

6. The District Magistrate has relied upon the inspection report and has stated that the petitioner could not produce any evidence or prove his case contrary to the findings recorded by the inspection team and, hence, rejected the reply of the petitioner and proceeded to pass order for recovery of an amount of Rs.10,39,68,500/- and also cancelled the lease deed issued in favour of the petitioner and further placed him in black list for a period of two years.

7. The petitioner being aggrieved by the order of the District Magistrate dated 26th April, 2021 had preferred a revision before the State Government which has also been decided and rejected by means of the impugned order dated 29th June, 2022. The revisional authority while rejecting the revision of the petitioner and passing the impugned order has noticed the fact that an inspection was carried out on which the mining lease was granted to the petitioner and certain allegations have come forth on the basis of which the show cause notice was given to the petitioner to which reply was submitted by him on 30.3.2021. The reply of the petitioner was not found satisfactory and merely on account of the fact that the allegations against the petitioner stood concluded by the inspection team no infirmity was found in the order of District Magistrate and accordingly the revision was rejected.

8. The petitioner in the present petition has assailed the cancellation of the lease deed as well as revisional order dated 29th June, 2022 and the recovery as well.

GROUNDS OF CHALLENGE :-

9. Learned counsel for the petitioner has firstly submitted that no proper opportunity of hearing was given to the petitioner before passing the order of cancellation and recovery against the petitioner. In support of his submissions he has submitted that, in fact, no inspection was actually carried out and a perusal of the show cause notice dated 22.3.2021 would indicate that no material including

the copy of inspection report was supplied to the petitioner along with the show cause notice and in absence of the relevant documents and material constituting the basis of the allegationsagainst the petitioner the entire proceedings was conducted in violation of the principles of natural justice and accordingly the same are illegal and arbitrary and deserve to be set aside.

10. Learned Standing counsel Sri Rakesh Bajpai, on the other hand, supporting the impugned orders submitted that a perusal of the show cause notice indicates that entire contents of the inspection report have been reproduced in the show cause notice. He does not dispute the fact that copy of the inspection report dated 19.3.2022 was never supplied to the petitioner.

11. Learned counsel for the petitioner has further submitted that the inspection report and all other relevant documents have been annexed by the State Government along with the counter affidavit. It is further submitted that the inspection report was submitted on 19.3.2021 to the Director, Mining and Geology, Government of Uttar Pradesh who by means of letter dated 20.3.2021 addressed to the District Magistrate, Banda forwarded a copy of the inspection report for proceedings against the petitioner. Along with the said report he had categorically given directions to the District Magistrate to pass orders as mentioned therein. The name of the petitioner finds mention at serial No.7 of the said letter where the District Magistrate was directed to register F.I.R. against the petitioner, cancel his mining lease and place his name in the black list and with regard to the allegations of illegal mining recovery be made from him. For the sake of convenience the directions of the Director are reproduced as under:-

''स्वीकृत क्षेत्र से बाहर एवं सटे खण्ड के क्षेत्र में अवैध खनन तथा अन्य अनियमितता पाये जाने पर पट्टेधारक के विरूद्ध थ्त दर्ज कराते हुए नियमानुसार पट्टा निरस्तीकरण एवं पट्टेधारक का नाम काली सूची में डाला जाय तथा अवैध खनन के विरूद्ध पट्टाधारक से नियमानुसार राजस्व क्षति की धनराशि वसूल किये जाने की कार्यवाही की जाय।''

12. It has also been submitted by the petitioner that entire proceedings have been held without any application of mind by the District Magistrate and from a perusal of the directions issued by the Director, Mining and Geology, the District Magistrate, who is the subordinate to the Secretary (Mining and Geology) was duty bound to comply and, in fact, complied with the directions and consequently it is a clear case of bias and non application of mind by the District Magistrate.

13. Learned counsel for the petitioner has further assailed the impugned orders on the ground that the inspection was conducted by Team A with regard to 19 persons who were the lease holders of the lease licenses issued in their favour and in pursuance of inspection report dated 19.3.2021 action was taken against all the 19 persons and in all the cases the directions / dictate of the Director, Mining and Geology, as contained in his letter dated 20.3.2021 were duly followed and complied by the District Magistrate and the leases of all the persons included in the said list was cancelled. It is further stated that against all the cancellation orders the respective persons had filed revisions before the State Government which were again decided by the Director (Mining and Geology), the same officer who had authored the letter dated 20.3.2021 in his

capacity as Secretary (Mining and Geology) of Government of Uttar Pradesh and rejected all the revisions except the revision of the revisionist at serial No.16, namely of VAR Enterprises Pvt. Ltd. A copy of the order passed in Revision No.128 (R)/SM/2021 filed by VAR Enterprises Pvt. Ltd has been annexed along with writ petition wherein on the basis of the same report the revision of VAR Enterprises Pvt. Ltd. has been allowed holding that the inspection report had clear infirmity and could not be relied upon and there is no material to indicate that the delinquent lease holder had, in fact, was involved or has indulged in any illegal mining and in the aforesaid circumstances, the Secretary, Government of Uttar Pradesh (Mining and Geology) in exercise of the power of the revisional authority on the basis of the same material allowed the said revision vide order dated 24.2.2022.

14. Learned counsel for the petitioner claims parity of the order dated 24.2.2022 and submits that the revisional authority has discriminated against the petitioner in as much as while considering the revision in the case of VAR Enterprises Pvt. Ltd. on the basis of the same facts and for the same reason the revision of the petitioner has been dismissed.

15. Sri Rakesh Bajpai, *per contra*, has submitted that due opportunity of hearing was given to the petitioner before passing the impugned orders. He submits that as per the provisions contained under Rule 60 and 67 of Uttar Pradesh Minor Mineral (Concession) Rules, 1963 reasonable opportunity of hearing has to be given to the petitioner before passing any cancellation or blacklisting order. He submits that the inspection was conducted by the authority prescribed under the said Rules and according to the said inspection it can safely be stated that as per the inspection report the petitioner was found to have indulged in illegal mining and, hence, was subjected to show cause notice and it is only after receiving the reply to the said show cause notice that action has been taken in accordance with the provisions contained in the said Act for cancellation of the lease deed and for imposition of the penalty. He submits that due opportunity of hearing was given to the petitioner and consequently it cannot be said that the proceedings are dehors the law and thus supported the entire proceedings as well as the impugned orders. He has further vehemently submitted that not providing copy of the inspection report dated 19.3.2021 has not prejudiced the case of the petitioner nor prejudice has been caused to the petitioner by not supplying the inquiry report and, as such, it cannot be said that there is any violation of the principles of natural justice.

DISCUSSION :-

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

17. The State Government after receiving certain complaints with regard to illegal mining by various persons in District Banda proceeded to constitute three enforcement teams for inspecting various areas for which the lease was granted for the purpose of mining. The order dated 12.3.2021 passed by Director, Mining & Geology, which is on record, indicates that the said team consisted of three officers from the same department along with Surveyor. It is further submitted that the said teams conducted inspection and submitted their inspection reports on

19.3.2021 to the Director. In the said report only finding is limited to the extent of area which has been mined and the quantity of mineral extracted with regard to each of the leases has been indicated. It is further noticed that there is no mention in the said report as to when the said inspection was carried out or as to whether the lease holders were ever informed about the said inspection or the manner in which the inspection was carried out are some of the factors which did not find mention in the said inspection reports. The inspection report with regard to each of the license holders in an extremely cryptic manner has only recorded that the license holders are involved in illegal mining and the quantities have been mentioned which have been illegally extracted by all the lease holders.

18. Learned Standing counsel, on the other hand, has stated that the said inspection was carried out and entries made in the diary of the surveyorwhich have also included in the counter affidavit. It is noticed that only the surveyor has signed on the report. It is surprising that even if this fact is accepted that certain irregularities with regard to the petitioner was found on 17.3.2021 why the remaining members of inspection team did not sign on the said survey report is one aspect whose answer has neither been given by the respondent in the counter affidavit nor has been satisfactorily responded by the Standing counsel and, therefore, the inspection itself becomes doubtful. It is on the basis of the said inspection report which was submitted to the Secretary, Mining and Geology that the entire proceedings have been conducted against the petitioner and also against all other lease holders. It is further noticed that as per lease deed dated 1st June, 2020 the petitioner was allotted following areas:-

बिन्दु	अक्षान्तर	देशान्तर
A	25º37' 23.28" N	80º 16' 58.18" E
B	25º37' 15.62" N	80º 16' 51.93" E
C	25º37' 20.56" N	80º 16' 37.64" E
D	25º37' 34.95" N	80º 16' 43.36" E

19. Further, the said mining area was described with reference to the other plots on the North, South, East and West of the leased area which has been described therein. It is noticed that the inspection report only records that the petitioner has made excavation and extracted minor minerals from the areas outside the mining area. It is nowhere mentioned when and where the inspection was carried out, who were present during the inspection and most importantly whether the inspection was carried out at the location allotted to the petitioner is also doubtful as the plot is identifiable by G.P.S. Coordinates and there is no mention that G.P.S. Coordinates were used for identification of the plot. These are the essential facts which go to the root of the matter. If the allegations against the petitioner is that they have illegally mined beyond the leased area then it was the duty of the inquiry team to have identified/pointed out the same but there is no attempt to establish the case that illegal mining had, in fact, been done on area beyond the leased area. All these facts should have been given in detail as the report recorded a finding that the said extraction have been conducted in the area beyond the leased area then it should have been described by giving their coordinates in the inspection report which was not done.

20. It is in the aforesaid facts and circumstances that this Court is of the view that the allegations against the petitioner for illegal mining could not be clearly established and merely stating that large quantity of the minerals have been extracted by them would not ipso facto prove that the petitioner had been involved in illegal mining. It is the duty of the State to obtain and produce credible evidence in support of the allegations to bring home the charges. The arguments in this regard have force, specially, relying on the judgment of this Court in the case of ***Ranveer Singh Vs. State of U.P. and others, 2017 (1) ADJ 240*** where this Court has held as under:-

"33. Once the liability was to be fastened on the shoulder of the petitioner, then it was the obligation of the State to prove by way of credible evidence available that it was the petitioner, who has indulged in illegal mining and in the said direction, apart from issuing show-cause notice, all the evidence that was sought to be relied upon, i.e., the incumbents who have carried out the search and survey and the incumbents who have come forward to depose against the petitioner their names ought to have been disclosed and they ought to have been produced to support the case of the State that petitioner, in fact, has indulged in illegal mining. Not only this, as a part of process, the petitioner was entitled to have reasonable opportunity of defending himself by questioning the veracity of evidence produced against him and by adducing his own evidence, if any. Decision maker is bound to act fairly, as under the scheme of things provided for the determination made by him will entail civil consequences, as qua the person charged with illegal mining, on charges being proved, financial liability would be shouldered and in contra situation, the State would be at loss."

21. It is further noticed that no further evidence was adduced during the proceedings apart from the inspection report which could indicate that the petitioner or the other persons were involved in illegal mining. No evidence in this regard has either been placed on record before this Court or during the course of inquiry conducted by the respondents culminating into cancellation of the lease licenses.

NON-SUPPLY OF DOCUMENT :-

22. With regard to non-supply of the inspection report in the present case, it is not disputed that show cause notice contained only allegations with regard to illegal mining as recorded by the inspection team. Copy of the inspection report was never supplied to the petitioner. Though there are several judgments including the judgments cited by the Standing counsel in the case of ***Gorkha Security Services Vs. Government (NCT of Delhi) and others, (2014) 9 Supreme Court Cases 105*** where it has been held that in case inquiry report is not supplied to the delinquent then the proceedings would not ipso facto be illegal and arbitrary and in violation of principles of natural justice but delinquent will have to show that prejudice was caused to him by not supplying a copy of the inquiry report.

23. It is noticed that in the present case the proceedings have been conducted against the petitioner only on the basis of inspection report. Undisputedly, no other material was adduced during the said inquiry nor any evidence or statement was recorded during the inquiry. No documents

were ever taken on record during the said inquiry and the culpability of the petitioner with regard to illegal mining and other allegations has been decided only on the basis of inspection report. Needless to say that the inspection report, in the present circumstances of the case, constitutes an essential material / document which ought to have been supplied to the petitioner as even in the impugned orders the petitioner has been held guilty of illegal mining relying upon the inspection report dated 19th March, 2021. Once it is noticed that action is taken solely on the basis of inspection report then non supply of the said report to the person against whom proceedings are to be carried out necessarily constitutes miscarriage of justice in as much as he has a right to receive all the material which constitutes the charge/allegations against him so as to adequately respond to the charges and defend himself effectively, while in the present case the only material/document on the basis of which the petitioner has been proceeded against has not been provided to him and, hence, it can be safely concluded that the inquiry proceedings against the petitioner in this regard are in clear violation of the principles of natural justice and the defence of the petitioner has been severely prejudiced. Even though the sum and substance of the allegations did find mention in the show cause notice but inspection report apart from establishing the allegations against the petitioner also does not explain about other aspects as to how and where (location) the inspection was conducted, as to in what manner the inspection was undertaken by the committee and as to whether the persons allegedly involved in the illegal mining were ever put to notice before conducting the said inspection, are certain factors which are very material facts for the persons, who have been proceeded against have a right to defend their actions and they have right to know all material facts and only thereafter assail the said report. In absence of inspection report their defence was seriously prejudiced and as vested right has been snatched away which undoubtedly has civil consequences. It is also not clear from perusal of the records as to what were the coordinates, where the inspection was conducted and merely recording that inquiry was conducted on the plots on which the lease has been executed are some of the factors which are necessarily to be proved by the prosecution before saddling the delinquent lease holders with penal consequences like cancellation of their leases and recovery of penalty. In the lease the area allotted for mining has been described with G.P.S. Coordinates and, therefore, it was incumbent to provide the G.P.S. Coordinates of the area on which inspection was carried out and also the coordinates of area beyond the leased area on which the petitioner has been alleged to have illegally mined. In absence of any cogent material or document the charge of illegal mining has sought to be proved. This Court is of the considered view that there was no sufficient cogent material linking the petitioner with the charge of illegal mining and as per the judgment of ***Ranveer Singh Vs. State of U.P.*** *(supra)*, the onus on the State has not been discharged and consequently the proceedings against the petitioner only on the basis of inspection report is arbitrary.

BIAS :-

24. Apart from violation of the principles of natural justice, it is further noticed that the proceedings itself became doubtful the moment the Director, Geology & Mining directed the District Magistrate

to proceed against the lease holders in a particular manner and to cancel the license and place them in black list. It would have been appropriate for the Director, Mining and Geology to have merely forwarded the inspection report and direct the competent authority i.e. the District Magistrate to proceed in accordance with law after giving reasonable opportunity of hearing to the lease holders but by specifically directing the District Magistrate to proceed to cancel the lease of the petitioner and other similarly situated persons and put them under the black list, clearly reveals that the respondents had premeditated and preordained the result of the inquiry proceedings which the District Magistrate obediently complied with and, hence, the cancellation order has been passed without application of any mind at the dictates of the higher authority and a perusal of the same clearly indicates that the grounds / defence taken by the petitioner in the reply have not even been considered either by the appellate or revisional authority rendering the impugned order illegal and arbitrary.

25. While assailing the impugned order dated 29.06.2022 passed in revision by the Secretary, Government of U.P. submitted that the same has been decided by Dr. Roshan Jacob, who was also holding the charge of Director, Mining and Geology at the time when he had issued letter dated 20.03.2021 whereby clear directions were issued to the District Magistrate to proceed against and to blacklist him. To consider the argument regarding bias, it would be fruitful to consider the rendition of the Supreme Court in this regard.

26. In the case of ***Mustafa v. Union of India,*** **(2022) 1 SCC 294** the Apex Court has held as under :-

36.More appropriate for our case would be an earlier decision inG. Saranav.University of Lucknow[G. Saranav.University of Lucknow, (1976) 3 SCC 585 : 1976 SCC (L&S) 474] , wherein a similar question had come up for consideration before a three-Judge Bench of this Court as the petitioner, after having appeared before the selection committee and on his failure to get appointed, had challenged the selection result pleading bias against him by three out of five members of the selection committee. He also challenged constitution of the committee. Rejecting the challenge, this Court had held : (SCC p. 591, para 15)

"15. We do not, however, consider it necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee. This view gains strength from a decision of this Court inManak Lal case[Manak Lalv.Prem Chand Singhvi, AIR 1957 SC 425] where in more or less similar circumstances, it was held that the failure of the appellant to take the identical plea at the earlier stage of the proceedings created an effective bar of waiver against him. The following observations made therein are worth quoting : (AIR p. 432, para 9)

''9. ... It seems clear that the appellant wanted to take a chance to

secure a favourable report from the tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point.' "

37.The aforesaid judgment inG. Sarana[G. Saranav.University of Lucknow, (1976) 3 SCC 585 : 1976 SCC (L&S) 474] was referred inMadras Institute of Development Studiesv.K. Sivasubramaniyan[Madras Institute of Development Studiesv.K. Sivasubramaniyan, (2016) 1 SCC 454 : (2016) 1 SCC (L&S) 164] , in which selection to the post of Assistant Professor was challenged on the ground that shortlisting of candidates was contrary to the Faculty Recruitment Rules. The challenge was declined on the ground of estoppel as the respondent, without raising any objection to the alleged variations in the contents of the advertisement and the Rules, had submitted his application and participated in the selection process by appearing before the committee of experts.

38.Equally appropriate would be a reference to the decision of this Court inP.D. Dinakaran (1)v.Judges Inquiry Committee[P.D. Dinakaran (1)v.Judges Inquiry Committee, (2011) 8 SCC 380] , in which the allegation was that one of the members of the committee constituted by the Chairman of the Council of States (Rajya Sabha) under Section 3(2) of the Judges (Inquiry) Act, 1968 was biased. This judgment extensively recites and assimilates from both domestic and foreign judgments on the question of bias and prejudice and quotes the following observations inG. Sarana[G. Saranav.University of Lucknow, (1976) 3 SCC 585 : 1976 SCC (L&S) 474] case : (G. Sarana case[G. Saranav.University of Lucknow, (1976) 3 SCC 585 : 1976 SCC (L&S) 474] , SCC p. 590, para 11)

"11. ... the real question is not whether a member of an administrative board while exercising quasi-judicial powers or discharging quasi-judicial functions was biased, for it is difficult to probe the mind of a person. What has to be seen is whether there is a reasonable ground for believing that he was likely to have been biased. In deciding the question of bias, human probabilities and ordinary course of human conduct have to be taken into consideration."

39.Thereafter, reference is made toAshok Kumar Yadavv.State of Haryana[Ashok Kumar Yadavv.State of Haryana, (1985) 4 SCC 417 : 1986 SCC (L&S) 88] , which refers to the Constitution Bench judgment inA.K. Kraipakv.Union of India[A.K. Kraipakv.Union of India, (1969) 2 SCC 262] .Ashok Kumar Yadav[Ashok Kumar Yadavv.State of Haryana, (1985) 4 SCC 417 : 1986 SCC (L&S) 88] was a case of selection by UPSC and following extract from this judgment is of some significance : (Ashok Kumar Yadav case[Ashok Kumar Yadavv.State of Haryana, (1985) 4 SCC 417 : 1986 SCC (L&S) 88] , SCC pp. 442-43, para 18)

"18. We must straightaway point out thatA.K. Kraipak[A.K. Kraipakv.Union of India, (1969) 2 SCC 262] is a landmark in the development of administrative law and it has contributed in a large measure to the strengthening of the rule of law in this country. We would not like to whittle down in the slightest measure the vital principle laid down in this decision which has nourished the roots of the rule of law and injected justice and fair play into legality. There can be no doubt that if a Selection Committee is constituted for the purpose of selecting candidates on merits and one of the members of the Selection Committee is

closely related to a candidate appearing for the selection, it would not be enough for such member merely to withdraw from participation in the interview of the candidate related to him but he must withdraw altogether from the entire selection process and ask the authorities to nominate another person in his place on the Selection Committee, because otherwise all the selections made would be vitiated on account of reasonable likelihood of bias affecting the process of selection. But the situation here is a little different because the selection of candidates to the Haryana Civil Service (Executive) and Allied Services is being made not by any Selection Committee constituted for that purpose but it is being done by the Haryana Public Service Commission which is a Commission set up under Article 316 of the Constitution. It is a Commission which consists of a Chairman and a specified number of members and is a constitutional authority. We do not think that the principle which requires that a member of a Selection Committee whose close relative is appearing for selection should decline to become a member of the Selection Committee or withdraw from it leaving it to the appointing authority to nominate another person in his place, need be applied in case of a constitutional authority like the Public Service Commission, whether Central or State. If a member of a Public Service Commission were to withdraw altogether from the selection process on the ground that a close relative of his is appearing for selection, no other person save a member can be substituted in his place. And it may sometimes happen that no other member is available to take the place of such member and the functioning of the Public Service Commission may be affected. When two or more members of a Public Service Commission are holding a viva voce examination, they are functioning not as individuals but as the Public Service Commission. Of course, we must make it clear that when a close relative of a member of a Public Service Commission is appearing for interview, such member must withdraw from participation in the interview of that candidate and must not take part in any discussion in regard to the merits of that candidate and even the marks or credits given to that candidate should not be disclosed to him."

40."Real likelihood test" applied inRanjit Thakurv.Union of India[Ranjit Thakurv.Union of India, (1987) 4 SCC 611 : 1988 SCC (L&S) 1] , is elucidated in the following words : (SCC pp. 617-18, paras 15-17)

"15. ... The test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely and whether Respondent 4 was likely to be disposed to decide the matter only in a particular way.

16. It is the essence of a judgment that it is made after due observance of the judicial process; that the court or tribunal passing it observes, at least the minimal requirements of natural justice; is composed of impartial persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial "coram non judice"....

17. As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the Judge is not to look at his own mind and ask himself, however, honestly, "Am I biased?"; but to look at the mind of the party before him."

27. In light of the settled law and the pronouncements of the Supreme Court on bias, examining the facts of the present case, this Court is of the view that Dr. Roshan Jacob, who was also the Director, Geology and Mining had directed the District Magistrate to proceed against the petitioner and to cancel his mining lease, which order was duly complied, and subsequently she herself as the revisional authority against the order of cancellation of the mining lease proceeded to hear and reject the revision, which order would certainly be hit by the vice of bias. It is the particular officer who initiated proceedings against the petitioner and other similarly situated persons, who can be said to have already made up her mind with regard to the penalty to be imposed upon the petitioner which is evident from her letter dated 20.03.2021 and further proceeded to decide the revision and, therefore, she was a Judge of her own cause deciding a matter which was initiated by her and also the revision challenging the order of District Magistrate which was passed on her dictates. The ground of bias squarely applies to the facts of the present case and the order dated 29.06.2022 rejecting the revision is clearly illegal and arbitrary and is hit with vice of bias.

28. This Court has also examined the revisional order passed in the case of VAR Enterprises Private Limited in Revision No.128 (R)/SM/2021. It is noticed that the revisionist therein was also confronted with the same inspection report where he was also held guilty of illegal mining in an area beyond the leased area allotted to him. The revisional authority has allowed the revision only on the ground that there is no material to indicate that the lease holder was, in fact, involved in or has indulged in illegal mining. It is clear that the same revisional authority in one case has sought to distinguish the inspection report and declined to fasten any liability upon VAR Enterprises Private Limited while on the basis of the same material have held the petitioner to be guilty of illegal mining. This clearly shows the discriminatory nature in which the impugned order of punishment has been passed and, as such, the action of the administrative authority cannot be sustained.

VIOLATIONS OF RULE 58 OF THE RULES OF 1963 :-

29. The impugned order has also been assailed on the ground that the same is in violation of Rule 58 of the Rules of 1963. By means of the impugned order the District Magistrate has passed final orders in pursuance of the show cause notice dated 13.11.2020, 10.3.2021 and 23.2.2021. It is stated that the said notice was only with regard to recovery of the outstanding amount of royalty, for non payment of 2 per cent TCS amounting to Rs. 20, 74, 860/- and also 10 per cent of the District Mining Fund (D.M.F.) amounting to Rs.2, 21, 61, 600/-.

30. In this regard Rule 58 of the Rules of 1963 provides that in consequence of non - payment of royalty or other dues the same can be recovered by the respondents only after service of notice to the lessee, to pay within thirty days of the receipt of the notice and if not paid within thirty days then on expiry of fifteen days of the notice the lease can be cancelled. In this regard it has been submitted that thirty days from the date of notice would expire only on 11.05.2021 and fifteen days beyond the said date would expire on 26.05.2021 and even according to the statutory provisions cancellation of the lease of the petitioner

could not have been ordered prior to expiry of the said period i.e. 26.05.2021 while in the present case the order of cancellation has been passed on 26.4.2021 before the expiry of statutory period, as such, it is clearly noticed that Rule 58 of the the Rules of 1963 has been flagrantly violated by the respondents in cancellation of their lease in pursuance of the show cause notice dated 12.9.2021. Therefore, on this ground also the cancellation order is illegal and arbitrary and violative of Rule 58 of the Rules of 1963.

31. In view of the aforesaid facts and circumstances, this Court is of the considered view that the impugned order dated 29.6.2022 passed by the State Government in Revision No.11 (R)/VSM/2022 as well as order 26.4.2021 passed by opposite party No.3 i.e. District Magistrate, Banda are illegal and arbitrary, hence, set aside.

32. Considering the seriousness of the allegations and the amount of recovery the respondents are given liberty to proceed against the petitioner in accordance with law, if they so choose.

33. In view of the above, the writ petition stands **allowed.**

(2023) 3 ILRA 290
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.03.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ C No. 4897 of 2022

Smt. Shivani Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
In Person

Counsel for the Respondents:
C.S.C., Divyarth Singh Chuahan, Meenakshi Singh Parihar

A. Civil Law - Custody of Minor daughter - The Juvenile Justice (Care And Protection Of Children) Act, 2015 - Section 101 - Appeal - Power of Appellate Authority to take Additional Evidence - the Juvenile Justice Act does not given any power to the Appellate Authority to receive additional evidence - It can only examine and decide the appeal on the grounds, on which the same has been filed - In case the appellate authority is of the view that the order of the committee is incorrect and that it should have taken/considered more evidence/material, then it could have remanded the matter back to the committee to decide the matter afresh, but it certainly did not have any power to receive "additional evidence" (Para 42)

B. Civil Law - Custody of minor child, in need of care and protection - Family Courts Act, Sections 7 (1)(a), (g) & 20 - The Juvenile Justice (Care And Protection Of Children) Act, 2015 - Child Welfare Committee (CWC) - jurisdiction in relation to the proceedings qua the custody or access to any minor lies with the Family Court - the Child Welfare Committee, under The JJ Act, neither has the jurisdiction nor the power to decide contested claims pertaining to guardianship and custody of minor - If at the behest of one of the parents, a complaint is made before the CWC, with regard to abuse of the child by the other parent or person, and custody is also sought by such parent or person, then the Committee would be within its powers to declare the child to be in need of care and protection, and send him to a fit facility of children's home etc. pending determination/adjudication by court of

competent jurisdiction on questions of custody - Power exercised by the committee is administrative in nature, rather than judicial (Para 30, 34)

C. Civil Law - Procedure in Relation to Children in Need Of Care And Protection - the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016) - Sections 31 & 36 - the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 - Rule 18 & 19 - Any child in need of care and protection is to be produced before the Committee - the Committee is to hold an inquiry and after interaction with the child may issue directions for placing the child with the parent or guardian or Children's Home, or direct the placing of the child in safe custody of a fit person or a fit facility - the objective of the committee is rehabilitation of the child - Held - in the instant case, there is no mention of the child being examined by the committee which was the primary duty and responsibility (Para 40)

D. The Juvenile Justice (Care And Protection Of Children) Act, 2015 - Child Welfare Committee - In the instant case, procedure and manner adopted by the was absolutely arbitrary - Committee, without giving any opportunity of hearing to the petitioner (mother), to defend herself, decided the matter of custody of her minor daughter and held that she was unable to look after the welfare of the child - The copy of the complaint was never supplied to the petitioner (mother) nor was she supplied any documents which were relied upon by the complainant before the committee - Committee relied upon information published in newspaper articles, and attributed disease of "fbing", still unknown to the medical science, to the petitioner (mother) - Committee was fully aware that the grandfather who was the complainant was 78 years' old and still proceeded to declare him a fit person only to hand over the custody of the minor child while respondent No.5 was a resident of NOIDA living with her husband and would not be in a position to look after the minor child at Sultanpur but she was also declared a fit person and custody handed over - order of the Committee was illegal and arbitrary and suffered from non application of mind (Para 40)

Allowed. (E-5)

List of Cases cited:

1. Geetanjali Dogra Vs State & ors. CM(M) 1140/2018

2. Tasleema Begum Vs The State Of West Bengal & Ors (Cal HC) W.P. No.19557(W) of 2017 04.01.2018

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard the petitioner in person, Sri H. G. S. Parihar, Senior Advocate assisted by Sri Divyarth Singh for private respondents and learned Standing counsel for the State-respondents.

2. The petitioner, who is the mother of a minor girl child, has assailed the order dated 17/08/2021 passed by the Child Welfare Committee, Sultanpur whereby the custody of the minor has been handed over to her father-in-law, husband and sister-in-law and has also assailed the order dated 06/12/2021 passed by the appellate authority upholding the order of the Child Welfare Committee (hereinafter referred to as the Committee), and dismissing the appeal preferred by the petitioner.

3. The present controversy is an outcome of an embittered matrimonial relationship between the petitioner and her husband, respondent No. 4. The marriage between the petitioner and respondent No. 4 was solemnised on 21/01/2014 and out of the said wedlock a daughter was born on 30/10/2015. The petitioner and respondent

No. 4 lived for 2 years at Sultanpur, where respondent No. 4 is running nursing schools, and sometimes in 2017 the petitioner along with minor daughter shifted to Lucknow, while respondent no.4 continued to live and work at Sultanpur visiting the petitioner and his daughter during the weekends. The minor child was admitted to a school at Lucknow and according to the petitioner the relationship between her and her husband as well as her in-laws was cordial prior to 25/08/2021, on which date the petitioner was directed to appear before the Committee, Sultanpur.

4. A complaint was made by respondent No. 3, father-in-law of the petitioner to the Committee, Sultanpur seeking custody of his grand daughter. He stating in his complaint that his granddaughter was born on 30/10/2015 at Lucknow. His son and daughter-in-law were living with him after their marriage, when after 2 years the petitioner pressurised her husband to shift to Lucknow to secure better education for the child and subsequently the petitioner and the minor child shifted to Lucknow. Number of allegations have been levelled in the said complaint against the petitioner for not looking after and neglecting the minor daughter. In support of the complaint CCTV images, certificates of various specialist in medical field were also submitted and accordingly prayed for interim custody of the minor child.

5. The Chairman of the Committee issued notices to the petitioner on 02/08/2021 to appear on 04/08/2021. On 04/08/2021 the District Probation Officer was directed to conduct counselling of the minor and submit his report. Again on 04/08/2021 notice was sent to the petitioner for appearance before the Committee on 06/08/2021. Another notice was sent on 06/08/2021 directing the petitioner to appear along with minor daughter on 11.08.2021. It was ordered that the notice be served on the petitioner through Smt Geeta Verma, the Counsellor. The order sheet of 12/08/2021 indicates that the Committee noted that service could not be affected upon the petitioner and hence she was telephonically informed to appear before the Committee on 13/08/2021 and again on 13/08/2021 she was directed to appear on 16/08.2021.

6. On 16/08/2021 the petitioner along with the minor child appeared before the Committee, where according to the order sheet the petitioner refused to sign on the statement made by her, and the entire proceedings were concluded on 16/08/2021 itself, and the matter was reserved for orders, which was delivered on 17/08/2021.

7. The Committee by means of impugned order dated 17/08/2021 accepted and allowed the complaint made by respondent no.3 and returned a finding that the petitioner is a victim of mental illness due to which she becomes violent. Even the adjournments sought by her before the Committee were attributed to her mental illness. The petitioner denied the medical reports submitted by her father-in-law as the same at been prepared under his influence as he had retired as Director General Medical and Health. The Committee also relied upon an article published in a local newspaper on 06/07/2021 with regard to "Paranoid Personality Disorder" and concluded that the petitioner also is suffering from the same disorder due to which she can become violent and such persons do not accept their fault.

8. In the impugned order the Committee has also held that the petitioner is suffering from "Fbing" which according to them is a disease where a person uses his phone excessively and consequently held that due to "Fbing" she neglects her minor daughter.

9. The Committee considered the fact that the complainant, who is father-in-law of the petitioner, retired from a very high post of Director General, Medical and Health Services, Uttar Pradesh and is financially capable of looking after the minor child. Though he is 78 years old and therefore for looking after the minor he will be supported by his son, respondent No. 4 and his daughter Ruchi Singh - respondent No. 5, who is living with her husband in NOIDA, gave an undertaking that they will look after the minor child effectively and accordingly the custody of the minor child was taken away from the petitioner and given to respondent no. 3, 4 and 5.

10. The petitioner being aggrieved by the order of the Committee, Sultanpur dated 17/08/2021 preferred an appeal before the District Magistrate, Sultanpur specially on the ground that the Committee had in the most illegal and arbitrary manner without giving any opportunity of hearing to the petitioner decided the matter of custody of her minor daughter and no procedure was followed apart from the fact that she was never given the copy of the complaint, nor was he supplied any documents which were relied upon by the complainant before the committee. She further submitted that she was never given any opportunity to defend herself, which is evident from the fact that even some statement was not signed by her, and entire proceedings were concluded in extremely hurried manner on 16/08/2021 itself. She denied that Councillor Geeta Verma had ever met her, and no document was examined by the Committee which would indicate that she was mentally unstable and unable to look after her daughter.

11. The petitioner being aggrieved with the order of Committee preferred an appeal before the District Magistrate, who has dismissed the appeal vide order dated 06.12.2021. The District Magistrate has admitted that the order of the Committee does not refer to any CCTV footage, but proceeded to take on record himself additional evidence holding that under the Civil Procedure Code as well as under the Criminal Procedure Code there was expressed provision of taking additional evidence at the appellate stage, and considering himself to be clothed with all the powers and authority of "appellate court" proceeded to examine the additional evidence placed by the respondents and only on the basis of the additional evidence came to conclusion that the petitioner was suffering from mental illness and was also subjecting the minor child with physical assault and abuse. The District Magistrate rejected the arguments of the petitioner that respondent no.3 was responsible for divorce of his elder son, and that respondent no.4, her husband was addicted to liquor and a drunkard and hence custody her minor daughter could not be given to either of them, as no evidence was adduced be her in this regard. He also concluded that the petitioner was informed telephonically about the date fixed before the Committee and hence she was sufficiently served. On the basis of the material produced before him he was satisfied that the conditions exist where living of the minor child with mother may be harmful for the child and dismissed the appeal but granted her visiting rights.

12. The petitioner has assailed the impugned orders passed by the Committee as well as the appellate order passed by the District Magistrate on the ground that the Committee has exceeded its jurisdiction in taking the custody away from the natural mother and handing it over to his grandfather was not the natural guardian of the minor child. It was submitted that in case the respondents wanted the custody of the minor child then the appropriate forum is only under the provisions of Family Courts Act, Hindu Minority and Guardianship Act, or under the provisions of the Guardians and Wards act 1890, before the appropriate Court and not before the Committee under the juvenile Justice act. It was submitted that the entire proceedings are without jurisdiction and liable to be set aside as such.

13. Sri H. G. S. Parihar, Senior Advocate appearing for the respondents, on the other hand, has vehemently opposed the writ petition. He supported the impugned orders passed by the Committee as well as the District Magistrate and submitted that the Committee had exercised the jurisdiction vested in it. It was submitted that various CCTV footages and other documentary evidence was available and submitted before the appellate authority and after proper examination of the same, concluded that the minor was a "child in need of care and protection" as she was physically abused by her mother, who was also found to be suffering from mental illness.

14. A divorce petition filed by the respondent no.4 is pending before the Family Court, Lucknow being case no.2497of 2021 and also a criminal case has been lodged against the petitioner being FIR no.0499/2021 has been lodged against the petitioner under sections 323,504 and 506 IPC.

15. Sri H.G.S. Parihar, Senior Advocate has submitted that according to the definition of "child in need of care" as provided in section 2(14) Of the Juvenile Justice Act, 2015 the daughter of the petitioner would fall in definition in subclause (iii) therein as the petitioner is alleged to have injured, neglected the child. Once the child is declared to be a child in need of care, then the child is to produced before the committee as provided for in section 31 Juvenile Justice Act, and after enquiry conducted under section 36 of the act, custody can be given to a fit person. In the present case the report of councillor Smt Geeta Verma was sought for and only thereafter, order for custody has been passed in terms of section 37 for placing the child with her grandfather, father and Bua (aunt) who have been declared to be fit persons.

16. Considering the argument of the petitioner with regard to be jurisdiction of the Committee to consider and decide the aspect of the custody of minor child, specially removing the child from the custody of the mother, and handing the same to the grandfather, it is necessary to examine the statutory provisions as Provided for in the Juvenile Justice (Care and Protection of Children) act 2015.

17. Section 2(14)(iii) of the Juvenile Justice (Care and Protection of Children) Act, 2015 provides to the effect:

2. In this Act, unless the context otherwise requires- .....

.....

.....

(14) "child in need of care and protection" means a child--

(i).....

(ii).....

(iii) who resides with a person (whether a guardian of the child or not) and such person--

(a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child; or

(b) has threatened to kill, injure, exploit or abuse the child and there is a reasonable likelihood of the threat being carried out.

(c) has killed, abused, neglected or exploited some other child or children and there is a reasonable likelihood of the child in question being killed, abused, exploited or neglected by that person;"

18. It is essential to observe that in terms of Section 2(23) of the very same enactment provides to the effect:

2(23) "Court" means a civil court, which has jurisdiction in matters of adoption and guardianship and may include the District Court, Family Court and City Civil Courts."

19. The petitioner has placed reliance on the provisions of Section 26 of the Hindu Marriage Act, 1955 which provides as follows:

"Section 26. In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made."

20. *Inter alia* the petitioner places reliance on the provisions of Sections 6(a) & 13 of the Hindu Minority and Guardianship Act, 1956, which read to the effect:-

"Section 6. The natural guardians of a Hindu minor; in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are--

(a) in the case of a boy or an unmarried girl--the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

and

Section 13. (1) In the appointment of declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor."

21. The petitioner has also placed reliance on the provisions of Sections 12 &

25 of the Guardians and Wards Act, 1890, which reads to the effect:-

"12. (1) The Court may direct that the person, if any, having the custody of the minor shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper. (2) If the minor is a female who ought not to be compelled to appear in public, the direction under sub-

section (1) for her production shall require her to be produced in accordance with the customs and manners of the country.

(3) Nothing in this section shall authorise--

(a) the Court to place a female minor in the temporary custody of a person claiming to be her guardian on the ground of his being her husband, unless she is already in his custody with the consent of her parents, if any, or

(b) any person to whom the temporary custody and protection of the property of a minor is entrusted to dispossess otherwise than by due course of law any person in possession of any of the property.

25. (1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.

(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1882 (10 of 1882).

(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship."

22. Significantly, Section 7 of the Family Courts Act, 1984 provides for the jurisdiction conferred on a Family Court and spells to the effect:-

"7. (1) Subject to the other provisions of this Act, a Family Court shall--

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation.--The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:--

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstance arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance.

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor. (2) Subject to the other provisions of this Act, a Family Court shall also have and exercise--

(a) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment."

23. Section 20 in Chapter-6 of the Family Courts Act, 1984 provides to the effect:-

"20. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

24. It is apparent thus that in view of the Family Courts Act, the provisions of Section 7 (1)(a) and (g) read with Section 20 of the said enactment makes it apparent that jurisdiction in relation to the proceedings qua the custody or access to any minor has to be essentially determined by the Family Court and cannot fall within domain of the Committee in terms of Section 2(14)(iii) of the Juvenile Justice (Care and Protection of Children), Act, 2015.

25. Considering the aforesaid, it is noticed that the procedure in relation to children in need of care and protection is provided in Chapter VI of the Act. The procedure commences with Section 31 which deals with production of the child in need of care and protection before the Committee by any of the authorities specially mentioned therein which are police officer Special Juvenile Police Unit, Designated Child Welfare Police Officer, any Officer of the District Child Protection Unit, Inspector appointed under Labour law, any public officer, Childline services or any volunteer non-governmental organisation or any agency as recognised by the State government, Child Welfare Officer or Probation Officer, and the social worker or a public spirited citizen, by the child himself or any nurse, doctor or management of a nursing home, hospital or maternity home.

26. According to Section 36 of the Act enquiry is to be conducted by the committee on production of a child or receipt of a report under section 31. A conjoint reading of section 36 and section 31 would make it clear that the child firstly, has to be produced before the Committee by the authorities mentioned therein, and on such production of the child before the Committee an enquiry is to be conducted, and after consideration of the said enquiry appropriate order has to be passed whether to send the child to children's home or in a fit facility or fit person. At this stage we may also like to observe that the enquiry can be conducted by the committee even on the basis of a report under section 31 of the Act. A perusal of the Juvenile Justice (Care and Protection of Children) model rules, 2016 also provide in rule 18 about production of the child before the committee, and only after the child is produced before the committee and the

report in this regard is submitted, the committee proceeds to conduct the enquiry, and thereafter if the facts warrant, declare the child to be a child in need of care and protection.

27. The scheme of the Act also indicates that the enquiry commences only after the production of the child before the committee as per section 36 of the act, and appropriate orders can be passed which are provided for in section 37 of the Act.

28. After examining the various provisions of the Juvenile Justice Act, 2015, it becomes clear that the golden thread underlying the scheme is the rehabilitation of the minor child. In section 36(3) it is provided that after completion of the enquiry the committee is of the opinion that the child has no family or ostensible support or is in continued need of care and protection, it may send the child to specialised adoption agency. Section 37 provides that after the committee declares the child to be in need of care and protection, its primary task is to restore the child to the parent or guardian or family, failing which the minor is to be placed with Children's Home, fit facility, specialized adoption agency etc. Section 38 of the act further provides with regard to the orphaned or abandoned child where the Committee is required to make all efforts for placing such children with their parents or guardians failing which they are declared as child legally free for adoption. Chapter VII is entirely dedicated towards rehabilitation and social reintegration of the children, where it is provided that the restoration and protection of a child shall be the primary objective of any children's home, specialised adoptive agency or orphan shelter. Considering aforesaid provisions contained in the Juvenile Justice Act, 2015 it becomes abundantly clear that the objective of the committee is rehabilitation of the child. When a child is produced before the committee, an enquiry is initiated by the committee. In the said enquiry all the available details regarding the child are gathered. His medical and psychological examination may be conducted, pursuant to which the declaration is required to be made that the child is in need of care and protection, and thereafter in accordance provisions laid down the child can be sent any of the places including children's home, fit institution or for fit person etc.

29. The jurisdiction of the Committee is limited to passing necessary orders after making an "enquiry". If the child is found to be a child in need of care and protection necessary orders as envisaged in the act can be passed. There may be cases where there are allegations of abuse of the child by his own parents, or the child may be voluntarily handed over/surrendered by the parents as provided in section 35 of the act, in which case the committee can send the child appropriate place including fit person, fit institution, children's home etc., after following the due process.

30. A bare perusal of the statutory scheme clearly indicates that it the Committee as constituted and empowered under the Act of 2015, does not envisage judicial determination of disputed facts, where at the behest of one of the parents a complaint is made with regard to abuse of the child by the other parent or person, and custody is also sought by such parent or person. If such a case arises then the Committee would be within its powers to declare the child to be in need of care and protection, and send him to a fit facility of children's home etc. pending determination/

adjudication by court of competent jurisdiction on questions of custody but handing over of the custody to the other parent or relative, would amount to deciding a matter regarding custody of minor, and as such, it cannot be done merely on basis of a limited enquiry as envisaged in section 31 of the Act. Disputed questions of fact and law would have to be judicially determined, which matter, as discussed earlier would be only for the regular Courts exercising jurisdiction under the Family Courts Act, Hindu Minority and Guardianship Act or the Guardians and Wards Act to decide the issue of custody of a minor child from one parent to another or from one parent to another person in the interest of the child. This is also in consonance with the definition of "Court"provided in Section 2 (23) of the Juvenile Justice Act, 2015 where in matters of adoption and guardianship court would means the civil court which has jurisdiction in the matter.

31. Section 40 of the juvenile Justice act would also indicate that it would be the primary duty of the committee to restore a child in need of care and protection, to its parents. Even section 40 of the Act cannot be interpreted to mean that the custody can be taken away from one parent and given to another, as under the said section the word used is "restoration" and "parents" and hence only where the child has fled from home, or is found in illegal custody of third person etc. can he be restored to his parents after following the procedure. It is clear that custody of a child with one parent cannot be transferred to another parent or relative in exercise of power under section 40 of the Act.

32. A petition under Section 13 of the Family Courts Act in case no.2479 of 2021 is pending before the Family Court, Lucknow filed by respondent no.4 against the petitioner, where the issue of custody of the minor child can be appropriately dealt with and decided.

33. Another important aspect which persuades us from holding that the Committee is not empowered to decide contentious custody matters is the scheme of the Juvenile Justice Act, where the procedure provided is limited to holding an enquiry as per section 37 of the Act of 2015 on the production of the child who is in "need of care and protection". On the completion of the enquiry if the committee is of the opinion that the child has no family or ostensible support and continued need of care and protection it may send the child to special adoptive agency. While exercising such power, the welfare of the child is of the utmost importance, which has to be objectively determined by the Committee on the basis of the material on record.

34. A perusal of the provisions dealing with the manner of exercise of power vested in the Committee is limited to passing necessary orders for the protection of the child keeping in mind his/her best interest. The power exercised by the committee is administrative in nature, rather than judicial, which involves determination disputed questions of law and fact. Only the facts have to be ascertained in an enquiry, and orders have to be passed in the best interest of the child. Matters pertaining to grant of custody to either of the parents where the matter is contested between the husband-and-wife, where both claim to be in a better position to have the custody of the minor, then the issues have to be determined judicially after due process and not in a summary

manner as per the provisions contained in the Juvenile Justice Act, 2015, and for this reason also, matters of guardianship and custody of minors are to be decided by the competent civil courts after taking evidence and giving proper opportunity of hearing to either side. In this regard Section 2(23) of the juvenile justice act has also to be taken account of which defines the "Court" to be a civil court which has jurisdiction in the matters of adoption and guardianship and may include District court, Family court and City Civil Courts. Therefore, with regard to matters pertaining to guardianship, even according to Juvenile Justice Act, 2015, it is the civil courts which would have precedence and exclusive jurisdiction in deciding such matters, and hence this Court is of the considered view that the Committee neither has the jurisdiction nor the power to decide contested claims pertaining to guardianship and custody of minor.

35. The Delhi High Court in the case of **Geetanjali Dogra Vs State and Others** CM(M) 1140/2018 while considering the powers of the Committee with regards to its powers to deal with the matters regarding visitation rights of one of the parent, after examining the provisions of the Juvenile Justice act held as under:-

"30. It is apparent thus that in terms of provisions of the Guardians and Wards Act, 1890 powers are conferred on the Court of competent jurisdiction to decide the aspects of guardianship, visitation and access to a minor child and as observed elsewhere hereinabove, in the circumstances of the instant case where there is litigation pending between the parties i.e. the petitioner and the respondent no.2 before the Family Courts, Delhi, the respondent no.2 could not have resorted to a mode to detract from the adjudication qua the rights of access to the minor child, which are to be made by a Court of law.

31. On a consideration of the submissions that have been made on behalf of either side, as observed hereinabove, in terms of Section 7(1) of the Family Courts Act, 1984, taking the same into account and the aspect that there is a litigation pending in the Family Court between the mother of the minor child and the father of the minor child as has been submitted on behalf of the petitioner and not refuted on behalf of the respondent no.1 in as much as the proceedings for maintenance are pending before the said Court, it is apparent that jurisdiction to grant permission or access to the respondent no.2 to the minor child in the circumstances of the instant case is vested with the Family Court concerned alone.

32. Furthermore, it cannot be overlooked that Article 9(1) of the UNCRC which reads to the effect:

"1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence."

also makes it apparent that it cannot be read in isolation and cannot be read in disregard of the domestic law.

36. The Calcutta High Court in the case of **Tasleema Begum vs The State Of**

West Bengal & Ors W.P. No.19557(W) of 2017 decided on 4 January, 2018 in similar circumstances has held:-

"In the present case, there is a lis pending for the custody of the children before the District Judge. Such proceedings, however, will decide the person who will be treated as a guardian of the children concerned. The Committee can in the interregnum provide for the welfare of the children.

Priya Yadav (supra) is of the view that, the Act of 2015 read with the Juvenile Justice (Care and Protection of Children) Rules, 2016 does not confer power to give custody of a child taking it from the mother and giving it to the father in the facts of that case."

37. A perusal of the aforesaid judgement is passed by the Delhi High Court as well as the Calcutta High Court would indicate that both the High Court's have also taken a similar view that the provisions of the Juvenile Justice Act does not give it the power to decide contested and disputed matters pertaining to custody, while it can only as an interim measure, pass appropriate orders in the welfare of the child.

38. Though the finding recorded hereinabove would have been sufficient to conclude/decide the present case, but the manner in which the Committee has proceeded to decide the case as well as the District Magistrate exercising his power of appeal, requires a special mention.

39. The Committee constituted under the Juvenile Justice Act is tasked with the sole objective of acting in the best interest of the child. The individuals manning the Committee are expected to be objective in their approach, be sensitive to the needs of the child and take a holistic view of the situation presented before them and are required to deal with regard to the children in need of care and protection with great circumspection and exploring all possible solutions, before reaching an informed decision with regard to the minor. Any decision short of the above attributes, is liable to be infirm and may turn out to be counter-productive to the best interest of the child. In present Case the complaint was made by the grandfather of the child levelling allegations against his daughter-in-law (petitioner) about abuse and mistreatment of the child, and in turn had sought custody of the minor. It is only after directions were issued by this court on 22.07.2021 that the Committee decided to take up the issue. Notices were issued to the petitioner on 02.08.2021 and 04.08.2021 directing her to appear on 04.08.2021 and 06.08.2021 respectively. It is not understood as to how the Committee expected the notices to be served within two day's by speed post. According to the order-sheet the petitioner was informed on telephone to appear on 16.08.2021. The petitioner appeared along with her minor daughter on the said date. She claims to have denied the allegations made by the complainant. She has denied the meeting with the councillor, she refused to sign the statement made by her and stated that all the medical reports submitted by the complainant were under influence of the father-in-law who retired senior post of Director general medical and health. The committee interacted with the child, and thereafter concluded the proceedings and reserved its orders.

40. A perusal of the impugned order passed by the Committee dated 17/08/2021 would reveal that the entire enquiry and

discussion is regarding conduct and behaviour of the petitioner. There is no mention or even a whisper with regard to the issue being dealt by them regarding the minor's custody which was being determined by the Committee. The Committee has relied upon information published in newspaper articles, and attributed disease of "fbing" still unknown to the medical science to the petitioner and held that she is unable to look after the welfare of the child. The procedure and manner adopted by the committee for deciding the controversy, on the face of it, is absolutely arbitrary coupled with the fact that even the copy of the complaint was never supplied to the petitioner, the medical reports sought to be used against her were never verified by the committee and most importantly there is no mention of the child being examined by the committee which was the primary duty and responsibility. There is no reason as to why the proceedings were concluded in such a hurry manner on 16/08/2021 itself when the petitioner had appeared along with her daughter. We have also perused the original records but could not find the proceedings relating to 16/08/2021. Initially a photocopy of the order-sheet was produced before us, as the order contained therein were cryptic and did not disclose the true proceedings of the Committee and therefore this Court was constrained to call for the entire original records and we found that the typed order-sheet produced before us was at variance with the order-sheet maintained by the committee in the original file. Such procedure is not appreciated and does not inspire confidence in the way the Committee seems to be functioning. No proper proceedings were held to declare the respondent No. 3, 4 and 5 to be fit persons, before handing over the custody of the minor. The procedures prescribed in the model rules have also not been followed. Even though respondent No. 3 had prayed for temporary custody of the minor child, but the custody has been granted without any boundation of time or any other contingency, as if it is a final determination with regard to the custody. The Committee has proceeded totally in violation of the statutory provisions and the rules in the present case. We also take cognizance of the fact that an application for exemption has been moved by the private respondents on 22.3.2023 on the ground that respondent No.3 is old and infirm and is suffering of various ailments while respondent No.5 is living with her husband in NOIDA. The above facts were also there before the Committee before it proceeded to declare respondent No.s 3 & 5 fit persons. The facts themselves reveal that the order of the Committee was was illegal and arbitrary and suffered from non application of mind. They were fully aware that respondent No.3 (grandfather) who was the complainant was 78 years' old and still proceeded to declare him a fit person only to hand over the custody of the minor child while respondent No.5 was a resident of NOIDA living with her husband and would not be in a position to look after the minor child at Sultanpur but she was also declared a fit person and custody handed over.

41. The District Magistrate, on the other hand, deciding the appeal against the order of the Committee has assumed the role of an "appellate court" under the Civil Procedure Code as well as Criminal Procedure Code. He has admitted that there was no reliable material before the Committee to give the custody to the respondents, but decided to entertain additional evidence, which was filed only by the respondents, and on the basis of the CCTV images and on the basis of the

evidence adduced it returned a finding that the petitioner was abusing the child and mistreating her and consequently granted custody to the respondents.

42. With regard to the validity of the impugned appellate order, firstly, we would like to observe, that an administrative officer hearing in appeal has to decide the same in consonance with the statutory provisions which have clothe him with such power. Under the Juvenile Justice Act Section 101 provides for appeals, against the orders of the Committee. The Act does not given any power to the appellate authority to receive additional evidence, and therefore in absence of any such power the appellate authority under the Juvenile Justice Act, 2015 would not have any power to receive additional evidence. It can only examine and decide the appeal on the grounds on which the same has been filed. Even otherwise, the Committee, who's order are appealed against does not take evidence, but only passes orders on the basis of "enquiry" as provided in Section 31 of the act, and certainly the appellate authority would not have any more powers than that of the body empowered to decide the matter originally. It is in this regard that the District Magistrate has exceeded its jurisdiction and clearly misdirected himself while deciding the appeal. In case the appellate authority was of the view that the order of the committee was incorrect and that it should have taken/considered more evidence/material, then it could have remanded the matter back to the committee to decide the matter afresh, but it certainly did not have any power to receive "additional evidence". The provision of appeal is also provided in various other statutes to the higher authority against the orders passed by authorities prescribed therein, where they decide about matters pertaining to creation, extinguishment or defining rights under the said statutes, but such appeals cannot be equated to the power of appeal as provided to the regular courts under the Civil Procedure Code or the Criminal Procedure Code. The appellate authority under these special statutes, are in fact Tribunals is of limited jurisdiction, and are vested with the power of deciding the appeal against the order of the prescribed authority and nothing more. Such appellate authorities are, in fact, Tribunals of limited jurisdiction exercise of powers of which are circumscribed in the statute itself and they cannot arrogate to themselves the powers of an appellate court under the Civil Procedure Code or Criminal Procedure Code.

43. After examining the orders of the Committee as well as of the District Magistrate, this Court is of the considered view that both the orders are illegal and arbitrary and deserve to be set aside. Accordingly, the writ petition is **allowed**. Order dated 17/08/2021 passed by the Child Welfare Committee, Sultanpur as well as the order dated 06/12/2021 passed by the appellate authority are hereby quashed.

44. The custody of the minor daughter of the petitioner is restored to the petitioner forthwith. It would be open for the petitioner as well as respondent No. 4 to approach the competent court to seek custody of their minor daughter in accordance with law.

(2023) 3 ILRA 304
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.02.2023

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE MANISH KUMAR, J.

Writ C No. 5797 of 2008

M/S G.B. Lawns P Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Deepak Seth

Counsel for the Respondents:
C.S.C., I.B. Singh, Manish Jauhari

U.P. Avas Evam Vikas Parishad Adhiniyam, 1965 - Power to levy mutation fee - In the instant case by the impugned order Parishad demanded a fee of 5% of the total consideration of the deed of assignment towards Mutation Fee - Held - purpose of mutation is to register the transfer in the records of the Parishad so as to recover taxes from such taxpayers - Once the application for mutation is made, the same is to be examined by the department concerned viz Parishad and after hearing objection, if any entry in the record is directed to be changed in favour of the transferee, such exercise is only for fiscal purpose to determine the liability to pay as tax - fee is levied essentially for services rendered and there is no element of quid pro quo between the petitioner and the Parishad as Avas Evam Vikas Parishad does not render any service to its allottees or transferees, except for correction to be made in the records that are maintained by it for its own purposes - Even if any fee can be charged by the Parishad to correct the entries in its record, it cannot be ex-propriatory in nature, and calculated ad valorem as the expenses incurred in all such cases are nominal in nature - function of the Parishad with regard to the mutation remains the same whether the applicant is a transferee under a conveyance or a lessee or a beneficiary under a will or in case of intestate succession - Impugned order set aside by court. (Para 21, 22, 23)

Allowed. (E-5)

List of Cases cited:

1. Calcutta Municipal Corp. & ors. Vs Shrey Mercantile Pvt. Ltd. & ors. (2005) 4 SCC 245

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

1. Heard Shri Deepak Seth, learned counsel for the petitioner, Sri Manish Jauhari, learned counsel appearing for the respondent Nos. 2 and 3 and learned Standing Counsel appearing for the State respondents.

2. This writ petition has been filed praying for quashing of the orders dated 16.05.2008 and 15.04.2004 passed by the respondent nos. 2 and 3 filed as annexure nos. 1 and 2 to the writ petition respectively. A Direction has also been sought to the respondents not to realize or demand any mutation fee from the petitioner in pursuance to the impugned orders dated 16.05.2008 and 15.04.2004.

3. It has been argued by the learned counsel for the petitioner that the petitioner is a Company incorporated under the Companies Act. The present petition has been filed through its Managing Director. The Company purchased a commercial Plot No. 5/C.P.-105 Indira Nagar, Lucknow

admeasuring 3722.10 Sq. Mtrs for a total consideration of Rs. 10,42,80,800/- through registered deed of assignment dated 06.12.2008 registered in the office of Sub Registrar-3 Lucknow from Mansarovar Urban Cooperative Bank Limited (hereinafter referred to as, the Bank) which in turn had purchased the same from U.P. Awas Evam Vikas Parishad, Lucknow (hereinafter referred to as, the Parishad) through registered lease deed dated 25.08.1995 for a total premium of Rs. 68,52,258/-.

4. Immediately after the execution of the deed of assignment dated 06.12.2006 in favour of the petitioner, the petitioner started paying House Tax, Water Tax and the Sewer Tax etc to the Nagar Nigam, Lucknow after due assessment. As the land was purchased for raising a commercial building, the petitioner submitted a building plan to the Parishad, which was approved by the Parishad and thereafter the petitioner raised construction over the land in question. All of a sudden, the Parishad vide its order impugned dated 15.04.2004 decided to levy mutation fee from subsequent purchaser of a property, which had initially been alloted by the Parishad to some other person. It demanded a fee of 5% of the total consideration of the deed of assignment towards Mutation Fee. A demand was raised by the Parishad and the petitioner represented to the respondent no. 3 on 12.04.2007 stating therein that there was no justification for imposition of 5% mutation fee ad *valorem* as it was very excessive, as compared to the mutation fee charged by the other local authorities including the L.D.A., which was at that time only 1% charging of the sale consideration.

5. Moreover, the L.D.A. may levy mutation fee on deriving power from the *Uttar Pradesh Urban Planning & Development Act,* 1973 but no such power could be usurped by the Parishad as the U.P. Avas Evam Vikas Parishad Adhiniyam, 1965 does not give such power to the Parishad to charge mutation fee, as aforesaid.

6. In pursuance of the representation of the petitioner, the Parishad ordered mutation of the name of the petitioner in its record subject to the condition that petitioner would pay the requisite fee within fifteen days, if any, after finalization of the matter and the petitioner was required to furnish an Indemnity Bond in the said circumstances. The Indemnity Bond was submitted by the petitioner on 25.04.2007. No further action was taken by the Parishad till April, 2008 but on 16.05.2008, the Parishad served a notice upon the petitioner to deposit Rs. 52,10,940/- as a mutation fee within a fortnight or else recovery proceedings would be initiated against the petitioner for recovery of same, as arrears of the land revenue.

7. It has been argued by the learned counsel for the petitioner that a fee is levied essentially for services rendered and there is no element of *quid pro quo* between the petitioner and the Parishad as the Parishad is not rendering any service to the petitioner in pursuance of the payment of such mutation fee except for maintaining its record correctly. All services relating to maintaining of the colony are being provided by the Lucknow Nagar Nigam for which the petitioner is paying the fee and taxes levied by the Nagar Nigam. There are no bylaws, Rules or Regulation or any other provision in the Act, 1965 itself for imposition or realization of mutation fee. Such a mutation fee without rendering any

service amounts to imposition of tax for which the Parishad has no authority delegated to it by the State Government or the State Legislature. The Act, 1965 confers power to make Rules upon the Government and the power to make Regulation subject to the provisions of the Act and the Rules by the Board of the Parishad. The impugned orders have been passed without jurisdiction and hence liable to be set aside.

8. It has also been argued by the learned counsel for the petitioner that when the petition was filed, the Court had been pleased to stay the operation and enforcement of the order dated 16.05.2008 demanding Rs. 52,10,940/- from the petitioner to be paid by it within 15 days or else to face recovery proceedings till further orders. Time was granted also to the respondents to file their counter affidavit.

9. A counter affidavit has been filed by the Parishad along with an application for vacation of interim order wherein it has been stated that the order dated 15.04.2004 has been passed in pursuance of a meeting convened by the Housing Commissioner in the interest of Parishad and taking into account power conferred upon him under Regulation 18 of *Avas Evam Vikas Parishad ki Sampatti Ke Nistaran Sambandhi* Viniyam, 1980, which provides that the decision of the Housing Commissioner shall be final in any case and he shall be competent to take decision in the interest of Parishad. Therefore, the Housing Commissioner has taken a decision to levy 5% mutation charges of transfer of commercial property.

10. It has been stated that initially the commercial plot in question had been allotted in favour of the Bank and the lease deed was executed in favour of the Bank by the Parishad on 16.08.1995. Although the Indira Nagar Scheme has been transferred to Lucknow Nagar Nigam, Lucknow, it is only for maintaining the services of the road, Sewer and Parks etc but the right relating to the properties has not been transferred and the Parishad continues to be the owner of the property and the allottees are lessees thereof and any lessee, who further leases out the property must do so with prior intimation to the Parishad. The allotment in respect of the Bank had been made subject to the condition that it may transfer the said land, but only for the same purpose for which it was originally allotted. Under Section 95 of the Act, 1965, the Board of the Parishad is authorized to frame Regulations and the Regulations have been framed in 1980. Power under Regulation 18 was available to the Housing Commissioner to issue the order levying 5% mutation fee.

11. It has further been stated that the petitioner had furnished Indemnity Bond on 25.04.2007 and therefore it cannot deviate from its liability of making payment and it also cannot challenge the order passed by the Housing Commissioner dated 15.04.2004. It is only after obtaining the Indemnity Bond that the name of the petitioner was mutated on the property in question by the Parishad.

12. A supplementary counter affidavit has also been filed by the respondents wherein mention has been made of the Government Order dated 06.02.1997 issued by the Principal Secretary directing all the Vice-Chairman of development authorities to determine mutation fee at their level. The aforesaid Government Order has been stated to be placed in the 198th Board meeting of Uttar Pradesh Awas Evam Vikas Parishad held on 21.07.2007 and it was

decided to refer the matter relating to the Parishad to the State Government.

13. There is no mention of any decision being taken by the State Government conferring such power on Parishad.

14. It has also been stated that the order dated 15.04.2004 was amended by an another order dated 29.04.2011 in pursuance of the decision taken in the 216th Board meeting held on 14.03.2011 and it was decided that only 1% mutation charges shall be taken in future but earlier matters shall not be reopened. Copy of the order dated 29.04.2011 and the Minutes of Meeting of the Board held on 14.03.2011 are annexed as annexure no. 2 to the Supplementary Counter Affidavit.

15. In the rejoinder affidavit filed by the petitioner, the contents of the writ petition have been reiterated relating to lack of power in the Housing Commissioner to issue the order impugned herein dated 15.04.2004 and also to levy mutation fees on ad *valorem* basis, which is in the nature of tax, which requires sanction of law by the competent legislature. It has also been submitted that mere furnishing of Indemnity Bond would not mean that petitioner has agreed by the charging of such mutation fee ad *valorem* by the Parishad.

16. In the case of ***Calcutta Municipal Corporation & Others Vs. Shrey Mercantile Pvt Limited & Others reported in (2005) 4 SCC 245*** where the question which arose for determination has been mentioned in paragraph 1 of the report, which has been framed as under:

" whether the imposition for the process of change in the name of the owner, in the assessment books of the Corporation is in the nature of "a fee" or "tax"?.

17. Thereafter, the facts of the particular Civil Appeal that was being considered, have been discussed, where certain property belonging to some persons was sold by a deed of conveyance to the respondents. The building was very old and was in a dilapidated condition. The developers decided to construct a new building after demolishing the existing old structure. The developers submitted the building plan for sanction which the Corporation refused to accept without the names of the developers being brought on record by way of mutation. The developers applied for mutation by deletion of names of the previous owners and substitution of their name for which the Corporation demanded mutation fee of Rs.3 lakhs under the Calcutta Municipal Corporation (Taxation) Regulations, 1989, which was challenged by filing of writ petition before the Calcutta High Court. By judgement and order dated 31.01.2000, the learned Single Judge held that mutation was the process of change of name of the owner in the books of the Corporation; that the impugned Regulations had failed to satisfy the requirement of *quid pro quo*; and that the Corporation was not justified in using its power to levy fees on mutation by charging large sums which partake the character of taxation. Learned Single Judge was of the considered opinion that in the garb of imposition of mutation fees, the Corporation had done nothing other than to impose the tax. Accordingly, the writ application was allowed.

18. Aggrieved by the said judgement of the learned Single Judge, the Corporation approached the Division Bench and the Division Bench rejected the

appeal by observing that the essential purpose of Section 183 of the Calcutta Municipal Corporation Act was to mutate somebody's name and that no other service of any kind whatsoever was rendered to the ratepayers, and that under Section 183 (5), mutation fee was merely to be prescribed by Regulations and not to impose a tax in the garb of fees, that no such delegation was ever made in favour of the Corporation; that the rate of levy on ad *valorem* basis itself indicated that the levy was in the nature of a tax; that the different rates prescribed for mutation in the case of transfers vis a vis intestate succession indicated that the levy was a tax and not a fee; that the said provision was not for the benefit of the owner of the premises but it was for statutory compliance, failure to comply wherewith was to attract penal consequences; that no benefit was conferred on the ratepayers and on the contrary, the said provision was for the benefit of the Corporation; that the nature of the services rendered to the ratepayers for mutation had no connection with the quantum of fees sought to be levied; that the fee was neither regulatory nor compensatory; and that the impugned Regulations were discriminatory inasmuch as the purchasers were subjected to a higher fee than those who got the ownership of property by way of intestate succession, wholly overlooking the fact that both these groups for all practical purposes of taxation constituted one class by themselves. Accordingly, the impugned Regulations were held to be arbitrary and violative of Article 14 and 246 of the Constitution.

19. The said judgement of the Division Bench was affirmed by the Hon'ble Supreme Court and while affirming the said judgement, the Supreme Court has referred to binding precedents for example, the ***State of West Bengal Vs. Kesoram Industries Ltd reported in (2004) 10 SCC 201; Synthetics and Chemicals Ltd Vs. State of U.P. reported in (1990) 1 SCC 109*** and ***CCE Vs. Chhata Sugar Company Limited reported in (2004) 3 SCC 466,*** wherein reference was made to distinction made between Fee and Tax and it was observed that in the garb of exercising the power to regulate, any fee or levy which has no connection with the cost or expenses of administering the Regulation, cannot be imposed and only such levy can be justified as can be treated as a part of regulatory measure. The power to regulate, develop, or control would not include within its ken, a power to levy tax or fee, except when it is only regulatory in nature.

20. The Court has also observed that undisputedly the appellant-Corporation was collecting Tax from general public for water supply, street light and approach roads etc. and thus the Tax that was sought to be imposed in the garb of service charges or mutation fee could not be allowed. The Court also observed in paragraphs 19, 20, 21 and 22 as follows:

19. In the case of Nand Kishwar Bux Roy v. Gopal Bux Rai [AIR 1940 PC 93] the Court,

"[M]utation proceedings are merely in the nature of fiscal inquiries, instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of the property may be put into occupation of it with the greater confidence that the revenue for it will be paid."

20. Therefore, it is clear that mutation enquiry is instituted in the interest of the Corporation for tax purposes and not for the benefit of the taxpayer.

21. Now coming to the question of challenge to the levy as arbitrary and discriminatory and violative of Article 14, we find that the functions of the Corporation with regard to mutation remain the same, whether the applicant is a transferee under a conveyance or a lessee or a beneficiary under a Will or an heir in the case of intestate succession. Once an application for mutation is made, the same is examined by the department and after hearing the objections, if any, the record is ordered to be changed. Ultimately, the exercise is for fiscal purpose. Similarly, the property valuation may be below Rs 50,000 or above Rs 2 lakhs, the function of the Corporation in making the mutation entry remains the same. Similarly, whatever may be the cause of mutation, whether it is a case of transfer or devolution, the activity of mutation remains constant in all the cases. The expenses incurred in all the cases also cannot vary, whatever be the value of the property or the cause of mutation. In the circumstances, there is no reason given for charging different rates depending on the value of the property and the cause of transfer. By doing so, the incidence of the levy falls differently on persons similarly situated resulting in violation of Article 14 of the Constitution. Moreover, the quantum of fees is disproportionate to the so-called "services" which is one more circumstance showing arbitrariness in the levy of such imposition. So far as Article 14 is concerned, the courts in India have always examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of legislation. (See Om Kumar v. Union of India [(2001) 2 SCC 386] .)

22. Applying the said tests to the impugned levy, we find that the levy is irrational, arbitrary, discriminatory and beyond Section 183(5) of the said 1980 Act."

21. It is clear from the arguments and the judgement of the Supreme Court, the purpose of mutation is to register the transfer in the records of the Parishad so as to recover taxes from such taxpayers. When no such taxes are payable to the Parishad after the transfer of the colony to the Nagar Nigam, there is no question of mutation fee to be paid to the Parishad. The function of the Parishad with regard to the mutation remains the same whether the applicant is a transferee under a conveyance or a lessee or a beneficiary under a will or in case of intestate succession. Once the application for mutation is made, the same is to be examined by the department concerned viz Parishad and after hearing objection, if any entry in the record is directed to be changed in favour of the transferee, such exercise is only for fiscal purpose to determine the liability to pay as tax.

22. Even if any fee can be charged by the Parishad to correct the entries in its record, it cannot be expropriatory in nature, and calculated ad *valorem* as the expenses incurred in all such cases are nominal in nature. This fact can also be ascertained from the circumstances which existed prior to the order dated 15.04.2004 as no mutation fee was being charged by the Parishad earlier.

23. This Court has found that the judgment rendered by the Hon'ble Supreme Court in the case of Calcutta Municipal Corporation (supra) squarely applies. The Parishad does not render any service to its allottees or transferees, except for correction to be made in the records that are maintained by it for its own purposes. Hence, the impugned order dated

15.04.2004 & 16.05.2008 are liable to be set aside and are hereby set aside.

24. Consequences to follow.

25. In view of the discussion made hereinabove, the present writ petition is ***allowed.***

(2023) 3 ILRA 310
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.03.2023

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ C No. 7439 of 2023

M/s Sai Enterprises & Ors. ...Petitioners
Versus
Debts Recovery Appellate Tribunal, JL Nehru Road, Tagore Town, Alld. & Anr. ...Respondents

Counsel for the Petitioners:
Sri Sanjay Kumar Gupta

Counsel for the Respondents:
Sri Pashupati Nath Tripathi

A. Practice and Procedure – Recovery of Debts and Bankruptcy Act, 1993 – S. 21 – Statutory appeal – Rider of pre-deposit – Noncompliance thereof – Effect – Phrase 'Shall not be entertained' – Scope – Held, Tribunal is barred from adjudicating/ deciding/applying its mind to the the appeal and the petitioner/ appellant would not be entitled to any benefit which accrue in terms of the Act only on the ground of filing of appeal as the appeal technically has not even been entertained, if the deposit is not made – The only benefit of filing an appeal without the mandatory deposit under Section 21 will be that the appellant would be entitled to the benefit of limitation and nothing more. (Para 7 and 8)

Writ petition allowed . (E-1)

List of Cases cited :-

1. Ananthesh Bhakta Vs Nayana S Bhakta; (2017) 5 SCC 185

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. The present petition has been filed by the petitioner challenging the order dated 03.01.2023 whereby the restoration application filed by the petitioner has been rejected on the ground of limitation.

2. The facts in brief are that the proceedings were initiated by the respondent Bank against the petitioner before the Debts Recovery Tribunal, Patna which was decided against the petitioner. Against the order of DRT, Patna, the petitioner preferred an Appeal before the Debts Recovery Appellate Tribunal, Allahabad, however, the petitioner had not made any deposit along with the appeal as is required under Section 21 of The Recovery of Debts and Bankruptcy Act, 1993.

3. From the documents as on record, it appears that the petitioner was granted time to make the deposit, however, he has not deposited which led to the dismissal of the appeal. Subsequently, when the petitioner arranged the funds, he moved an application for deposit of an amount of Rs.20,00,000/- and sought recall of the order dated 21.01.2020 whereby the appeal was dismissed for want of pre-deposit and prayed that the said order be recalled and decided on merit. The said recall application has been dismissed by means of the impugned order dated 03.01.2023 mainly on the ground that the restoration application has been filed after expiry of

two and a half years and the same is highly belated.

4. The contention of the Counsel for the petitioner Shri Sanjay Kumar Gupta, is that under the Act in question, there is a provision of filing of an appeal as contained under Section 21 of the RDB Act. 1993. He argues that condition specified in Section 21 is only for entertaining the Appeal and the provisions of said does not provide any power to the DRAT to direct the pre-deposit and in any case, even if, no deposit is made, as specified in Section 21, the appeal cannot be dismissed. The only effect of Section 21 of the RDB Act, 1993 is that the appeal would not be entertained unless the deposit as required is made. Before discussing the said controversy, it is necessary to reproduce the said Section 21 of the RDB Act, which is as under:

*"21. **Deposit of amount of debt due, on filing appeal.** Where an appeal is preferred by any person from whom the amount of debt is due to a bank or a financial institution or a consortium of banks or financial institutions, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal fifty per cent. of the amount of debt so due from him as determined by the Tribunal under section 19:*

Provided that the Appellate Tribunal may, for reasons to be recorded in writing, reduce the amount to be deposited by such amount which shall not be less than twenty-five per cent. of the amount of such debt so due to be deposited under this section."

5. On a plain reading of Section 21, it is clear that it provides for a statutory appeal, with a rider that the appeal can not be entertained, if the deposit, as specified, subject to the exercise of powers under the proviso, is not made.

6. The phrase "shall not be entertained", came up for consideration in various judgments of Supreme Court as the said expression is used in many statutes. The Supreme Court in the Judgment of Ananthesh Bhakta vs. Nayana S Bhakta (2017) 5 SCC 185 considered the meaning of the said expression and laid as under.

"20. There is one another aspect of the matter which is sufficient to uphold the order of the District Judge. Section 8(2) uses the phrase "shall not be entertained". Thus, what is prohibited is the entertainment of the application unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

21. The word "entertained" has specific meaning in P. Ramanatha Aiyar's Advanced Law Lexicon. The word "entertained" has been defined as:

"Entertain.--(1) To bear in mind or consider; esp., to give judicial consideration to (the court then entertained motions for continuance). (2) To amuse or please. (3) To receive (a person) as a guest or provide hospitality to (a person).

The expression "entertain" means to "admit a thing for consideration" and when a suit or proceeding is not thrown out in limine but the court receives it for consideration and disposal according to law it must be regarded as entertaining the suit or proceeding, no matter whatever the ultimate decision might be."

22. The Black's Law Dictionary also defines this word "entertain" as follows:

"entertain, vb. (1) To bear in mind or consider; esp., to give judicial consideration to

23. In Hindusthan Commercial Bank Ltd. v. Punnu Sahu [Hindusthan Commercial Bank Ltd. v. Punnu Sahu, (1971) 3 SCC 124] , the word "entertained" came for consideration as occurring in Order 21 Rule 90 proviso of the Civil Procedure Code. Para 2 of the judgment notices the amended proviso which was to the following effect: (SCC p. 125)

"2. The amended proviso with which we are concerned in this appeal reads thus:

"Provided that no application to set aside a sale shall be entertained--

(a) upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up; and

(b) unless the applicant deposits such amount not exceeding twelve-and-half per cent of the sum realised by the sale or furnishes such security as the court may, in its discretion, fix except when the court for reasons to be recorded dispenses with the requirements of this clause:

Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the court is satisfied, that the applicant has sustained substantial injury by reason of such irregularity or fraud.'"

24. The contention of the appellant in Punnu Sahu case [Hindusthan Commercial Bank Ltd. v. Punnu Sahu, (1971) 3 SCC 124] was that the word "entertain" refers to initiation of the proceedings and not to the stage when the court takes up the application for consideration. The High Court had rejected the said contention. The above view of the High Court was approved by this Court in para 4 of the judgment. Following was stated: (SCC pp. 125-26)

"4. Before the High Court it was contended on behalf of the appellant and that contention was repeated in this Court, that clause (b) of the proviso did not govern the present proceedings as the application in question had been filed several months before that clause was added to the proviso. It is the contention of the appellant that the expression "entertain" found in the proviso refers to the initiation of the proceedings and not to the stage when the Court takes up the application for consideration. This contention was rejected by the High Court relying on the decision of that Court in Kundan Lal v. Jagan Nath Sharma [Kundan Lal v. Jagan Nath Sharma, 1962 SCC OnLine All 38 : AIR 1962 All 547] . The same view had been taken by the said High Court in Dhoom Chand Jain v. Chaman Lal Gupta [Dhoom Chand Jain v. Chaman Lal Gupta, 1962 SCC OnLine All 29 : AIR 1962 All 543] and Haji Rahim Bux and Sons v. Firm Samiullah and Sons [Haji Rahim Bux and Sons v. Firm Samiullah and Sons, 1962 SCC OnLine All 156 : AIR 1963 All 320] and again in Mahavir Singh v. Gauri Shankar [Mahavir Singhv. Gauri Shankar, 1963 SCC OnLine All 221 : AIR 1964 All 289]. These decisions have interpreted the expression "entertain" as meaning "adjudicate upon" or "proceed to consider on merits". This view of the High Court has been accepted as correct by this Court in Lakshmiratan Engg. Works Ltd. v. CST[Lakshmiratan Engg. Works Ltd. v. CST, AIR 1968 SC 488] . We are bound by that decision and as such we are unable to accept the contention of the appellant that clause (b) of the proviso did not apply to the present proceedings."

25. Another relevant judgment is Martin and Harris Ltd. v. Addl. District Judge [Martin and Harris Ltd. v. Addl. District Judge, (1998) 1 SCC 732] . In the above case Section 21(1) proviso of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (13 of

1972) word "entertain" came for consideration. The proviso to Section 21(1) was to the following effect: (SCC p. 741, para 8)

"8. ... "Provided that where the building was in the occupation of a tenant since before its purchase by the landlord, such purchase being made after the commencement of this Act, no application shall be entertained on the grounds, mentioned in clause (a) unless a period of three years has elapsed since the date of such purchase and the landlord has given a notice in that behalf to the tenant not less than six months before such application, and such notice may be given even before the expiration of the aforesaid period of three years:'

26. In the above case, the application under Section 21(1) was filed by the landlord before expiry of period of three years from the date of purchase. It was held by this Court that word "entertained" as employed in the first proviso under Section 21(1) could not mean "institution" of such proceedings. In paras 9 and 10, following was laid down: (Martin and Harris case [Martin and Harris Ltd. v. Addl. District Judge, (1998) 1 SCC 732] , SCC pp. 744-46)

"9. Even that apart there is an internal indication in the first proviso to Section 21(1) that the legislature has made a clear distinction between "entertaining" of an application for possession under Section 21(1)(a) of the Act and "filing" of such application. So far as the filing of such application is concerned it is clearly indicated by the legislature that such application cannot be filed before expiry of six months from the date on which notice is given by the landlord to the tenant seeking eviction under Section 21(1)(a) of the Act. The words, "the landlord has given a notice in that behalf to the tenant not less than six months before such application", would naturally mean that before filing of such application or moving of such application before the prescribed authority notice must have preceded by at least six months. Similar terminology is not employed by the legislature in the very same proviso so far as three years' period for entertaining such application on the grounds mentioned in clause (a) of Section 21(1) a stage must be reached when the court applied its judicial mind and takes up the case for decision on merits concerning the grounds for possession mentioned in clause (a) of Section 21(1) of the Act. Consequently on the very scheme of this Act it cannot be said that the word "entertain" as employed by the legislature in the first proviso to Section 21(1) of the Act would mean "institution" of such proceedings before the prescribed authority or would at least mean taking cognizance of such an application by the prescribed authority by issuing summons for appearance to the defendant-tenant. It must be held that on the contrary the term "entertain" would only show that by the time the application for possession on the grounds mentioned in clause (a) of Section 21(1) is taken up by the prescribed authority for consideration on merits, at least minimum three years' period should have elapsed since the date of purchase of the premises by the landlord.

10. ... The learned Senior Counsel, Shri Rao, for the appellant then invited our attention to two decisions of this Court in Lakshmiratan Engg. Works Ltd. v. CST [Lakshmiratan Engg. Works Ltd. v. CST, AIR 1968 SC 488] and Hindusthan Commercial Bank Ltd. v. Punnu Sahu [Hindusthan Commercial Bank Ltd. v.Punnu Sahu, (1971) 3 SCC 124]. In Lakshmiratan Engg. [Lakshmiratan Engg. Works Ltd. v. CST, AIR 1968 SC 488] this Court was concerned with the meaning of

the word "entertain" mentioned in the proviso to Section 9 of the U.P. Sales Tax Act, 1948. Hidayatullah, J., speaking for the Court observed in the light of the statutory scheme of Section 9 of the said Act that the direction to the Court in the proviso to Section 9 was to the effect that the Court shall not proceed to admit to consideration an appeal which is not accompanied by satisfactory proof of the payment of the admitted tax. In Hindusthan Commercial Bank [Hindusthan Commercial Bank Ltd. v. Punnu Sahu, (1971) 3 SCC 124] the term "entertain" as found in the proviso to Order 21 Rule 90 of the Code of Civil Procedure (CPC) fell for consideration of the Court. Hegde, J., speaking for a Bench of two learned Judges of this Court in this connection observed that the term "entertain" in the said provision means "to adjudicate upon" or "to proceed to consider on merits" and did not mean "initiation of proceeding". The aforesaid decisions, in our view, clearly show that when the question of entertaining an application for giving relief to a party arises and when such application is based on any grounds on which such application has to be considered, the provision regarding "entertaining such application" on any of these grounds would necessarily mean the consideration of the application on the merits of the grounds on which it is base. In the present case, therefore, it must be held that when the legislature has provided that no application under Section 21(1)(a) of the Act shall be entertained by the prescribed authority on grounds mentioned in clause (a) of Section 21(1) of the Act before expiry of three years from date of purchase of property by the landlord it must necessarily mean consideration by the prescribed authority of the grounds mentioned in clause (a) of Section 21(1) of the Act on merits."

27. In the present case as noted above, the original retirement deed and partnership deed were filed by the defendants on 12th May and it is only after filing of the original deeds that the court proceeded to decide the application IA No. IV.

28. Section 8(2) has to be interpreted to mean that the court shall not consider any application filed by the party under Section 8(1) unless it is accompanied by the original arbitration agreement or duly certified copy thereof. The filing of the application without such original or certified copy, but bringing original arbitration agreement on record at the time when the court is considering the application shall not entail rejection of the application under Section 8(2).

29. In the present case it is relevant to note that the retirement deed and partnership deed have also been relied upon by the plaintiffs. Hence, the argument of the plaintiffs that the defendants' application IA No. IV was not accompanied by the original deeds, hence, liable to be rejected, cannot be accepted. We are thus of the view that the appellants' submission that the application of the defendants under Section 8 was liable to be rejected, cannot be accepted."

7. Thus what transpires from the plain reading of Section 21, the phrase "shall not be entertained" used therein and the law as explained by Supreme Court and as recorded above it is clear that the Tribunal is barred from adjudicating/ deciding/ applying its mind to the the appeal and the petitioner/ appellant would not be entitled to any benefit which accrue in terms of the Act only on the ground of filing of appeal as the appeal technically has not even been entertained, if the deposit is not made.

8. The interesting question that arises is whether the appeal can be dismissed only on the ground that the same is without the mandatory pre-deposit? From the law with regards to bar of entertainment of appeal as explained above, it is clear that what cannot be entertained cannot be dismissed either. The only benefit of filing an appeal without the mandatory deposit under Section 21 will be that the appellant would be entitled to the benefit of limitation and nothing more and the Bank or the Financial Institution would be at liberty to initiate and prosecute recovery proceedings against the borrower.

9. In the present case the DRAT has erred in law rejecting the application only on the ground of inordinate delay. From the order, it is clear that the appeal is dismissed for want of pre-deposit which action of the Tribunal itself is bad, as for want of pre-deposit, the appeal technically could not be entertained and thus could not be dismissed either.

10. The Counsel for the respondent Bank, Sri P.N. Tripathi argues that the petitioner has not paid the dues and is adopting dilatory tactic and when steps were taken to recover the dues of the Bank, he made the application after depositing the amount as stated above.

11. In view of the said rival submission, coupled with the fact that the issue raised in the present writ petition pertains to the interpretation of Section 21 of the RDB Act, 1993, I am not inclined to keep the matter pending, as such, the order impugned dated 03.01.2023 is set aside with directions to the Appellate Tribunal to hear and decide the appeal on merit, in accordance with law, with all expedition, preferably within a period of four months from the date of production of certified copy of this order.

12. It is provided that no unnecessary adjournment shall be granted to either of the parties.

13. The amount of Rs.20,00,000/- in the form of demand draft(prepared but not accepted by DRAT) shall be deposited within two weeks from today.

14. It will also be open to the petitioner to approach the respondent Bank for any settlement in accordance with law, if so advised.

16. The writ petition is ***allowed.***

(2023) 3 ILRA 315
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.02.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ C No. 10292 of 2007

Smt. Sheela Sachdeva & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Sanjeev Kumar, Sri S.K. Singh, Sri S.K. Srivastava, Sri Sanjeev Singh, Sri Shashi Nandan, Sri Rajesh Shukla, Sri Ravi Kant (Sr. Advocate). Sri K.N. Tripathi (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Addl. Advocate General, Dr. Y.K. Srivastava

A. Civil Law – Nazul land – Freehold right – GO dated 31.12.2002 and 14.12.2004 – Part of the plot has already been made freehold in favour of petitioner – Effect – Application to freehold in respect of remaining part rejected – legality challenged – GO dated 3.12.2002 providing for freehold right on deposit of 25% valuation amount, relied upon – Permissibility – Held, GO dated 31.12.2002 does not refer to or advert to such Nazul land over which Government Office or any other accommodation is standing and is in possession of the Government department / Office – By making an application for grant of freehold right, petitioner did not acquire vested right. (Para 15, 24, 30 and 36)

B. Practice and procedure – Decision on an application – Government Policy – Applicability – The Government policy applicable on the date of decision of the Government would apply while disposing off the applications of the petitioners for freehold right. (Para 36)

C. Constitution of India – Article 296 – St.'s ownership – Word 'Nazul' – Meaning – Principle of escheat – Explained – 'Nazul' is an Arabic word. It refers to a land annexed to Crown (Rajbhoomi) i.e. Government land. It is only such land which is owned and vested in the St. on account of its capacity of sovereign – Article 296 of the Constitution of India, has retained power of St. to get ownership of such land, in respect whereof principle of 'escheat', 'lapse' or 'bona vacantia' would have been applicable prior to the enforcement of Constitution of India. (Para 17 and 18)

Writ petition dismissed of . (E-1)

List of Cases cited :-

1. Sharif Ahmad Vs Regional Transport Authority, Meerut; (1978) 1 SCC 1

2. Gujrat Pottery Works Vs B.P. Sood; AIR 1967 SC 964

3. Virendra Sahney & anr. Vs District Officer / Collector, Mau & ors.; AIR 1997 ALL. 82

4. Sangam Upnivashan Avas Evam Nirman Sahkari Samiti Ltd. Vs St. of U.P. & St. of U.P. & ors.; 2018 (7) ADJ 617

5.Shyam Lal Vs Deepa Dass Chela Ram Chela Garib Das; (2016) 7 SCC 572

6. Pierce Leslie and Co. Ltd. Vs Miss Violet Ouchterlony Wapsnare; AIR 1969 SC 843

7. St. of U.P. Vs Zahoor Ahmad; 1973 (2) SCC 547

8. Prakati Rai & ors. Vs St. of U.P. & ors.; 2020(1) ADJ, 469 (DB)

9. Anand Kumar Sharma's case (FB) ; 2014(2) ADJ 742 (FB)

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

1. Heard Sri Ravi Kant, learned Senior Advocate assisted by Sri Sanjeev Kumar, learned counsel appearing for the petitioners and Sri Ajit Kumar Singh, learned Additional Advocate General assisted by Sri Amit Verma, learned Standing Counsel for the State-respondents.

2. The property in issue pertains to Nazul Plot No. 10 Civil Station, Allahabad (Prayagraj), admeasuring 11761.41 sq. meters. The petitioners claim freehold right of the property.

3. The admitted, facts, *inter se*, parties are that a lease came to be executed by the State-respondents in favour of Smt. Khetar Dasi for a period of 50 years w.e.f. 1 April, 1914. Thereafter, the afore-noted plot came to be recorded in the name of Lala Mattu Mal in the Nazul register. After the death of Lala Mattu Mal, on the basis of a registered family partition dated 04 December, 1935, area admeasuring 4211 sq. meters, fell in

the share of Ganesh Prasad Seth, son of, Lala Mattu Mal. The property devolved on the death of Ganesh Prasad Seth upon his widow Smt. Tara Devi. Smt. Tara Devi executed a Will in favour of petitioners on 26 June, 1972.

4. It is not in dispute, *inter se*, parties that the terms of the lease expired on 15 March, 1963. As per the stand of the State-respondents the Nazul plot in question was initially allotted to one A.M. Zeller on 16 March, 1863, for a period of 20 years on lease, duly executed by the then Commissioner, Allahabad Division, Allahabad. The lease expired on 16 March, 1930, which came to be renewed for another 50 years w.e.f. 01 April, 1914. On expiry of the lease in 1963, after a lapse of 27 years, the petitioners herein field an application on 28 February, 1999 for freehold rights.

5. As per the State-respondents, freehold rights has already been granted to the petitioners for 1427 sq. meters of the Nazul land on 26 March, 2002. Further, freehold rights on an additional area admeasuring 612 sq. meters was granted to the petitioners on 30 March, 2002. In other words 2084 sq. meters of the Nazul land was made freehold in favour of petitioners. The petitioners claim freehold right on the remaining part of the Nazul plot.

6. It appears that on a part of the Nazul land a building was standing, which was in the occupation of the Department of Food and Supply of Government of Uttar Pradesh, that portion of the Nazul land, the petitioners claim freehold rights from the State. The applications of the petitioners seeking freehold rights on the constructed portion of the Nazul land came to be rejected by the State Government by passing an order dated 12 October, 2006, wherein, it has been noted that the building was in occupation of the Department of the State Government. Consequently, pursuant to the Government Order referred therein, the lease for freehold rights for the land over which building stands cannot be granted to the petitioners. Pursuant to the impugned order, the second respondent District Magistrate, Allahabad (Prayagraj), by order dated 30 November, 2006, resumed the building / land admeasuring 1513.10 sq. meters. The petitioners by the instant writ petition are assailing the afore-noted orders and claim freehold rights on the said portion of the Nazul land.

7. It is submitted that on 28 February, 1999, petitioners filed an application for freehold right for an area admeasuring 1289.20 sq. meters. As per the Government Order, 25% of the self assessment of valuation of the plot came to be deposited by the petitioners vide Treasury Challan No. DP-2 at Rs. 1,54,704/-. Pursuant thereof, a demand notice was issued by the Additional District Magistrate for the balance amount at Rs. 3,16,700.84 for conversion of the Nazul land into freehold. The amount came to be deposited by the petitioners on 05 June, 2000. A proposed freehold deed, thereafter, was supplied to the petitioner by the office of the Additional District Magistrate. On 05 June, 2000, petitioners submitted a freehold deed along with stamp papers. It appears, thereafter, neither the deed was executed by the second respondent on behalf of the State Government, nor, did the occasion for registration arise.

8. In the meantime, by the impugned communication dated 12 October, 2006, issued by the Special Secretary to the State Government, addressed to the second

respondent that part of the Nazul land admeasuring 1513.10 sq. meter over which the office of the District Supply Officer and Additional District Magistrate (Na. Aa.) were functioning, pursuant to the Government Order dated 14 December, 2004, came to be allotted for the office of District Supply Officer, Allahabad, on the terms and conditions specified therein. Pursuant thereof, the District Magistrate passed the consequential order dated 30 November, 2006, resuming the property, admeasuring 1513.10 sq. meter, after demarcation.

9. Relying upon the Government Order dated 14 December, 2004, the application of the petitioners, herein, for freehold rights, on part of the property admeasuring 1289.20 sq. meters, sought vide applications dated 28 February, 1999, came to be rejected. Further, order was passed to refund the amount deposited by the petitioners towards freehold rights along with interest. Nazul land admeasuring 1513.10 sq. meters, accordingly, came to be resumed, as per Government Order dated 12 October, 2006, for the purposes of office of the District Supply Officer.

10. Learned counsel for the petitioners submits that since the second respondent acted upon the application submitted by the petitioners for freehold rights, the demand amount raised by the office of the second respondent came to be deposited, along with the freehold deed and stamp papers, it is urged that the second respondent cannot, thereafter retreat, rather, was bound to execute the deed and got it duly registered. It is further submitted that the second respondent is estopped from retracting and resuming the property in favour of the office of the State Government. It is, therefore, submitted that the respondents be directed to execute the freehold deed for the area of the plot for which the papers was duly completed and submitted for execution and registration.

11. Learned counsel for the petitioners placed reliance on the following judgements in support of his submission.

(i) Sharif Ahmad vs. Regional Transport Authority, Meerut 1;

(ii) Gujrat Pottery Works vs. B.P. Sood2;

(iii) Virendra Sahney & Another vs. District Officer / Collector, Mau & others3;

(iv) Sangam Upnivashan Avas Evam Nirman Sahkari Samiti Ltd. vs. State of U.P. & State of U.P. & others4 and;

(v) Shyam Lal vs. Deepa Dass Chela Ram Chela Garib Das5.

12. In rebuttal, the learned counsel appearing for the State-respondents submits that the lease, admittedly, came to expire in the year 1963. It is not in dispute that the office of the State Government exists on the constructed area of the Nazul plot and has continuously been in possession of the State, until the building was declared dilapidated and not fit for habitation. Consequently, the office came to be shifted to another tenanted building, in view of the status quo order passed by this Court.

13. It is further submitted that the application for renewal of lease came to be filed by the petitioners almost after three decades, the petitioners do not have any vested right and authority to insist upon the State Government to declare a part of the Nazul plot freehold in favour of petitioners.

14. Rival submissions fall for consideration.

15. The facts, *inter se*, parties are not in dispute. Admittedly, the entire plot belongs to the State and it is also not in dispute that an area admeasuring 2084 sq. meters, in two parts (1472 + 612 sq. meters) has already been made freehold in favour of the petitioners. The claim of the petitioners on that part of the Nazul plot over which, admittedly, office of the State Government was operational and functional, has been refused as per the Government Orders applicable on the date of the decision. Government Order dated 14 October, 2004, mandates allotment of Nazul plot in favour of Government, over which offices has been setup. In other words, that portion of the land would not be made freehold in favour of the lease holder. Further, the construction of the office of the District and Supply Officer, after demolition of the dilapidated building is pending since 2010, due to the pendency of the present writ petition.

16. The sole question that arises for determination is as to whether the State Government was justified, in view of Government Order dated 14 October, 2004, refusing freehold right in favour of the petitioners for the Nazul plot on which office of the State Government was functional.

17. 'Nazul' is an Arabic word. It refers to a land annexed to Crown (Rajbhoomi) i.e. Government land. It is only such land which is owned and vested in the State on account of its capacity of sovereign, and application of right of bona vacantia, which is covered by the expression 'Nazul', as the term is known for the last more than one and half century.

18. Article 296 of the Constitution of India, has retained power of State to get ownership of such land, in respect whereof principle of 'escheat', 'lapse' or 'bona vacantia' would have been applicable prior to the enforcement of Constitution of India. The above power continued to apply after enactment of the Constitution with the only modification that if such land is situate within the territory of State Government, it will vest in State and in other cases, it will vest in Union of India. (Ref : **Pierce Leslie and Co. Ltd. vs. Miss Violet Ouchterlony Wapsnare6; State of U.P. vs. Zahoor Ahmad7 and Prakati Rai and others vs. State of U.P. and others8.**

19. The Government Order dated 14 October, 2004, addressed to all the Divisional Commissioners, District Magistrates and Vice Chairman of the Development Authority, pertains to the offices standing on leased Nazul plot, accordingly, mandating allotment of that portion of the Nazul land to the respective State departments free of cost.

20. The above noted Government Order and the relevant paragraphs for the purposes of the this case is being extracted :-

विषय- प्रदेश के विभिन्न जनपदों में पट्टागत नजूल भूमि पर अवस्थित राजकीय कार्यालयों के पक्ष में नजूल भूमि का आवंटन निःशुल्क किया जाना।

१. नजूल की जिस भूमि का वर्तमान में शासकीय (कार्यालय, आवास या अन्य प्रयोजन हेतु) प्रयोग हो रहा हो उनके पट्टे की अवधि यदि समाप्त हो गयी हो तो इसे फ्री होल्ड/नवीनीकरण तब तक न किया जाये जब तक कि उपयोगकर्ता विभाग द्वारा लिखित रूप में यह सूचित न किया जाये कि अब उन्हे इस भूमि की आवश्यकता शासकीय उपयोग के लिये नहीं है।

२. .....

३. ऐसे प्रकरण जहाँ पट्टागत भूमि का आंशिक रूप से शासकीय प्रयोग हो रहा है तथा आंशिक रूप से यह पट्टाधारक के

कब्जे में है उसमें यदि शासकीय प्रयोग वाले विभाग को अपने विभागीय उत्तरदायित्वो के निर्वहन हेतु भूखण्ड/भवन की आवश्यकता है तो पट्टे की अवधि समाप्त होने पर पूरी भूमि प्रशासकीय विभाग को आवंटित कर दी जायेगी।

४. .....

५. .....

६. *जिन मामलो में पूर्व में तत्समय प्रचलित नजूल नीति के अन्तर्गत पट्टाधारकों के पक्ष में फ्रीहोल्ड करने हेतु स्वमूल्यांकन धनराशि जमा की जा चुकी है परन्तु फ्रीहोल्ड डीड निष्पादित नहीं की गयी है, उनमें भी शासकीय कार्यालय स्थित होने तथा उसके उपयोग के लिये आवश्यकता होने की स्थिति में फ्रीहोल्ड करने से मना किया जा सकेगा और जमा स्वमूल्यांकन धनराशि जमाकर्ता को सब्याज वापस कर दी जायेगी।*

21. On bare perusal of the afore-noted Government Order, it mandates that wherever, on leased Nazul land government office, residential accommodation or any other activities are continuing and the term of the lease has expired, freehold / renewal of the lease would not be renewed / granted without obtaining prior approval from the concerned department as to whether, the property is required for the State. The Government Order further provides that where on the leased Nazul land, Government Offices are situated and in possession of the State department, and that the property is required for the purposes of the office, the same would be allotted to the concerned department, upon expiry of the lease. In other words, freehold right would not be granted.

22. Paragraph 6 of the Government Order mandates and clarifies that where the lease holder of the Nazul property has deposited the amount of the self assessment valuation, but the freehold deed is yet to be executed or has not been executed, the same would not be executed for the portion of the Nazul land over which government office is situated. In that event, the amount, so deposited would be returned to the lease holder along with interest.

23. On specific query, learned counsel appearing for the petitioners fairly admits that the Government Order dated 14 October, 2004 is not under challenge in the present writ petition.

24. On the contrary, reliance has been placed by the learned counsel for the petitioners on the Government Order dated 31 December, 2002, clarifying the earlier Government Order dated 10 December, 2002. In paragraph 3 of Government Order dated 31 December, 2002, it has been provided that the lease holders of expired lease, who have deposited 25% of the self assessment valuation amount prior to 10 December, 2002, and pursuant thereof the entire formalities were been completed, as per government policy, in that event all the applications pending for freehold should be processed and completed pursuant to the Government Order dated 10 December, 2002.

25. The relevant portion of the Government Order dated 31 December, 2002, is extracted :-

"31.12.2002

विषयः- नजुल भूमि के प्रबन्ध एवं निस्तारण के सम्बन्ध में जारी शासनादेश। दिनांक 10 दिसम्बर 2002 के सम्बन्ध में मार्ग दर्शन।

2- उक्त सम्बन्ध में यह स्पष्ट किया जाता है कि शासनादेश संख्या - 2873 / 9 - आ - 4 - 2002 - 152 एन / 2000 टी०सी०दिनांक 10 दिसम्बर 2002 द्वारा प्रतिपादित नीति तत्काल प्रभाव से लागू की गयी है। अतः दिनांक 10.12.2002 से पूर्व में जिन आवेदको ने स्वमुल्यांकन की 25 प्रतिशत धनराशि जमा करते हुए चालान की प्रति के साथ प्रार्थना पत्र प्रस्तुत कर दिया था तथा फ्री होल्ड की पात्रता सम्बन्धी समस्त निर्धारित औपचारिकतायें पूर्णकर दी थी, उन प्रकरणो में तत्कालीन

नीति अनुसार दरे व शर्तें लागू होगी। ऐसे मामलो में शासनादेश दिनांक 10.12.2002 लागू नही होगा।"

26. Further, reliance was placed by the learned counsel for the petitioners on the order dated 24 March, 2003, issued by the Special Secretary, Government of Uttar Pradesh, addressed to the District Magistrate, Allahabad, in respect of Nazul land No. PP Civil Station, Allahabad, wherein, it has been directed that in the event, the lease holder has deposited the self assessment valuation amount in the State Treasury, in the year 2000, it was incumbent that as per the Government Policy pertaining to Nazul land freehold right could not have been refused.

27. In view of the afore-noted Government Orders and communications, it is submitted that the petitioners, admittedly, completed the formalities pursuant to their application dated 28 February, 1999, and the deed came to be prepared on the proposed draft supplied by the second respondent on 05 June, 2000, upon deposit of the self assessment valuation amount of the plot. It is urged that the petitioners could not be discriminated against and freehold rights should be executed as per Government Order dated 31 December, 2002.

28. In support of the submissions reliance has been placed on **Sangam Upnivashan Avas Evam Nirman Sahkari Samiti Ltd**. (supra), wherein, petitioners seeking freehold rights, the Division Bench after referring to the Full Bench decision in **Anand Kumar Sharma9**, was of the view that once there is a decision to grant freehold rights then the element of discrimination between the same set of applicants and any arbitrary act would give rise to violation of fundamental rights, judicial review whereof would be permissible. Relevant portion of judgement is extracted :-

"The Full Bench, however, did not proceed further and, we therefore, find that it necessary to indicate that once there is a decision to grant freehold rights then the element of discrimination between the same set of applicants and any arbitrary act would give rise to violation of fundamental rights, judicial review whereof would be permissible. This would remove any element of uncertainly possibility of arbitrariness as and when the occasion arises."

29. In this backdrop, learned counsel for the petitioners submits that petitioners cannot be discriminated as it is admitted that petitioners had completed all the formalities for freehold right pursuant to Government Order dated 31 December 2002 and in view of the decision rendered in **Sangam Upnivashan Avas Evam Nirman Sahkari Samiti Ltd.** (supra), petitioners are entitled to freehold right of the remaining Nazul plot.

30. We do not find merit in the submission of learned counsel for the petitioners. Upon careful perusal of the Government Orders, relied upon by the petitioners, we find that it is of no assistance to the petitioners. The Government Order dated 10 December, 2002 and 31 December, 2002, merely, mandates that in the event, the lease holders of Nazul plot have complied their part by depositing self assessment valuation for freehold rights before 10 December, 2002, freehold deed be executed in their favour. The Government Order does not, however, refer to or advert to such Nazul land over which Government Office or any

other accommodation is standing and is in possession of the Government department / Office. The petitioners herein have been declined allotment of the Nazul land over which government office was functioning, in view of Government Order dated 14 December, 2004. It is also not being disputed by the learned counsel for the petitioners that petitioners have already been granted freehold rights of the Nazul land in respect of 2084 sq. meters. A part of the Nazul land admeasuring 1513.10 sq. meters, over which the Government office was functional and in possession of the Government department, in view of the Government Order dated 14 October, 2004, the District Magistrates have been restrained from converting the Nazul plot into freehold, if the department has sought allotment of the property for the purposes of office / accommodation.

31. The question referred to the Full Bench of this Court in **Anand Kumar Sharma** (supra) is extracted :-

"1. Whether the application of the petitioner dated 25.07.2005 submitted for grant of freehold right on the basis of the Government Order dated 01.12.1998 (Paragraph 7) and the Government Order dated 10.12.2002 (paragraph 5) was entitled to be considered in accordance with the Government policy as was in existence on the date of application or the Government policy as amended by Government Order dated 04.08.2006, was to be taken into consideration while deciding the application while deciding the application on 18.12.2006?

32. In other words, the question posed to the Court was as to whether, the Government policy applicable on the date of application for freehold right would apply or the Government policy applicable on the date of decision of the Government.

33. In paragraphs 41 and 42, the Court clarified that by merely making an application for grant of freehold rights, petitioners did not acquire a vested right.

34. Paragraphs 41 and 42 are extracted :-

"41. Vested right can be different kind of vested right in context of different variety or nature of right. It is true that the words "vested right" are generally used in context of a right in a property, but the concept of vested right cannot be confined only to right of enjoyment of possession of land. The issue in the present case is as to whether by submitting an application for grant of freehold right any vested right has been acquired by the petitioner.

42. We after considering the relevant Government Orders on the subject and pronouncements of the Apex Court as noted above, are of the view that merely by making an application for grant of freehold right, petitioner did not acquire a vested right.

35. The Court, thereafter, answered the reference in the following terms :-

(i) The application of the petitioner dated 25.07.2005 submitted for grant of free hold right on the basis of the Government Orders dated 01.12.1998 and 10.12.2002 was entitled to be considered in accordance with the Government's policy as was in existence at the time of passing of the order. The Government Order dated 04.08.2006 was rightly relied on by the Collector while rejecting the application on 18.12.2006.

36. The Full Court was of the view that by making an application for grant of freehold right, petitioner did not acquire vested right. The Government policy applicable on the date of decision of the Government would apply while disposing off the applications of the petitioners for freehold right.

37. Accordingly, in view of the law laid down in **Anand Kumar Sharma** (supra), the application submitted by the petitioners for freehold rights, was entitled to be considered in accordance with the Government policy as was in existence on the date of passing of the order on the application. The State respondents were justified in disposing of the application submitted by the petitioners as per the Government policy mandated vide Government Order dated 14 December, 2004.

38. It is noted in the impugned order that the District Supply Officer had demanded the premises to continue the office in the same building, after removing the dilapidated structure and constructing a new building, thereupon. It is informed that budget was also sanctioned for the construction but due to pendency of the present writ petition, the same could not be executed. The office was shifted to another rented accommodation.

39. The plea of the petitioners that petitioners have been discriminated, is unfounded. It is not being disputed by the learned counsel for the petitioners that petitioners have been granted freehold right on 2084 sq. meters of the same Nazul plot, like being the case of other occupants of the plot. Further, parity claimed by the petitioners with lease holder of Nazul plot No. PP Civil Station, Allahabad, contending that since they were granted freehold rights, petitioners being similarly placed should also be granted freehold right. The claim based on parity lacks merit. On Nazul plot No. 10, Civil Station, a Government Office was in occupation of the building, whereas, there is no such building in the possession and occupation of the Government department on Nazul plot No. PP Civil Station, Allahabad. The Government Order dated 14 October, 2004, would govern all such Nazul land over which Government Office / Department is in occupation. That is not the case with Nazul plot No. PP Civil Station, Allahabad. In any case, petitioners are not the lease holder / occupant of Nazul plot No. PP Civil Station, Allahabad, therefore, it is not open for the petitioners to submit that they have been discriminated against after allottees of Nazul plot No. PP Civil Station, Allahabad. The ratio of **Sangam Upnivashan Avas Evam Nirman Sahkari Samiti Ltd.** (supra), would not apply in the case of the petitioners.

40. The learned counsel for the petitioners failed to point out any illegality, irregularity or perversity in the impugned order.

41. The writ petition being devoid of merit, is accordingly, **dismissed.**

42. The State respondent to proceed with the construction of the Government office in accordance with law.

(2023) 3 ILRA 323
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.07.2022

BEFORE

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

Writ C No. 19100 of 2022

Nasir Ali & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Surya Prakash Dubey, Sri Ved Prakash Dubey.

Counsel for the Respondents:
Sri Hare Ram (Standing Counsel), Sri Dharmendra Singh Chauhan

A. Acquisition Law – Land Acquisition Act, 1894 – Sections. 4(1), 6(1) & 17(1) – Sale-deed executed after issuance of notification u/s 4(1) of the Act – How far title is conferred to the subsequent purchaser – Relief sought against demolition – Permissibility – Held, there is hardly any cavil about the Law that any sale deed of a land executed by its owner after the issue of a notification under Section 4(1) of the Act of 1894 is void. It confers no title on the transferee. At best, it may afterwards confer on the transferee a right to stake his claim to compensation in the owner's stead – In the garb of relief sought against demolition and dispossession, otherwise than in accordance with Law, read together with the pleas raised in the writ petition, what the petitioners intend to do, is to efface the acquisition that has attained finality and its validity affirmed right up to the Supreme Court. (Para 12 and 16)

B. Acquisition Law – Land Acquisition Act, 1894 – Sections 4(1), 6(1) & 17(1) – Claim of being in settled and continuous possession – Effect – Held, in case of the land acquisition by the St., where after the issue of notifications under Section 4(1) of the Act of 1894 read with Section 17(1) and a declaration u/S 6(1) r/w S. 17(4), land has vested u/S 17(2) in the St., free from all encumbrances, every person in occupation of such land is a trespasser, liable to ejectment by the St.. (Para 18)

Writ petition dismissed . (E-1)

List of Cases cited :-

1. Meera Sahni Vs Lieutenant Governor of Delhi & ors.; (2008) 9 SCC 177

2. U.P. Jal Nigam, Lucknow & anr. Vs Kalra Properties (P) Ltd. & ors.; (1996) 3 SCC 124

3. Shiv Kumar & anr. Vs U.O.I. & ors.; (2019) 10 SCC 229

4. Indore Development Authority Vs Manoharlal & ors.; AIR 2020 SC 1496

5. Shyoraj Singh & anr. Vs St. of U.P. & ors.; 2021 SCC OnLine All 873

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

1. The three petitioners have come together and instituted the present writ petition, because their distinct and individual causes of action are not different. The causes of action of the petitioners involve common question of facts and law, prompting them to combine against the same set of respondents, against whom they want relief. In substance, the petitioners' prayer is two fold: firstly, that the respondents be commanded by a *mandamus* not to demolish the petitioners' houses, standing over their respective plots of land until consideration of their case by the respondents, canvassed through a representation dated 31.05.2022; and secondly, an order restraining the respondents not to interfere with the petitioners' peaceful possession over their respective plots of land, except in accordance with law.

2. The facts giving rise to this petition are these: Nasir Ali, the first petitioner is a resident of Village Harungala, Post R.K. University, District Bareilly and currently resides at Village Dohariya, Tehsil and District Bareilly. The second petitioner, Smt. Hasina is a resident of Village Chandpur Bichpuri, Tehsil and District

Bareilly and presently resides at Village Dohariya, Tehsil and District Bareilly. The third petitioner, Smt. Taslim Jahan is a resident of Jagatpur, Nai Basti, Talab, Bareilly and presently also resides at Village Dohariya, Tehsil and District Bareilly. The first petitioner purchased a plot measuring 83.61 square meters, located in Village Dohariya from one Anwar Miyan son of Mohd. Taqi Painter through a registered sale deed dated 07.05.2018. The said plot is located in *Khasra* No. 58 of the village. It was purchased by Anwar Miyan from the original recorded owner of the land, Naresh son of Gendan Lal through a registered sale deed dated 18.01.2004. The second petitioner, Smt. Hasina purchased a plot measuring 167.22 square meters, also part of *Khasra* No. 58 of Village Dohariya from Naresh son of Gendan Lal, through a registered sale deed dated 17.11.2011. The third petitioner, Smt. Taslim Jahan purchased a plot measuring 83.61 square meters, part of *Khasra* No. 60 of Village Dohariya from Riyasat Ali and Anis Ahmad, sons of Mohd. Bachchan, through a registered sale deed dated 30.07.2019. Riyasat Ali and Anis Ahmad, vendors of petitioner No. 3, had in turn purchased the land from one Lal Bahadur through a registered sale deed dated 11.10.2010. It is asserted that the name of Lal Bahadur continues to be recorded in the revenue records, relating to *Khasra* No. 60.

3. It is the petitioners' case that they are in continuous and uninterrupted possession of their respective plots, whereon they have raised their residential houses in the years 2018, 2011 and 2019, respectively. The petitioners live in the said houses along with their families. It is also asserted that the name of Naresh, son of Gendan Lal, the original owner of *Khasra* No. 58, whose rights ultimately petitioners Nos. 1 and 2 had purchased, continues to be recorded in the revenue records. The land comprising the plots of each of the three petitioners, two located in *Khasra* No. 58 and one in *Khasra* No. 60 of Village Dohariya, Tehsil and District Bareilly, shall hereinafter be collectively referred to as 'the land in dispute'.

4. It is common ground between parties that a notification under Section 4(1) read with Section 17(1) of the Land Acquisition Act, 1894 (for short, 'the Act of 1894') was issued on 3rd June, 2004. The aforesaid notification under Section 4(1) was followed by a declaration under Section 6(1) read with Section 17(4) of the Act of 1894, which came to be issued by the State Government on 4th July, 2005. The two notifications aforesaid were issued by the State Government in order to acquire land for the purpose of development of a residential colony, going by the name *Ram Ganga Nagar Awasiya Yojna, Bareilly.* The aforesaid project was to be executed by the Bareilly Development Authority, Bareilly (for short, 'the B.D.A.'). It is to be noticed here that *vide* the two notifications issued under the Act of 1894, a total area of 259.361597 hectares of lands in the Villages of Ahirola, Chandpur Bichpuri, Manohar alias Ramnagar and Dohariya came to be acquired by the State Government for the purpose of development by the B.D.A. It is also not in issue between parties that the two land acquisition notifications under reference were challenged before this Court through a number of writ petitions, which were tagged and heard together with Writ-C No. 17542 of 2010, Sharawan Kumar and others v. State of U.P. and others as the leading case. The said batch of writ petitions was heard and dismissed *vide*

judgment and order dated 06.09.2016 passed by this Court. This Court upheld the acquisition. The judgment of this Court dated 06.09.2016, above referred, was challenged by means of a petition for Special Leave to Appeal being SLP (Civil) No. 25147 of 2016, Piyush Kumar Agarwal and others v. State of U.P. and others. The Special Leave Petition was also dismissed by the Supreme Court *vide* order dated 09.01.2017. The parties, therefore, appear to be *ad idem* that the acquisition of the land in dispute was upheld up to the Supreme Court.

5. The Special Land Acquisition Officer (Joint Organization), Bareilly proceeded to make an award in respect of the acquired land at Village Dohariya, Tehsil and District Bareilly. It is the petitioners' case that possession of the land in dispute has not been taken from any of them nor any compensation paid. The residential houses still stand on the land in dispute and the petitioners are living there peaceably. The petitioners also hold electricity connections in their names and pay water tax to the Municipal Authorities. The petitioners say that on 15.03.2022, and thereafter in quick successions, on 20.04.2022 and 26.04.2022, some officials of the B.D.A. came over to their homes and harassed the petitioners with the intention of extorting money. They threatened the petitioners with illegal demolition of their houses. The petitioners were told that their houses would be demolished by the B.D.A.

6. It is in the aforesaid circumstances that the present writ petition has been instituted.

7. Heard Mr. Surya Prakash Dubey, learned Counsel for the petitioners, Mr. Hare Ram, learned Standing Counsel appearing on behalf of respondent Nos. 1 and 2 and Mr. Dharmendra Singh Chauhan, learned Counsel appearing on behalf of respondent Nos. 3 and 4.

8. It is submitted by the learned Counsel for the petitioners that the B.D.A. and its officials are acting in a most arbitrary and illegal manner. They are out to demolish the petitioners' houses without recourse to legal proceedings for the purpose. It is emphasized that the land was acquired for the *Ram Ganga Nagar Awasiya Yojna*, Bareilly, and at present the petitioners' houses stand over the land in dispute, including its vicinity. It is urged that the purpose of acquisition was to pro*vide* residential apartments and not to destroy preoccupied houses. It is suggested that in case the constructions raised are not found in accordance with law, the petitioners' case be considered for compounding. It is also said that compensation, which has not been paid, may also be directed to be adjusted against the compounding charges for the constructions. It is urged that the petitioners' constructions, that may not be found to be in violation of the law, may be exempted from acquisition on the ground that the residential houses already exist there and the purpose of the acquisition was ultimately to pro*vide* housing. It is also pointed out that the purpose of acquisition has failed since the proposed residential scheme has not at all been implemented. The development, if any, has taken place in chunks with no uniformity.

9. It is argued that the B.D.A. have no business under the circumstances to demolish the petitioners' houses and forcibly take possession of their land, which they have lawfully purchased through registered sale deeds. It is also

urged that though the State Government had acquired the land for the purpose of development as a residential colony, the B.D.A. is now commercializing the scheme and constructing schools, shopping malls, parks and allotting plots for industries, after illegally taking possession of properties of poor villagers and ordinary men, like the petitioners. It is emphasized that the land in dispute with the individual plots of the three petitioners are very small, whereon their humble dwelling units exist. Demolishing those dwelling units and taking forcible possession, amounts to depriving the petitioners of their right to roof and shelter, besides an infraction of their constitutional right under Article 300-A of the Constitution.

10. The learned Standing Counsel appearing for the State and Mr. Chauhan, learned Counsel appearing for the B.D.A. have strongly opposed the motion to admit this petition to hearing. They submit in one voice that this petition is misconceived. It is argued that the land in dispute is acquired land of the B.D.A., where the petitioners are rank-trespassers and encroachers. It is within the respondents' right to expel them and abate the encroachment.

11. We have carefully considered the submissions made at the Bar and perused the record.

12. We must at once say that the submissions advanced by the petitioners are only to be noticed and rejected. Each of the three petitioners or their immediate predecessors-in-title have secured the land in dispute through registered sale deeds, all of which were executed after 3rd June, 2004, that is to say, the date on which the notification under Section 4(1) read with Section 17(1) of the Act of 1894 was issued. There is hardly any cavil about the law that any sale deed of a land executed by its owner after the issue of a notification under Section 4(1) of the Act of 1894 is void. It confers no title on the transferee. At best, it may afterwards confer on the transferee a right to stake his claim to compensation in the owner's stead. No interest whatsoever is created in the transferee by a conveyance executed after the issue of a notification under Section 4(1) of the Act of 1894.

13. Here, what this Court finds is that the notification under Section 4(1) of the Act of 1894 was issued invoking the provisions of Section 17(1) and the declaration under Section 6(1) invoked Section 17(4). The two notifications aforesaid were issued on 3rd June, 2004 and 4th July, 2005. Since Section 17(1) was invoked, it is e*vide*nt that the inquiry under Section 5-A of the Act of 1894 was dispensed with and immediate possession was taken on ground of urgency. The land in dispute along with all those covered by the notification and the declaration under Sections 4(1) and 6(1), respectively, would stand vested in the State, free from all encumbrances. The sale deeds, therefore, that the petitioners claim to confer title on them, are all void. The petitioners' act in raising constructions over the land in dispute, which is acquired land of the State, entrusted to the B.D.A. for development, is a naive and reckless act. The petitioners cannot capitalize on their own wrong by invoking equities to create title, where nothing but a void transaction stairs them in the face.

14. In regard to the validity of sale deeds executed after issue of a notification under Section 4(1) of the Act of 1894, that is followed by a declaration under Section

6(1), reference may be made to the decision of the Supreme Court in **Meera Sahni v. Lieutenant Governor of Delhi and others, (2008) 9 SCC 177. In Meera Sahni** *(supra)*, it has been held:

17. When a piece of land is sought to be acquired, a notification under Section 4 of the Land Acquisition Act is required to be issued by the State Government strictly in accordance with law. The said notification is also required to be followed by a declaration to be made under Section 6 of the Land Acquisition Act and with the issuance of such a notification any encumbrance created by the owner, or any transfer made after the issuance of such a notification would be deemed to be void and would not be binding on the Government. A number of decisions of this Court have recognised the aforesaid proposition of law wherein it was held that subsequent purchaser cannot challenge acquisition proceedings and also the validity of the notification or the irregularity in taking possession of the land after the declaration under Section 6 of the Act.

18. In *U.P. Jal Nigam v. Kalra Properties* (P) Ltd. [(1996) 3 SCC 124] it was stated by this Court that : (SCC p. 126, para 3)

"3. ... Having regard to the facts of this case, we were not inclined to further adjourn the case nor to remit the case for fresh consideration by the High Court. It is well-settled law that after the notification under Section 4(1) is published in the gazette any encumbrance created by the owner does not bind the Government and the purchaser does not acquire any title to the property."

19. In *Sneh Prabha v. State of U.P.* [(1996) 7 SCC 426] it is stated as under : (SCC p. 430, para 5)

"5. ... It is settled law that any person who purchases land after publication of the notification under Section 4(1), does so at his/her own peril. The object of publication of the notification under Section 4(1) is notice to everyone that the land is needed or is likely to be needed for public purpose and the acquisition proceedings point out an impediment to anyone to encumber the land acquired thereunder. It authorises the designated officer to enter upon the land to do preliminaries, etc. Therefore, any alienation of the land after the publication of the notification under Section 4(1) does not bind the Government or the beneficiary under the acquisition. On taking possession of the land, all rights, title and interests in land stand vested in the State, under Section 16 of the Act, free from all encumbrances and thereby absolute title in the land is acquired thereunder."

20. The said proposition of law was also reiterated in *Ajay Krishan Shinghal v. Union of India* [(1996) 10 SCC 721] and *Star Wire (India) Ltd. v. State of Haryana* [(1996) 11 SCC 698].

15. Though, there is already a reference to it in the decision of the Supreme Court in **Meera Sahni** *(supra)*, the locus classicus on the point is the enunciation of the law in **U.P. Jal Nigam, Lucknow through its Chairman and another v. Kalra Properties (P) Ltd., Lucknow and others, (1996) 3 SCC 124,** where it has been held:

3. ... It is settled law that after the notification under Section 4(1) is published in the Gazette any encumbrance created by the owner does not bind the Government and the purchaser does not acquire any title to the property. In this case, notification under Section 4(1) was published on 24-3-1973, possession of the land admittedly

was taken on 5-7-1973 and pumping station house was constructed. No doubt, declaration under Section 6 was published later on 8-7-1973. Admittedly power under Section 17(4) was exercised dispensing with the enquiry under Section 5-A and on service of the notice under Section 9 possession was taken, since urgency was acute, viz., pumping station house was to be constructed to drain out flood water. Consequently, the land stood vested in the State under Section 17(2) free from all encumbrances. It is further settled law that once possession is taken, by operation of Section 17(2), the land vests in the State free from all encumbrances unless a notification under Section 48(1) is published in the Gazette withdrawing from the acquisition. Section 11-A, as amended by Act 68 of 1984, therefore, does not apply and the acquisition does not lapse. The notification under Section 4(1) and the declaration under Section 6, therefore, remain valid. There is no other provision under the Act to have the acquired land divested, unless, as stated earlier, notification under Section 48(1) was published and the possession is surrendered pursuant thereto. That apart, since M/s Kalra Properties, respondent had purchased the land after the notification under Section 4(1) was published, its sale is void against the State and it acquired no right, title or interest in the land. Consequently, it is settled law that it cannot challenge the validity of the notification or the regularity in taking possession of the land before publication of the declaration under Section 6 was published.

16. This Court finds that in the garb of relief sought against demolition and dispossession, otherwise than in accordance with law, read together with the pleas raised in the writ petition, what the petitioners intend to do, is to efface the acquisition that has attained finality and its validity affirmed right up to the Supreme Court. For one, the petitioners cannot be permitted to do in a direct and insidious manner what they cannot achieve directly under the law.

17. That apart, the petitioners being purchasers subsequent to the issue of a notification under Section 4(1) of the Act of 1894, followed by a declaration under Section 6(1), where land has vested in the State under Section 17(2), free from all encumbrances. They cannot be permitted to question that acquisition in an indirect manner, as they are not permitted to challenge it directly, being purchasers subsequent to the issue of Section 4(1) notification. About the right of purchasers, who take under conveyances after the issue of a notification under Section 4(1) of the Act of 1894, the Supreme Court repelled the existence of any such rights in subsequent purchasers in **Shiv Kumar and another v. Union of India and others, (2019) 10 SCC 229**, reiterating a steady line of precedent. **Shiv Kumar** *(supra)* was also a case where an unauthorized colony had come up and its members, who were the petitioners, claimed that they were in actual physical possession of the subject land despite passing of the award. The Government of N.C.T. had provisionally regularized the unauthorized colony, after the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 came into force w.e.f. 01.01.2014. The settlers in the unauthorized colony claimed that since the State or their Authorities never took actual physical possession, the acquisition had lapsed. It was in the context of the aforesaid facts that in **Shiv Kumar**, it was held by their Lordships of the Supreme Court:

8. It has been laid down that the purchasers on any ground whatsoever cannot question proceedings for taking possession. A purchaser after Section 4 notification does not acquire any right in the land as the sale is ab initio void and has no right to claim land under the policy.

18. In aid of the second relief, which the petitioners claim, it is argued that the petitioners are in settled possession and have constructed residential houses, where their families live. The respondent Authorities, including the B.D.A., are threatening them with forcible dispossession, otherwise than in accordance with law. It is argued that even a trespasser in settled possession cannot be dispossessed or evicted, except in accordance with law. This injunction of the law, in the submission of the learned Counsel for the petitioners, applies in a case where the trespasser is sought to be dispossessed by the true owner as well. For a general proposition of law, the submission may be sound, but in case of the land acquisition by the State, where after the issue of notifications under Section 4(1) of the Act of 1894 read with Section 17(1) and a declaration under Section 6(1) read with Section 17(4), land has vested under Section 17(2) in the State, free from all encumbrances, every person in occupation of such land is a trespasser, liable to ejectment by the State. The aforesaid principle has been authoritatively laid down by the Constitution Bench of the Supreme Court in **Indore Development Authority v. Manoharlal and others, AIR 2020 SC 1496**. A Division Bench of this Court in **Shyoraj Singh and another v. State of U.P. and others, 2021 SCC OnLine All 873,** following the principle laid down by the Supreme Court in **Indore Development Authority** *(supra)* has held:

"20. The issue as to what is meant by "possession of the land by the State after its acquisition" has also been considered by Constitution Bench of Hon'ble Supreme Court in **Indore Development Authority** Vs. Manoharlal and others AIR 2020 SC 1496. It is opined therein that after the acquisition of land and passing of award, the land vests in the State free from all encumbrances. The vesting of land with the State is with possession. Any person retaining the possession thereafter has to be treated trespasser. When large chunk of land is acquired, the State is not supposed to put some person or police force to retain the possession and start cultivating on the land till it is utilized. The Government is also not supposed to start residing or physically occupying the same once process of the acquisition is complete. If after the process of acquisition is complete and land vest in the State free from all encumbrances with possession, any person retaining the land or any re-entry made by any person is nothing else but trespass on the State land. Relevant paragraphs 244, 245 and 256 are extracted below:

"244. Section 16 of the Act of 1894 pro*vide*d that possession of land may be taken by the State Government after passing of an award and thereupon land vest free from all encumbrances in the State Government. Similar are the provisions made in the case of urgency in Section 17(1). The word "possession" has been used in the Act of 1894, whereas in Section 24(2) of Act of 2013, the expression "physical possession" is used. It is submitted that drawing of panchnama for taking over the possession is not enough when the actual physical possession remained with the landowner and Section 24(2) requires actual physical possession to be taken, not the possession in any other form. When the State has acquired the land

and award has been passed, land vests in the State Government free from all encumbrances. The act of vesting of the land in the State is with possession, any person retaining the possession, thereafter, has to be treated as trespasser and has no right to possess the land which vests in the State free from all encumbrances.

245. The question which arises whether there is any difference between taking possession under the Act of 1894 and the expression "physical possession" used in Section 24(2). As a matter of fact, what was contemplated under the Act of 1894, by taking the possession meant only physical possession of the land. Taking over the possession under the Act of 2013 always amounted to taking over physical possession of the land. When the State Government acquires land and drawns up a memorandum of taking possession, that amounts to taking the physical possession of the land. On the large chunk of property or otherwise which is acquired, the Government is not supposed to put some other person or the police force in possession to retain it and start cultivating it till the land is used by it for the purpose for which it has been acquired. The Government is not supposed to start residing or to physically occupy it once possession has been taken by drawing the inquest proceedings for obtaining possession thereof. Thereafter, if any further retaining of land or any re-entry is made on the land or someone starts cultivation on the open land or starts residing in the outhouse, etc., is deemed to be the trespasser on land which in possession of the State. The possession of trespasser always inures for the benefit of the real owner that is the State Government in the case.

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256. Thus, it is apparent that vesting is with possession and the statute has pro*vide*d under Sections 16 and 17 of the Act of 1894 that once possession is taken, absolute vesting occurred. It is an indefeasible right and vesting is with possession thereafter. The vesting specified under Section 16, takes place after various steps, such as, notification under Section 4, declaration under Section 6, notice under Section 9, award under Section 11 and then possession. The statutory provision of vesting of property absolutely free from all encumbrances has to be accorded full effect. Not only the possession vests in the State but all other encumbrances are also removed forthwith. The title of the landholder ceases and the state becomes the absolute owner and in possession of the property. Thereafter there is no control of the landowner over the property. He cannot have any animus to take the property and to control it. Even if he has retained the possession or otherwise trespassed upon it after possession has been taken by the State, he is a trespasser and such possession of trespasser enures for his benefit and on behalf of the owner." (emphasis supplied)

19. In the present case, the petitioners are nobodies so far as the land in dispute is concerned. They are trespassers on State land, of which possession had already been taken in proceedings for acquisition. Merely because in the large tract of land acquired for a big scheme, some remote corner has remained unguarded, would not entitle the petitioners to claim on the basis of void sale deeds, even the semblance of a right based on possession. The assertion of the right to possession over such acquired land of the State is inherently so illegal that it cannot be regarded as a settled possession of the occupier, which can only be removed through the judicial process.

20. In the circumstances, there is no force in this writ petition. It **fails** and is **dismissed.**

(2023) 3 ILRA 332
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.02.2023

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Writ C No. 28220 of 2022
With
Writ C No. 28071of 2022
and other connected cases

Rajendra Prasad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arvind Singh

Counsel for the Respondents:
C.S.C.

A. Character certificate – Issuance and rejection – GO dated 02.02.20 23 – Para 6A and 6B – Though forum has been provided therein, yet modalities have not been finalized – Effect – High Court issued direction to enforce para 6A and 6B – High Court further issued direction to finalize the modalities for grant, rejection, suspension or cancellation etc. of character certificates. (Para 5 and 8)

Writ petitions disposed of . (E-1)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Anish Kumar Gupta, J.)

1. Heard Shri Arvind Singh, learned counsel for the petitioner in Writ-C No.28220 of 2022, Shri Rahul Mishra, learned counsel for the petitioner in Writ-C No.28071 of 2022, Shri Rakesh Kumar Dubey, learned counsel for the petitioner in Writ-C No.32690 of 2022, Shri Rakesh Kumar Pandey, learned Senior Advocate assisted by Shri Santosh Kumar Singh holding brief of Parmeshwar Kr. Chaudhary, learned counsel for the petitioner in Writ-C No.34443 of 2022, Shri Utkarsh Srivastava, learned counsel for the petitioner in Writ-C No. 34611 of 2022, Shri Shitla Prasad Pandey, learned counsel for the petitioner in Writ-C No.36083 of 2022, Shri Shravan Kumar Pandey, learned counsel for the petitioner in Writ-C No.37521 of 2022, Shri Ramesh Kumar Kushwaha, learned counsel for the petitioner in Writ-C No. 34540 of 2022 and Shri Manish Goyal, learned Additional Advocate General assisted by Shri Ankur Tandon, learned counsel for the State-respondents.

2. Grievance of the petitioners are either:-

(a) against the rejection of application for character certificate; or

(b) suspension or cancellation of their character certificates; or

(c) non-providing of any modalities for issuance of character certificate; or

(d) non-providing of any forum to challenge the orders passed by the District Magistrate adversely disposing of a character certificate application.

3. Since the controversy involved in the present writ petitions is mainly on the above noted points and the State has filed personal affidavit of respondent no.1 providing for a forum and the **learned Additional Advocate General has stated that modalities for grant or refusal to grant character certificate are under**

preparation, therefore, with the consent of learned counsel for the parties, all these writ petitions are being finally heard.

4. In paragraph nos. 3 and 4 of his personal affidavit dated 20.02.2023 Shri Sanjay Prasad, Principal Secretary, Department of Home, Government of U.P., Lucknow filed on behalf of respondent no.1, has stated, as under:

"3. That in this regard, it is submitted here that after due consideration with regard to the guidelines for character certificate, a Government Order dated 02.02.2023 had been issued by the Government of U.P., in which it is stated that in context of Government Order dated 02.11.2006, 12.12.2007 and 20.05.2013, ***in case any application for new character certificate is rejected by the concerned District Magistrate/Collector, such information along with reasons would be served upon the applicant and the applicant may within one month approach the concerned Divisional Commissioner by way of representation, upon which the concerned Divisional Commissioner would pass a reasoned order, after affording opportunity of hearing to both the sides and the same would be communicated to the concerned District Magistrate/Collector who would act accordingly.*** *A true Photostat copy of Government Order dated 02.02.2023 is being annexed herewith and marked as* ***Annexure No. PA-1*** *to this affidavit.*

4. That further it is also provided that ***with regard to character certificates already issued,*** *if the same would be* ***cancelled*** *by any District Magistrate/Collector, then the concerned person would be served with the information of cancellation of his character certificate and within one month he may file his representation before the concerned Divisional Commissioner and after giving opportunity to both the sides and the same would be communicated to the concerned District Magistrate/Collector who would act accodingly."*

5. **Learned counsel for the petitioners jointly submit** that although a forum has now been provided by the State Government vide G.O. No.47/6-iq0-14-23-50(07)/2006 dated 02.02.2023 and yet **modalities have not been finalized by the State Government for issuance or rejection of a character certificate application or for cancellation of a character certificate.** Learned counsel for the petitioners have also drawn our attention to the law laid down by learned Single Bench of this Court in Chandrika Prasad Nishad vs. State of U.P. and others (Writ Petition No.5018 (MS)/2005 decided on 12.07.2006 (paragraph nos. 30, 31 and 101) and pursuant thereto issuance of Government Order dated 05.01.2007.

6. Learned Additional Advocate General has drawn our attention to Government Order dated 02.11.2006 and Note no.6 of the PWD-T-4 (Form of character certificate).

G.O. No.47/6-iq0-14-23-50(07)/2006 dated 02.02.2023 is reproduced below:

"संख्या-47/6-पु०-14-23-50(07)/2006

प्रेषक,

दुर्गा शंकर मिश्र,
मुख्य सचिव,
उत्तर प्रदेश शासन।

सेवा में,

1. समस्त अपर मुख्य सचिव/प्रमुख/सचिव/सचिव
उत्तर प्रदेश शासन।

2. पुलिस महानिदेशक,

उत्तर प्रदेश, लखनऊ।

3. समस्त विभागध्यक्ष,

उत्तर प्रदेश, लखनऊ।

4. समस्त आयुक्त/जिलाधिकारी

उत्तर प्रदेश।

5. समस्त पुलिस आयुक्त/वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक,

उत्तर प्रदेश।

गृह (पुलिस) अनुभाग-14 लखनऊः-दिनांक 02 फरवरी, 2023

विषयः- प्रदेश में माफिया गतिविधियों पर रोक लगाने हेतु मार्ग-दर्शक सिद्धान्त।

महोदय,

उपर्युक्त विषयक शासनादेश संख्या-4435/6-पु०-14-06-50(07)2006, दिनांक 02.11.2006, शासनादेश संख्या- 87यू०ओ०/6-पु०-14-07185/07, दिनांक 12.12.2007 एवं शासनादेश संख्या- 1624/6-पु०-14-06-50(07)/2006, दिनांक 20.05.2013 का संदर्भ ग्रहण करने का कष्ट करें।

2. शासनादेश संख्या-87यू०ओ०/6-पु०-14-07-185/07, दिनांक 12.12.2007 के साथ संलग्न प्रपत्र संख्या-पी०डब्लू०डी०टी-4 के प्रस्तर-6 में यह व्यवस्था निर्धारित की गयी थी कि " इस प्रमाण-पत्र के निर्गत करने अथवा निरस्त करने के संबंध में अन्तिम निर्णय सम्बन्धित जिला मजिस्ट्रेट/कलेक्टर का होगा"।

3. मा० उच्च न्यायालय, इलाहाबाद में योजित रिट याचिका संख्या-28220/2022 राजेन्द्र प्रसाद बनाम उ०प्र० राज्य व अन्य के साथ टैग रिट सी संख्या-37521/2022 पंकज कुमार तिवारी बनाम उ०प्र० राज्य व अन्य में पारित आदेश दिनांक 16.01.2023 के क्रम में सम्यक विचारोपरान्त मुझे यह कहने का निर्देश हुआ है कि उपर्युक्त संदर्भित शासनादेश दिनांक 12.12.2007 के संलग्न प्रारूप पीडब्लूडी-टी-4 के निर्देश/नोट के अनुक्रम में प्रस्तर-6 के सम्बन्ध में निम्नवत व्यवस्था की जाती हैः-

6ए- "इस प्रमाण-पत्र को निर्गत करने अथवा निरस्त करने के संबंध में अन्तिम निर्णय सम्बन्धित जिला मजिस्ट्रेट/कलेक्टर का होगा। जिला मजिस्ट्रेट/कलेक्टर द्वारा नवीन चरित्र प्रमाण-पत्र आवेदन पत्र के सम्बन्ध में आवेदन को अस्वीकार किये जाने की स्थिति में कारण सहित अस्वीकरण सूचना आवेदक को तामील करायी जायेगी। आवेदक द्वारा सूचना तामील के 01 माह के अन्दर अपना प्रत्यावेदन सम्बन्धित मण्डलायुक्त के समक्ष प्रस्तुत किया जा सकेगा, जिस पर उभय पक्षों को सुनकर सम्बन्धित मण्डलायुक्त चरित्र प्रमाण पत्र निर्गत किये जाने अथवा न किये जाने के सम्बन्ध में अपना सुस्पष्ट अभिमत/निर्णय सम्बन्धित जिला मजिस्ट्रेट/कलेक्टर को प्रेषित करेगा। सम्बन्धित मण्डलायुक्त द्वारा चरित्र प्रमाण पत्र निर्गत किये जाने का निर्णय दिये जाने की स्थिति में जिला मजिस्ट्रेट/कलेक्टर उक्त निर्णय के समादर मे चरित्र प्रमाण पत्र निर्गत करेगा"।

6बी- पूर्व से निर्गत चरित्र प्रमाण-पत्र को जिला मजिस्ट्रेट/कलेक्टर द्वारा निरस्त किये जाने की दशा में आवेदक को निरस्तीकरण के कारण सहित सूचना तामील करायी जायेगी। आवेदक द्वारा सूचना तामील के 01 माह के अन्दर अपना प्रत्यावेदन सम्बन्धित मण्डलायुक्त के समक्ष प्रस्तुत किया जा सकेगा, जिस पर उभय पक्षों को सुनकर सम्बन्धित मण्डलायुक्त चरित्र प्रमाण पत्र बहाल किये जाने अथवा न किये जाने के सम्बन्ध में अपना सुस्पष्ट अभिमत/निर्णय सम्बन्धित जिला मजिस्ट्रेट/कलेक्टर को प्रेषित करेगा। सम्बन्धित मण्डलायुक्त द्वारा चरित्र प्रमाण पत्र बहाल किये जाने का निर्णय दिये जाने की स्थिति में जिला मजिस्ट्रेट/कलेक्टर उक्त निर्णय के समादर मे चरित्र प्रमाण पत्र बहाल करेगा"।

4. शासनादेश संख्या- 87यू०ओ०/6-पु०-14-07-185/07,दिनांक 12.12.2007 के साथ संलग्न प्रपत्र संख्या-पी०डब्लू०डी०-टी-4 के प्रस्तर-6 को इस सीमा तक संशोधित समझा जाये। शासनादेशों को शेष शर्ते/प्रक्रिया यथावत रहेंगी।

भवदीय

(दुर्गा शंकर मिश्र)

मुख्य सचिव।"

7. **A statement has been made by the learned Additional Advocate General that the preparation of modalities for issuance, suspension and cancellation etc. of character certificate are under process at the level of State Government,** therefore, we do not wish to express any opinion on this aspect of the matter.

8. In view of the own stand taken by the State Government in the aforequoted Government Order and also in view of the statement made by learned Additional Advocate General that preparation of modalities for issuance, suspension or

cancellation of character certificate is under preparation by the State Government, we direct the State Government, as under:

(i) Paragraph nos. 6, and 6ch under paragraph no.3 of the aforequoted Government Order shall be enforced by the State Government and all concerned authorities forthwith.

(ii) Representation made by a person under the aforequoted paragraph nos. 6, or 6ch of the G.O. dated 02.02.2023 shall be disposed of by the concerned Divisional Commissioner within six weeks from the date of submission of representation by a speaking and reasoned order, after affording reasonable opportunity of hearing to all the parties concerned.

(iii) Since these writ petitions are pending from several months before this Court, therefore, we grant 30 days' time to all the petitioners to make a representation before Divisional Commissioner under the aforequoted paragraph nos. 6, or 6ch, as the case may be, within one month from today, against the order of the District Magistrate.

(iv) Where the District Magistrate/Collector does not pass any order on the character certificate application of an applicant within one month from the date of submission of application, such applicant shall also have a right to make a representation before the Divisional Commissioner, who shall issue appropriate order within six weeks from the date of submission of representation, after affording reasonable opportunity of hearing to the parties concerned.

(v) Modalities for grant, rejection, suspension or cancellation etc. of character certificates shall be finalized and an appropriate Government Order containing the modalities shall be issued by the State Government within six weeks from today.

9. With the aforesaid directions, **all the writ petitions are disposed of.**

10. This order shall be communicated by the learned Additional Advocate General to the State Government within three days for compliance.

(2023) 3 ILRA 335
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.02.2023

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ C No. 28379 of 2022

Paramedical Council of India ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Abhay Raj Yadav

Counsel for the Respondents:
A.S.G.I., Sri Anurag Sharma

A. Civil Law – National Commission for Allied and Healthcare Professions Act, 2021 – Sections 2(d), 2(j), 10, 11, 22, 29, 30, 31, 32 & 40 – Paramedical courses – Recognition to the institution – Claim by the petitioner to grant the recognition – Permissibility – Held, entire Act reveals that it is a comprehensive enactment dealing with the aspect of education, registration and licencing of allied and healthcare professional, regulation of allied and healthcare institutions & ors. related matters – Petitioner cannot be permitted to grant recognition to institutions imparting education and training or register any such institution, except in accordance with, and to the extent permissible under the scheme and terms of the Act. (Para 9 and 10)

Writ petition dismissed. (E-1)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Jayant Banerji, J.)

1. Heard Shri Abhay Raj Yadav, learned counsel for the petitioner and Shri Anurag Sharma, learned Central Government Standing Counsel.

2. The petitioner has filed the present writ petition for a direction to the respondent to permit the petitioner to function as Paramedical Council to grant recognition and to register the Institutions, imparting education in the field of Paramedical Courses until the formation of any Regulatory Body for Paramedicals by the respondents and not to interfere in peaceful functioning of the petitioner in imparting the paramedical education and training.

3. A perusal of this writ petition reveals that the petitioner is infact seeking legitimacy to exercise a function that is within the domain of the legislative power of the Parliament exerciseable under the Union List of the Seventh Schedule of the Constitution of India.

4. The learned Central Government Standing Counsel has placed before us a copy of the Gazette notification of the National Commission for Allied and Healthcare Professions Act, 20211. Sections 2(d) and 2(j) of the Act define "allied health professional" and "healthcare professional" respectively as follows:-

"(d) "allied health professional" includes an associate, technician or technologist who is trained to perform any technical and practical task to support diagnosis and treatment of illness, disease, injury or impairment, and to support implementation of any healthcare treatment and referral plan recommended by a medical, nursing or any other healthcare professional, and who has obtained any qualification of diploma or degree under this Act, the duration of which shall not be less than two thousand hours spread over a period of two years to four years divided into specific semesters.

.....

2(j) "healthcare professional" includes a scientist, therapist or other professional who studies, advises, researches, supervises or provides preventive, curative, rehabilitative, therapeutic or promotional health services and who has obtained any qualification of degree under this Act, the duration of which shall not be less than three thousand six hundred hours spread over a period of three years to six years divided into specific semesters."

5. Chapter II of the Act provides for constitution of a Commission called the National Commission for Allied and Healthcare Profession for exercising such powers and discharging such duties as may be laid down under the Act. Under Section 10 of the Act, the Commission is empowered to constitute Professional Council for every recognised category of the allied and healthcare professionals specified in the Schedule to the Act. Under Section 11, the duty of the Commission is to take all such steps as it may think fit for ensuring coordinated and integrated development of education and maintenance of the standards of delivery of services under the Act and for purposes of performing its functions, the Commission may frame policies and standards for the

governance of allied and healthcare related education and professional services; regulate the professional conduct, code of ethics and etiquette to be observed by the allied and healthcare professionals; to create and maintain an up-to-date online and live Central Register; provide scope of practice of each profession; provide basic standards of education, courses, curricula, etc.; provide for qualification, uniform entry examination with common counselling for admission into institutions at the diploma, undergraduate, postgraduate and doctoral level; provide for exit or licensing examinations for professional practice or entrance into postgraduate or doctoral level and National Teachers Eligibility Test for academicians, etc. Under Section 12 of the Act, the Central Government is empowered to constitute an Advisory Council to advise the Commission on the issues relating to allied and healthcare professionals.

6. Chapter III of the Act deals with State Allied and Healthcare Council. Section 22 of the Act authorises the State Government to constitute a State Council for exercising such powers and discharging such duties as may be laid down under the Act. Section 29 empowers the State Council to constitute the specified Autonomous Board for regulating the allied and healthcare professionals.

7. Sections 29, 30, 31 and 32 of the Act read as follows:-

"29. (1) The State Council shall, by notification, constitute the following Autonomous Boards for regulating the allied and healthcare professionals, namely,--

(a) Under-graduate Allied and Healthcare Education Board,

(b) Post-graduate Allied and Healthcare Education Board,

(c) Allied and Healthcare Professions Assessment and Rating Board, and

(d) Allied and Healthcare Professions Ethics and Registration Board.

(2) The Autonomous Boards constituted under sub-section (1) shall consist of a president and such number of members from each recognised category as may be specified by the regulations and shall be appointed by the State Government.

(3) The Under-graduate Allied and Healthcare Education Board and Post-graduate Allied and Healthcare Education Board shall determine standards of allied and healthcare education at the graduate, postgraduate level and super-speciality level, develop competency based on dynamic curriculum content, reviewing institutional standards against norms, faculty development, approval of courses of recognised qualification and other functions as entrusted by the State Council for Under Graduate Education and Post Graduate Education.

(4) The Allied and Healthcare Profession Assessment and Rating Board shall determine the procedure for the assessment and rating of allied and healthcare institutions by providing for inspection of institutions, grant permission for establishment of new allied and healthcare institutions and seat capacity, empanelling assessors, imposing warnings or fines, recommend for withdrawal of recognition of institutions and any other function as entrusted by the State Council to ensure maintenance of minimum essential standards.

(5) The Allied and Healthcare Profession Ethics and Registration Board shall maintain online and live State

Registers of all licensed allied and healthcare practitioners in the State, regulate the professional conduct and promotion of ethics and undertake any other function as entrusted by the State Council.

(6) The Under-graduate Allied and Healthcare education or Post-graduate Allied and Healthcare education or Allied and Healthcare Professions Assessment and Rating or Allied and Healthcare Professions Ethics and Registration shall perform such other functions as may be specified by regulations.

30. It shall be the duty of the State Council to take all such steps as it may think fit for ensuring the co-ordinated and integrated development of education and maintenance of the standards of delivery of services under this Act and, for the purposes of performing its functions, the State Council shall-

(a) enter the name of the recognised categories, enforce the professional conduct, code of ethics and etiquette to be observed by the allied and healthcare professionals in the State and take disciplinary action, including the removal of a professionals' name from the State Register;

(b) ensure minimum standards of education, courses, curricula, physical and instructional facilities, staff pattern, staff qualifications, quality instructions, assessment, examination, training, research, continuing professional education;

c) ensure uniform entry examination with common counselling for admission into the allied and healthcare institutions at the diploma, undergraduate, postgraduate and doctoral level under this Act;

(d) ensure uniform exit or licensing examination for the allied and healthcare professionals under this Act;

(e) inspect allied and healthcare institutions and register allied and healthcare professionals in the State;

(f) ensure compliance of all the directives issued by the Commission;

(g) provide minimum standards framework for machineries, materials and services;

(h) approve or recognise courses and intake capacity for courses;

(i) impose fine upon institutions in order to maintain standards; and

(j) perform such other functions as may be entrusted to it by the State Government for implementation of the provisions of this Act.

31. The State Council may constitute as many professional Advisory Boards as may be necessary to examine the issues relating to one or more recognised categories and to recommend the State Council and also to undertake any other activity as may be authorised by the State Council.

32. (1) The State Council shall maintain online and live State Register of persons in separate parts for each of the recognised categories to be known as the State Allied and Healthcare Professionals' Register which shall contain information including the name of person and qualifications relating to any of their respective recognised categories in such manner as may be specified by regulations.

(2) The State Register shall contain the details of academic qualification institutions, training, skill and competencies of Allied and Healthcare Professionals related to their profession in the manner as may be specified by regulations.

(3) The State Register shall be deemed to be a public document within the meaning of the Indian Evidence Act, 1872,

and may be proved by a certified copy provided by the State Council."

8. Chapter V of the Act deals with establishment of new allied and healthcare institutions. Section 40 reads as follows:-

"40. (1) Notwithstanding anything contained in this Act or any other law for the time being in force, on and from the date of commencement of this Act-

(a) no person shall establish an allied and healthcare institution; or

(b) no allied and healthcare institution shall--

(i) open a new or higher course of study or training (including post-graduate course of study or training) which would enable students of each course of study or training to qualify himself for the award of any recognised allied and healthcare qualification; or

(ii) increase its admission capacity in any course of study or training (including post-graduate course of study or training); or

(iii) admit a new batch of students in any unrecognised course of study or training (including post-graduate course of study or training), except with the previous permission of the State Council obtained in accordance with the provisions of this Act:

Provided that the allied and healthcare qualification granted to a person in respect of a new or higher course of study or new batch without previous permission of the State Council shall not be a recognised allied and healthcare qualification for the purposes of this Act:

Provided further that where there is no State Council constituted by a State Government, the Commission shall give the previous permission for the purposes of this section.

(2)(a) Every person or allied and healthcare institution shall, for the purpose of obtaining permission under sub-section (1), submit to the State Council a scheme in accordance with the provisions of clause (b).

(b) The scheme referred to in clause (a) shall be in such form and contain such particulars and be preferred in such manner and be accompanied with such fee as may be prescribed by the Central Government.

(3) On receipt of a scheme under sub-section (2), the State Council may obtain such other particulars as may be considered necessary by it from the person or the allied and healthcare institution concerned, and thereafter, it may,--

(a) if the scheme is defective and does not contain any necessary particulars, give a reasonable opportunity to the person or allied and healthcare institution concerned for making a written representation and it shall be open to such person or allied and healthcare institution to rectify the defects, if any, specified by the State Council;

(b) consider the scheme, having regard to the factors referred to in sub-section (5).

(4) The State Council may, after considering the scheme and after obtaining, where necessary, such other particulars under sub-section (2) as may be considered necessary by it from the person or allied and healthcare institution concerned, and having regard to the factors referred to in sub-section (5), either approve with such conditions, if any, as it may consider necessary or disapprove the scheme and any such approval shall constitute as a permission under sub-section (1):

Provided that no such scheme shall be disapproved by the State Council except after giving the person or allied and

healthcare institution concerned a reasonable opportunity of being heard:

Provided further that nothing in this sub-section shall prevent any person or allied and healthcare institution whose scheme has not been approved by the State Council to submit a fresh scheme and the provisions of this section shall apply to such scheme, as if such scheme had been submitted for the first time under sub-section (2).

(5) The State Council shall, while passing an order under sub-section (4), have due regard to the following factors, namely:--

(a) whether the proposed allied and healthcare institution or the existing allied and healthcare institution seeking to open a new or higher course of study or training, would be in a position to offer the basic standards of education as specified by regulations;

(b) whether the person seeking to establish an allied and healthcare institution or the existing allied and healthcare institution seeking to open a new or higher course of study or training or to increase its admission capacity has adequate financial resources;

(c) whether necessary facilities in respect of staff, equipment, accommodation, training, hospital and other facilities to ensure proper functioning of the allied and healthcare institution or conducting the new course of study or training or accommodating the increased admission capacity have been provided or would be provided as may be specified in the scheme;

(d) whether adequate facilities, having regard to the number of students likely to attend such allied and healthcare institution or course of study or training or as a result of the increased admission capacity, have been provided or would be provided as may be specified in the scheme;

(e) whether any arrangement has been made or programme drawn to impart proper training to students likely to attend such allied and healthcare institution or the course of study or training by the persons having the recognised allied and healthcare qualifications;

(f) the requirement of manpower in the allied and healthcare institution; and

(g) any other factors as may be specified by regulation.

(6) Where the State Council passes an order under sub-section (4), a copy of the order shall be communicated to the person or allied and healthcare institution as the case may be.

Explanation.--For the purposes of this section,--

(a) "person" includes any University, institution or a trust, but does not include the Central Government or State Government;

(b) "admission capacity", in relation to any course of study or training (including post-graduate course of study or training) in an allied and healthcare institution, means the maximum number of students as may be decided by the State Council from time to time for being admitted to such course of study or training."

9. A perusal of the entire Act reveals that it is a comprehensive enactment dealing with the aspect of education, registration and licencing of allied and healthcare professional, regulation of allied and healthcare institutions and other related matters.

10. Given the mandate of the Act in general and of Section 40 of the Act in particular, the petitioner cannot be

permitted to grant recognition to institutions imparting education and training or register any such institution, except in accordance with, and to the extent permissible under the scheme and terms of the Act. No mandamus, as sought for, can be issued.

11. For all the reasons stated above, the writ petition is **dismissed.**

(2023) 3 ILRA 341
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.02.2023

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE MANISH KUMAR, J.

Writ C No. 29501 of 2017

Lucknow Eye Hospital ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Vijay Dixit

Counsel for the Respondents:
C.S.C., A.S.G., Arun Pratap Singh, Madhukar Ojha, Prasoon Srivastava, Sanjeev Singh, Satyajit Banerji, Taranjeet Singh Makker

A. Insurance Law – Unorganized Workers' Social Security Act, 2008 – Rashtriya Swastha Bima Yojana – The beneficiaries, who are non BPL categories of informal Sector, were entitled to hospitalization coverage of upto Rs. 30,000/- for most of the diseases – Insurance policy – Non-payment of premium – Effect – Held, insurance coverage of the insured is as per the premium paid. Existence/continuance of any policy is dependant on payment of premium and non payment of the same would result in the end of the Insurance Policy and claim could be repudiated on that ground alone. (Para 40)

B. Constitution of India – Article 226 – Writ – Judicial review – Scope – Contract between the petitioner and Insurance company – How far can be interfered with – Held, it is a non statutory contract which has an arbitration clause appended to it which had been signed by the petitioner with open eyes. If the petitioner claims any breach of such contract, the appropriate remedy for the petitioner is to approach the alternative Dispute Redressal Forum/ Arbitral Tribunal as mentioned in clause 16.7 of the agreement. (Para 42 and 52)

Writ petition dismissed. (E-1)

List of Cases cited :-

1. Ram Barai Singh and Co. Vs St. of Bihar & ors.; (2015) 13 SCC 592

2. M/s. Surya Constructions Vs The St. of U.P. & ors.; (2019) 16 SCC 794

3. ABL International Ltd. & anr.. Vs Export Credit Guarantee Corp. of India Limited & ors.; (2004) 3 SCC 553

4. Civil Appeal Nos. 3504-3505 OF 2010; Gas Authority of India Ltd. Vs Indian Petrochemicals Corporation Ltd. & ors. decided on 08.02.2023

5. Mah. Chess Association Vs U.O.I. & anr.; (2020) 13 SCC 285

6. Writ-C No. 18949 of 2019; Anand Polyclinic and Trauma Centre & anr. Vs St. of U.P. and 3 others decided on 07.08.2019

7. Writ-C No. 1048 of 2019; Jeevan Dhara Hospital and Research Centre & anr. Vs St. of U.P. & ors. decided on 05.07.2019

8. Interim Order dated 21.05.2019 in Writ-C No.17347 of 2019; M/s Ashirwad Hospital and Research Centre & anr. Vs U.O.I. & ors.

9. Radhakrishna Agarwal Vs St. of Bihar; (1977) 3 SCC 457

10. Banchhanidhi Rath Vs St. of Orissa; (1972) 4 SCC 781

11. Har Shankar Vs Deputy Excise and Taxation Commissioner; (1975) 1 SCC 737

12. Mahavir Auto Stores Vs Indian oil Corp.; (1990) 3 SCC 752

13. St. of U.P. Vs Bridge and Roof Comp. India Ltd; (1996) 6 SCC 22

14. Verigamto Naveen Vs Government of A.P.; (2001) SCC 344

15. ABL International Ltd Vs Export Credit Guarantee Corp of India Ltd; (2004) 3 SCC 553.

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

1. Heard Sri Vijay Dixit, learned counsel for the petitioner, learned Standing Counsel appearing for the State of U.P. i.e. respondent no. 3, Sri Madhukar Ojha, learned counsel for the respondent no. 4, Sri Sanjeev Singh, learned counsel for the respondent no. 6, Sri Satyajit Banerji, learned counsel for respondent no. 7 and there is a request for adjournment on the ground of illness on behalf of Sri Taranjeet Singh Makkar, who appears for the HDFC Ergo General Insurance Co. Ltd-respondent no. 8. Learned counsel for the petitioner has stated that all payments due from respondent no. 8 have been received by the petitioner no lis survives in so far as the respondent no. 8 is concerned, therefore, this Court has proceeded to hear the matter finally.

2. It is the case of the petitioner that for providing social security and welfare of the unorganized workers and for matters connected therewith and incidental thereto, the Government of India introduced the Unorganized Workers' Social Security Act, 2008, and introduced a Welfare Scheme for unorganized workers in the name of Rashtriya Swastha Bima Yojana (hereinafter referred to as 'the RSBY') to cover a number of non BPL categories of informal Sector including street vendors, domestic workers, Beedi workers, building and construction workers and workers who had worked for more than 15 days in MNREGA for covering diseases which involved hospitalization. The beneficiaries under the Scheme were entitled to hospitalization coverage of upto Rs. 30,000/- for most of the diseases and the coverage was extended upto five Members of the same family. The Scheme was sponsored by the Central Government which had to pay 75 per cent of the premium and 25 per cent of the premium was to be paid by the State Government, in most of the States of the Country.

3. Under the RSBY, the ICICI Lombard General Insurance Company Ltd. was empaneled for various districts including the District Lucknow and the ICICI Lombard General Insurance Company Ltd. entered into an agreement with the Government of U.P. to provide health insurance services to the persons below poverty line and also beneficiaries covered under the RSBY. The guidelines were issued by the Government of India and also by the State Government for settlement of claim, the latest being the one issued on 17.07.2012 by the Government of India and under Clause 2(iii), it has been provided that in case the Insurance Company has not received the necessary premium, then also they had to settle the claim of the hospital. However, liberty was granted to the Insurance Company to indicate that payment will be made after

premium is received. The Insurance Company had to make a settlement of the claim within thirty days of receipt of the same but actual payment had to be made after premium was received. Since the ICICI Lombard General Insurance Company Ltd. was nominated for the District of Lucknow, the petitioner-Hospital entered into an agreement with ICICI Lombard General Insurance Company Ltd.

4. The contract between the petitioner and the ICICI Lombard General Insurance Company Ltd. was for the financial year 2012-13, 2013-14 & 2014-15 and each year a fresh contract was signed. The petitioner provided health services to various beneficiaries and bills for payment were raised which was cleared by the Insurance Company up to 31.10.2014. In the year 2015, various Grievance Redressal Committees were constituted by the RSBY in order to effectively address the grievance raised by any of the parties. Since certain claims of the petitioner were not settled by the ICICI Lombard General Insurance Company Ltd. in time, it raised a claim before the respondent no. 5 i.e. the Chairman, District Grievance Redressal Committee/Chief Medical Officer, Lucknow, and also sent repeated e-mails to the respondent no. 5 for settlement of claims.

5. On 06.11.2015, the respondent no. 5 informed the petitioner that the claim of the petitioner-Hospital could not be settled as the Insurance Company had not received the premium from the Government and as soon as the premium is received, the claim will be settled. The respondent no. 5 on being approached in this regard passed an order after hearing both parties on 07.09.2016 directing the respondent no. 6 to make all payments to the petitioner within a fortnight of the order. The payment was still not made by the respondent no. 6 on the ground that the premium have not been paid by the State Government.

6. It is the case of the petitioner that once the respondent no. 5 has passed the order dated 07.09.2016 directing the respondent no. 6 to make payment to the petitioner within a fortnight irrespective of the fact whether the premium was paid to it by the Government or not, it was incumbent upon the Insurance Company to comply with the directions of respondent no. 5 and make payments as are due to the petitioner. When no heed wad paid, the petitioner approached this Court with the following main prayers:-

" I. Issue a writ, order or direction in the nature of certiorari quashing the part of the clause 2(iii) of the Government Order dated 17.07.2012 issued by the Opposite party no. 1, as contained in Annexure No. 1 to the writ petition, as far it empowers the Insurance Company to withheld the payment of the Hospital even after verification of claims till the premium is received by the Insurance Company from the Government.

II. Issue a writ, order or direction in the nature of Mandamus commanding the opposite party nos. 6 to 8 to make the payment of the claims authenticated and verified by the opposite parties immediately alongwith interest @ 8 % p.a. on delayed payment."

7. It has been argued by the learned counsel for the petitioner that because the Insurance Company is taking shelter of the provisions of the Government Order dated 17.07.2012, which entitles it to settle the claim of the Hospital within a month but to refuse to make payment till it receives

premium from the Government. The Government Order dated 17.07.2012 and its relevant clause has also been challenged.

8. The learned Counsel for the petitioner has placed reliance upon Annexure 14 to the writ petition, which is a copy of the decision taken by the C.M.O. as Chairman of the District Grievance Redressal Committee. The representative of the hospital and the Insurance Company were heard and it was observed that the hospital had provided free healthcare services to the beneficiaries under the agreement with the Insurance Company, and that reimbursement of its claim by the Insurance Company had been withheld only on the ground that there was a dispute between the State Nodal Agency and the Insurance Company and no premium has been paid to it by the State Nodal Agency; the Insurance Company could not withhold the amount claimed by the hospital only on the ground that no insurance premium had been paid by the State Government/State Nodal Agency to the Company. The C.M.O. had directed that Insurance Company should pay the hospital bills raised by it within 15 days. The Chief Executive Officer of the State Nodal Agency also wrote to the Insurance Company on 25.11.2016 directing it to make payments of dues to the petitioner as soon as possible.

9. In the counter affidavit filed by the State Government, it has come out that the National Grievance Redressal Committee by its order dated 08.01.2018 had directed payment of Rs.3.63 crores by the State Nodal Agency to the Insurance Agencies for settling of claims of various hospitals. However, these figures were not final as a high-powered committee of U.P. Swasthya Bima Kalyan Samiti had decided to constitute a third-party audit through expert IT professionals of the State Government, to accurately identify the correct figure of smart cards prepared by Insurance Companies and thereafter final payment would be done by the State Nodal Agency to the Insurance Companies. In the agreement dated 01.10.2012, extended from time to time between the Insurance Company and the petitioner, the State Government is not a party and the aforesaid agreement did not contain any clause for holding the State Government responsible for any claim of the petitioner, in any dispute between the State Nodal Agency and the Insurance Company. The Government of India also in its order dated 17.07.2013 had directed all claims to be settled mandatorily by Insurance Company within one month from the receipt of such claims from the treating hospitals and wherever necessary premium had not been received by the Insurance Company and it becomes the reason for delay in claim settlement, the Insurance Company would still take a decision on the claims within the stipulated time limit and convey to the concerned hospital clearly that payment would be made after premium is received.

10. Sri Sanjeev Singh, learned counsel appearing on behalf of the respondent no. 6 has pointed out from the copy of the Contract entered into between the petitioner-Hospital and respondent no. 6 Article 16 which relates to miscellaneous provisions and Clause 7 thereof which relates to the law applicable to the agreement and Arbitration clause. He has pointed out sub Clause (ii) & (iii) of Clause 7 wherein it has been provided that any dispute, controversy or claim arising out of or in relation to the agreement or the breach, termination or irregularity thereof, shall be settled by Arbitration in

accordance with the provisions of Arbitration and Conciliation Act, 1996. The Arbitral Tribunal would be comprised of three Arbitrators, one Arbitrator appointed by each party and one another Arbitrator appointed by mutual consent of the Arbitrators, so appointed. It has been pointed out that the place of Arbitration would be Mumbai and any award whether interim or final shall be made only in Mumbai.

11. It has further been argued by Sri Sanjeev Singh, on the basis of counter affidavit filed on behalf of the respondent no. 6 that in terms of the Advisory issued by the Central Government dated 17.07.2012, the Insurance Company can withhold payment to the Hospital in case it does not receive premium amount. In the absence of payment of premium by the Central and State Government, the Insurance Company had informed the petitioner that the claim raised by it will only be considered after such premium is paid by the Government under the RSBY. It is the case of the Insurance Company that since payment of premium has not been made, the Insurance Company cannot be held liable. Moreover, the petitioner on its own cannot assume that the bills raised by it are genuine and authenticated by the answering respondents, as the claims have not been processed by the Insurance Company in the absence of premium being paid to it. Also, the State Nodal Agency and the Government have raised questions regarding the correct number of verified Smart Card for the beneficiaries under the RSBY and the State Nodal Agency and the Government have been denying the premium amount claimed by the Insurance Company and unless the issue of verification of Smart Cards is settled by the Government/State Nodal Agency, it cannot be said that the entire claim raised by the petitioner-Hospital on the basis of treatment of Smart Card beneficiaries is genuine and authenticated. It has been further been argued that the petitioner has not submitted any document to establish that the entire claim raised by the petitioner has been verified and authenticated by the Insurance Company.

12. It has also been argued that the order passed by the District Grievance Redressal Committee dated 07.09.2016 was passed ignoring the provisions contained in Clause 2(iii) of the Government Order dated 17.07.2012 issued by the Central Government and outstanding premium amount of Rs. 62.63 crores for Phase 4 & 5 of the RSBY still remains to be paid.

13. The arguments advanced by Sri Sanjeev Singh, learned counsel for the respondent no. 6 have been adopted by Sri Satyajit Banerji, learned counsel appearing on behalf of respondent no. 7- National Insurance Company Ltd.

14. Sri Madhukar Ojha, learned counsel for the RSBY, on the other hand, has referred to the counter affidavit and supplementary counter affidavit filed on behalf of respondent no. 4 wherein it has been stated that the ICICI Lombard General Insurance Company Ltd. has participated in the 4th & 5th rounds of RSBY launched by the Government of India in the State of U.P. and the State Nodal Agency was appointed to implement the aforesaid Scheme with the help of Insurance Companies nominated/empaneled in this regard. The State Government/Nodal Agency had to make payment of State's share of premium of 25 per cent to the Insurance Company and the remaining 75 per cent had to be

paid by the Central Government on the basis of verified enrollment data of the identified beneficiaries. The Insurance Company enrolled the 1,06,680 beneficiaries and in the 4th round, raised invoice for payment of Insurance premium to the State Nodal Agency. Only 85,452 beneficiaries were found to be correctly identified, for which the Insurance premium of Rs. 2.78 crores was paid to the ICICI Lombard General Insurance Company Ltd., in between December 2012 to May, 2013.

15. The Insurance Company aggrieved by the decision of the State Nodal Agency regarding number of verified beneficiaries Smart Cards and premium paid on that basis approached the State Grievance Redressal Committee for rectifying the same. The State Grievance Redressal Committee found genuine grant of enrolled beneficiaries as 84,291, for which Rs. 2.77 crores was to be paid to the Insurance Company and therefore, Rs. 1,00,000/- that was paid in excess by the State Nodal Agency was to be recovered from the Insurance Company.

16. The Insurance Company also participated in the 5th round of RSBY in the State of U.P. and the Insurance Company provided enrollment to 75,587 beneficiaries for which Rs. 1.72 crore was claimed as premium amount. On verification by the State Nodal Agency, the figure of 53,810 beneficiaries was found to be correct for which premium of Rs. 1.23 crores was paid to the Insurance Company between March 2014 to March, 2015. The Insurance Company again approached the State Grievance Redressal Committee for rectifying the alleged wrong verification but it was found that Rs. 6.03 crore was recoverable from the ICICI Lombard General Insurance Company Ltd. and Rs. 9.66 crore was payable to the respondent no. 6 at the end of 5th round of RSBY. As per the orders of the National Grievance Redressal Committee dated 08.01.2018, an amount of Rs. 3.63 crore has to be conditionally paid to the Insurance Company on production of affidavit that this amount would be used only to pay the outstanding dues of Hospitals like that of the petitioner and after due verification of the Smart Card, prepared by the Insurance Company of identified beneficiaries.

17. The High powered Committee of U.P. Swastha Bima Kalyan Samiti had decided to constitute a Third Party Audit through expert IT professionals of the State Government to accurately access the correct figure of Smart Cards prepared by the Insurance Companies and thereafter final payments shall be made by the State Nodal Agency to the Insurance Company concerned.

18. In the counter affidavit filed by the State Nodal Agency, the respondent no.4, it has been stated that the Insurance Company has generated several fraudulent smart cards for unidentified and ineligible beneficiaries, and that respondent no.4 has made payment of the enrolled beneficiaries by the Insurance Company after due verification process which has been found to be correct by the Social Audit Team of the Government of India constituted on the directions of the Secretary, Health and Family Welfare, Union of India, for the purpose of verification of enrolment software processes. The verification process adopted by the State Nodal Agency was challenged by the Insurance Company before the State Grievance Redressal Committee and State Grievance Redressal Committee made minor enhancement in the

verified figures and such order was later on upheld by the National Grievance Redressal Committee. A copy of the recommendations of the Social Audit Team have been filed as Annexure to the counter affidavit where it was noted that rejection by the State Nodal Agency of the figures provided by the Insurance Companies for reimbursement was mainly on account of change in the name of the head of the family, other than one indicated in the pre-enrolment data. The Social Audit Team had found the Insurance Company's claims unconvincing. The Committee observed that the enrolment figure for all such smart cards where there was a change in the name of the head of the family should be disallowed, and no premium was required to be paid to the concerned Insurance Company in all such cases. It was also found that the Insurance Company had issued multiple smart cards on single Unique Relationship Number (URN). The State Nodal Agency had stressed that these duplicate cards were the result of not following of prescribed procedures by the Insurance Company in the field during enrolment as such the possibility of mischief could not be ruled out. The team observed that the issue of multiple cards under the same URN is prohibited. The State Nodal Agency was directed to identify beneficiaries of duplicate cards by analysis of the URN data and payment should be made to the Insurance Companies only for one single card thereafter by the State Nodal Agency. Also, delivery of smart cards to beneficiaries on the spot i.e. on the date of enrolment itself was not ensured by the Insurance Company. Insurance companies were demanding premium on pro rata basis for all such cards, because according to them, such cards had been delivered to the beneficiaries. The State Nodal Agency emphasised that the Tender Document itself provided that payment of premium for only delivered cards is to be made on pro rata basis. The onus to prove the delivery of cards to the correct beneficiary was not delayed beyond the specified period by the Insurance Company.

19. With regard to the agreement dated 01.10.2012, which has been made the basis of the writ petition, it has been argued on behalf of the State Nodal Agency that the agreement was exclusively between the petitioner and the Insurance Company and the State Nodal Agency was not a party to the said agreement. With regard to the Government of India Advisory dated 17.07.2012, it has been submitted that the Insurance Company has to settle/verify all claims mandatorily within one month of receipt of such claims from the Hospitals, and even if necessary premium has not been received by the Insurance Company, it may still verify the claim but make payment after premium is received. The Insurance Company has not verified the claim of the petitioner. Although, no such advisory was issued by the Government to withhold even verification of the hospital's claim.

20. The Social Audit Team constituted by the State Nodal Agency is on the directions of the Secretary, Health and Family Welfare, Union of India for the purpose of verification of enrollment, software processing especially with respect to possibility of fictitious enrollment, examination of enrolled figures by the Insurance Companies. The verification process adopted by the State Nodal Agency was challenged in State Grievance Redressal Committee, which was disposed of with minor enhancement in verified figure of beneficiaries and such order was

upheld by the National Grievance Redressal Committee. The payment cannot be made by the State Nodal Agency without verification of beneficiaries Smart Card as prepared by the Insurance Companies.

21. In the supplementary counter affidavit filed on behalf of respondent no. 4, subsequent developments have been mentioned wherein the order passed by the District Grievance Redressal Committee and the order passed by the State Nodal Agency to make payment only after verification, has been brought on record and it has been pointed out that none of the orders so passed have been challenged by any of the Insurance Companies, the respondent nos. 6, 7 & 8 before any higher Forum i.e. the National Grievance Redressal Committee or any court of law.

22. In a supplementary counter affidavit filed by the State Nodal Agency, it has been stated that during the operation of the RSBY Scheme, the ICICI Lombard General Insurance Company had reported certain anomalies to the State Nodal Agency. On further enquiry, discrepancies were found true and the same find mention in the report and in the observations of the NGRC regarding possibility of fraudulent claims raised during enrolment process. The State Nodal Agency, after due verification and enquiry of all such data requested the Government of U.P., which has released 7.27 crores of the State's share in favour of various Insurance Companies to be paid to various hospitals/service providers on 26.03.2021.

23. Sri Sanjeev Singh has stated on the basis of affidavit filed by the parties that although the respondent no. 6 has claimed more than Rs. 64 crores as premium. The State Nodal Agencies and the State Governments have admitted an amount of around Rs. 10 crores only, which contains part of State share and Central Government's share.

24. Certain other paragraphs of the supplementary counter affidavit have been pointed out by Sri Sanjeev Singh to show that there is a dispute with regard to premium being paid and since there is a dispute with regard to the premium being paid, the respondent no. 6 has rightly withheld the payment to the petitioner for treatment of beneficiaries and claims made by it. In any case, if the petitioner is aggrieved by any breach of condition of the agreement between the Insurance Company and the petitioner, the appropriate remedy would be under Clause 16.7 of the agreement.

25. Learned counsel for the petitioner has placed reliance upon the judgment rendered by Hon'ble Supreme Court in the case of **Ram Barai Singh and Co. vs. State of Bihar and Ors. [(2015) 13 SCC 592]** wherein it has been observed that the constitutional remedy of writ petition is always available to an aggrieved party and an arbitration clause in an agreement between the parties cannot ipso facto render a writ petition not maintainable.

26. Learned counsel for the petitioner has also placed reliance upon the judgment rendered by the Hon'ble Supreme Court in **M/s. Surya Constructions vs. The State of U.P. and Ors. [(2019) 16 SCC 794]** where the amount payable to the appellant being wholly undisputed and in fact admitted in contempt proceedings before the High Court, still the High Court refused to interfere in the matter on the ground of contractual obligations and disputed

questions of facts. Hon'ble Supreme Court placed reliance upon the judgment rendered in *ABL International* **Ltd. and Anr. vs. Export Credit Guarantee Corporation of India Limited and Ors. [(2004) 3 SCC 553]** to say that once the amount that was payable was admitted, in pursuance of agreement entered into between the parties, then it was not right for the High Court to refuse the relief prayed for by the appellant and to relegate the parties to remedies available under the agreement.

27. Learned counsel for the petitioner has also placed reliance upon the judgment of Hon'ble Supreme Court in the case of **Gas Authority of India Ltd. vs. Indian Petrochemicals Corporation Ltd. and Ors.** passed in CIVIL APPEAL Nos. 3504-3505 OF 2010, decided on 08.02.2023 and paragraph 20 thereof, where the Court observed that although the dispute arises from a commercial contract, the writ petition challenging the clauses of such contract was maintainable as it was not disputed that **Gas Authority of India Ltd.** is a Public Sector Undertaking and qualifies under the definition of State under Article 12 of the Constitution. At the time of entering into contract, GAIL was enjoying a monopolistic position with respect to the supply of natural gas in the country. The Indian Petrochemicals Corporation Ltd., having incurred a significant expense in setting up appropriate infrastructure, had no choice but to enter into agreement with GAIL. Thus, there was a clear public element involved in the dealings between the parties and writ jurisdiction can be exercised when the State, even in its contractual dealings, fails to exercise a degree of fairness or practices any discrimination.

28. Learned counsel for the petitioner has also placed reliance upon the judgment rendered by Hon'ble Supreme Court in the case of **Maharashtra Chess Association vs. Union Of India and Anr. [(2020) 13 SCC 285]** and paragraph 11 thereof, where it has been held that Article 226 of the Constitution confers on High Courts the power to issue writs, and consequently, the jurisdiction to entertain actions for the issuance of writs not only for enforcement of fundamental rights but for any other purpose.

29. Learned counsel for the petitioner has referred to various paragraphs in the said judgment to say that the Hon'ble Supreme Court has reiterated that the High Court's powers are plenary in nature and are purely discretionary and no limits can be placed upon their discretion and that the bar relating to alternative remedy has to be considered to be a rule of self imposed limitation and it is essentially a Rule of policy, convenience and discretion and never a Rule of law. Despite existence of an alternative remedy, it is within the jurisdiction or discretion of the High Court to grant relief under Article 226 of the Constitution.

30. The learned Counsel for the petitioner has pointed out from the Supplementary Counter Affidavit filed by the State Nodal Agency that a Coordinate Division Bench at Allahabad had directed payment to be made to various hospitals/petitioners by the Insurance Company, and direction has been issued also for payment of interest at the rate of 9% per annum for delay in releasing such amount. One such writ petition, namely, Writ-C No.18949 of 2019 was decided on 07.08.2019.

31. This Court has gone through Annexures 5, 6 and 7 pointed out by the counsel for the petitioner. It is apparent from SCA 5, which is an order dated 07.08.2019 passed in Writ-C No. 18949 of 2019, ***Anand Polyclinic and Trauma Centre and another versus State of U.P. and three others,*** that the writ petition was filed for a direction to the Oriental Insurance Company to pay more than Rs.13 lakhs claimed by the petitioners under the RSBY within a reasonable time. The Court passed an Interim Order on 08.07.2019 directing the Managing Director to appear and explain why a direction be not issued to make payment with interest at the rate of 12% per annum, and for exemplary cost for compelling the petitioner to approach the Court. In pursuance of the same, the Deputy Manager was present in Court and filed an affidavit that the amount had been paid through NEFT/ RTGS after deducting TDS. The Court directed interest to be paid from December 2018 as the Chief Executive Officer of State Nodal Agency had directed such payment to be made to the hospital on 05.11.2018.

32. The order dated 08.08.2019 is not a judgement as no issue was raised regarding maintainability of the writ petition for contractual obligations when the agreement between the parties, none of whom was State within the meaning of Article 12 of the Constitution of India, clearly provided for arbitration for settlement of disputes arising out of contract.

33. This Court has also gone through Interim Order passed by the same Coordinate Bench dated 05.07.2019 in Writ-C No. 1048 of 2019:***Jeevan Dhara Hospital and Research Centre and another versus State of U.P. and three others***, and Interim Order dated 21.05.2019 in Writ-C No.17347 of 2019: ***M/s Ashirwad Hospital and Research Centre and another versus Union of India and others.*** All the Interim Orders refer to the directions issued by the State Grievance Redressal Committee to the Regional Manager of Oriental Insurance company to make payment to the petitioner's hospitals and, thereafter, direct to make payments within one month or to appear in person before the Court. None of such interim orders are binding upon this Court.

34. This Court has considered the judgments as have been cited before us and finds that the judgment in the case of **Ram Barai Singh and Co. (supra)**, a writ petition was filed for interest on delayed refund of security deposit and against direction for recovery of labour escalation costs after completion of contract and the Hon'ble Supreme Court held that the High Court failed to notice that the agreement itself had worked out long back and in the earlier round of litigation as well as in the instant round of litigation, the respondents never raised any objection on the basis of arbitration clause, therefore, the High Court should not have remitted the matter on the ground of alternative remedy where no such objection was raised by the respondent at any stage. Availability of arbitration clause did not always forfeit the right of aggrieved party to file a writ petition. This Court has carefully considered the facts and finds that in the case of **Ram Barai Singh and Co. (supra)**, it was a question of satisfactory performance of contract entered into between the Superintending Engineer of the Government of Bihar and the petitioner-company.

35. In the case of **M/s. Surya Constructions (supra)**, the admitted dues for extra work done by the petitioner for

U.P. Jal Nigam was claimed. The High Court had asked the U.P. Jal Nigam to decide the representation of the petitioner and in the decision on such representation, it had come out that the dues were admitted and were not being paid on account of various reasons.

36. In the case of **Gas Authority of India Ltd.** (supra), the dispute was between two Public Sector Undertakings, GAIL being the monopoly holder in supply of gas had entered into a contract for supply for such natural gas with IPCL which had set up and installed a Plant investing more than Rs. 4500/- crore in laying down pipelines between Hazira and the Plant at Gandhar. There was a dispute regarding the methodology of supply of gas and the price of gas. Hon'ble Supreme Court therefore in the context of such facts had made observations in paragraph 20, which has been read before us by the counsel for the petitioner.

37. In the case of **Maharashtra Chess Association (supra)**, a private agreement was entered into between the appellant and affiliated Society registered under the Societies Registration Act, 1860 and the second respondent, also a registered Society and the Governing Authority for Chess in India in the form of the Constitution and bye-laws of the latter. The question was with regard to the place/jurisdiction of Court to entertain the settlement of any dispute. The Court had observed that where several courts would have jurisdiction to try the subject matter of the dispute, the parties to a Contract can stipulate that a suit be brought exclusively before one of the several courts, to the exclusion of the others. The judgment rendered in the case of **Maharashtra Chess Association (supra)**, is clearly inapplicable to the facts of the petitioner's case.

38. This Court has found from the arguments raised by the counsel for the parties and from the affidavits filed on their behalf that there is a serious dispute with regard to the verification of the beneficiaries/Smart Cards in between the State Nodal Agency and the Insurance Company. Learned Counsel for the Insurance Company, on the other hand, says that since premium has not been given due to dispute being raised regarding verification of Smart Card beneficiaries, it shall not make any payment to the petitioner.

39. The petitioner has no doubt challenged clause 2(iii) of the Central Government Advisory dated 17.07.2012 which empowered and entitle the Insurance Company to withhold payment of compensation in case of non-payment of premium. But this Court is of the opinion that such an Advisory/policy decision is of a routine nature which is found in all Insurance Policies.

40. Insurance coverage of the insured is as per the premium paid. Existence/continuance of any policy is dependant on payment of premium and non payment of the same would result in the end of the Insurance Policy and claim could be repudiated on that ground alone. Therefore, the clause in the Government of India advisory is not arbitrary or unreasonable or violative of Article 14 of the Constitution.

41. Learned counsel for the petitioner has pointed out that the petitioner is claiming payment for services rendered by it under the agreement.

42. While considering the question of scope of judicial review of action by the State in a matter arising from a contract, and what is the effect of the contract not being statutory, and as to what constitutes public law element to bring in judicial review in contractual matters, the Supreme Court in *M.P. Power* (supra), considered the observations made by it in ***Radhakrishna Agarwal versus State of Bihar (1977) 3 SCC 457***; where petitions were filed against orders of the State Government revising the rate of royalty under a lease and the cancellation of the lease on various grounds. The Court was of the opinion that the only question which normally arose in such cases was as to whether the action complained of was in conformity with the agreement. It referred to the earlier judgements rendered, where the Supreme Court had observed that any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant, cannot be enforced by the machinery of a writ under Article 226 of the Constitution.

43. In ***Banchhanidhi Rath versus State of Orissa (1972) 4 SCC 781***, the Supreme Court had observed that if a right is claimed in terms of a contract such a right cannot be enforced in a writ petition. In ***Har Shankar versus Deputy Excise and Taxation Commissioner (1975) 1 SCC 737***; the Constitution Bench had observed that *"a writ petition is not an appropriate remedy for impeaching contractual obligations.'*

44. The Court also took the view that it is the contract and not the executive power regulated by the Constitution which governs the relations of the parties. The Supreme Court in the case of *M.P. Power* (supra) referred to the observations made by it in ***Mahavir Auto Stores Versus Indian oil Corporation*** (1990) 3 SCC 752; where while referring to judgements in earlier cases, the Supreme Court had observed that the rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the Rule of Law applicable in situation or action by the State instrumentality in dealing with the citizens. Even though the rights of citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice equality and non-discrimination in the type of transactions and nature of the dealing as evident in the facts and circumstances of a particular case.

45. In ***State of U.P. versus Bridge and Roof Company India Ltd (1996) 6 SCC 22***; the Supreme Court was dealing with a case of a writ petition filed by the respondent therein which was a Public Sector Corporation seeking payment allegedly due from the appellant State. The Court noted that the contract in question contained articles providing inter-alia for settlement of disputes by reference to arbitration. The very resort to Article 226 was found to be misconceived in the circumstances. The Court observed as follows:-

"Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or maybe, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated,

in a writ petition. That is a matter either for arbitration as provided by the contract or for the civil court, as the case maybe. Whether any amount is due to the respondent from the appellant - Government under the contract and, if so, how much and further the question whether retention or refusal to pay any amount by the Government is justified or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition."

(emphasis supplied)

46. In *M.P. Power (supra),* the Supreme Court also considered judgement rendered in **Verigamto Naveen Vs Government of A.P. (2001) SCC 344;** which involved mining leases granted to a Corporation and sub lease, which was permitted by the Government which permission was later on sought to be withdrawn. The Supreme Court observed in paragraph 21 as follows: -

"21 ..... where the breach of contract involves breach of statutory obligation, when the order complained of was made in exercise of the statutory power by a statutory authority, though cause of action arises out of or pertains to contract, brings it within the sphere of public law because the power exercised is apart from contract. The freedom of the Government to enter into business with anybody it likes is subject to the condition of reasonableness and fair play as well as public interest. After entering into a contract, in cancelling the contract which is subject to the terms of the statutory provisions, as in the present case, it cannot be said that the matter falls purely in a contractual field..."

47. In paragraph 46 of the judgement in *M.P. Power* (supra), the Supreme Court dealt with the observations made in *ABL International* **Ltd versus Export Credit Guarantee Corp of India Ltd (2004) 3 SCC 553;** which involved a company incorporated under the Companies Act repudiating insurance claim made by the writ petitioner, in paragraph 27 as follows: -

"27. From the above discussion of ours, the following legal principles emerge as to the maintainability of the writ petition:

(a) In an appropriate case, a writ petition as against the State Or an instrumentality of the State arising out of a contractual obligation is maintainable.(b)Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule. (C) A Writ petition involving a consequential relief of monetary claim is also maintainable."

48. At the same time the Supreme Court in paragraph 28 of the same judgement had made the following observations : -

"28. However, while entertaining and objection as to the maintainability of the writ petition under Article 226 of the Constitution of India, the Court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. The High Court having regard to the facts of the case has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. - - - And this plenary right of the High Court to issue a prerogative Writ will not normally be exercised by the court

to the exclusion of other available remedies unless such action of the state or its instrumentalities is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it fit and necessary to exercise the said jurisdiction."

(emphasis supplied)

49. The Supreme Court steered clear of the criticism that it was not following the principles laid down by it in the *State of U.P. versus Bridge and Roof Corporation* (supra), by noting that in the said case there was a contract which contained an arbitration clause but in *ABL International* (supra) there was no arbitration clause.

50. The Supreme Court in the case of *M.P. Power* (supra) thereafter considered recent developments in law and culled out certain principles where High Court in exercise of the powers under Article 226 can interfere in contractual matters also. It observed in paragraph 55 to 60 as follows: -

"55. We may now notice the judgment of this court in Joshi Technologies International Inc. v. Union of India, which is also relied upon by the learned Additional Solicitor General. The said case actually involved the complaint of the writ petitioner therein that it was entitled to the benefit of Section 42 of the Income Tax Act, 1961 which provided for certain deductions. The petitioner had entered into an agreement with the respondent, the Government of India. The case of the respondent, inter alia, was one denying the case of the petitioner that the omission of Section 42 was by oversight. The prayer in the writ petition itself inter alia was essentially to declare entitlement to the deduction under Section 42, inter alia. It is while dealing with the said case that this court no doubt proceeds to, inter alia, lay down as following after adverting to ABL limited (supra) also:--"69. The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, "normally", the Court would not exercise such a discretion:

69.1. The Court may not examine the issue unless the action has some public law character attached to it.

69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances."

"70. Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority

with private parties, can be summarised as under:

70.1. At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practise some discriminations.

70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the Court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.

70.4. Writ jurisdiction of the High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so : and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.

70.6. Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

70.7. Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if it can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

70.8. If the contract between private party and the State/instrumentality and/or agency of the State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction.

70.9. The distinction between public law and private law element in the contract with the State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract, this Court has maintained the position that writ petition is not maintainable. The dichotomy between public law and private law rights and remedies would depend on the factual matrix of each case and the distinction between the public law remedies and private law field, cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties

bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision-making process or that the decision is not arbitrary.

70.10. Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.70.11. The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes."

56. In State of Kerala v. M.K. Jose, the specific question with which we are concerned with, namely, entertaining a writ petition in a contractual matter and where the specific question was the validity of the termination of the contract, fell for consideration. We may notice the following:

"13. A writ court should ordinarily not entertain a writ petition, if there is a breach of contract involving disputed questions of fact. The present case clearly indicates that the factual disputes are involved."

57. Thereafter, the court went on to consider in detail the judgment of this Court in ABL (supra) and found that it was a case where the court granted relief as the facts were absolutely clear from the documentary evidence and it pertained to interpretation of such clauses of the contract of insurance. We need notice only paragraph 20 in M.K. Jose (supra). It reads as under:

"20. We have referred to the aforesaid authorities to highlight under what circumstances in respect of contractual claim or challenge to violation of contract can be entertained by a writ court. It depends upon facts of each case. The issue that had arisen in ABL International [(2004) 3 SCC 553] was that an instrumentality of a State was placing a different construction on the clauses of the contract of insurance and the insured was interpreting the contract differently. The Court thought it apt merely because something is disputed by the insurer, it should not enter into the realm of disputed questions of fact. In fact, there was no disputed question of fact, but it required interpretation of the terms of the contract of insurance. Similarly, if the materials that come on record from which it is clearly evincible, the writ court may exercise the power of judicial review but, a pregnant one, in the case at hand, the High Court has appointed a Commission to collect the evidence, accepted the same without calling for objections from the respondent and quashed the order of termination of contract."

(emphasis supplied)

58. In State of U.P. v. Sudhir Kumar Singh, the first respondent the successful tenderer had worked the contract for a year when he was visited with cancellation. This Court exhaustively referred to the earlier case law including

ABL (supra) and Joshi Technology (supra) and held, inter alia, as follows:--"23. It may be added that every case in which a citizen/person knocks at the doors of the writ court for breach of his or its fundamental rights is a matter which contains a "public law element", as opposed to a case which is concerned only with breach of contract and damages flowing therefrom. Whenever a plea of breach of natural justice is made against the State, the said plea, if found sustainable, sounds in constitutional law as arbitrary State action, which attracts the provisions of Article 14 of the Constitution of India - see Nawabkhan Abbaskhan v. State of Gujarat, (1974) 2 SCC 121 at paragraph 7. The present case is, therefore, a case which involves a "public law element" in that the petitioner (Respondent No. 1 before us) who knocked at the doors of the writ court alleged breach of the audi alteram partem rule, as the entire proceedings leading to cancellation of the tender, together with the cancellation itself, were done on an ex parte appraisal of the facts behind his back."

59. We have already concluded that PPA is not a Statutory Contract. However, that would not be the end of enquiry. Dr. A.M. Singhvi, learned Senior Counsel, would point out that the contract, not being a statutory contract, assumes relevance only for the purpose of deciding as to whether the Court should relegate the writ applicant, to alternate remedies. In other words, while the Court would retain its discretion to entertain the petition or decline to do so, in the facts of each case, there is no absolute taboo against the Court granting relief, even if the challenge to the termination of a contract is made in the case of a contract, which is not statutory in nature, when the offending party is the State. In other words, the contention is that the law in this field has witnessed an evolution and, what is more, a revolution of sorts and a transformatory change with a growing realisation of the true ambit of Article 14 of the Constitution of India. The State, he points out, cannot play the Dr. Jekyll and Hyde game anymore. Its nature is cast in stone. Its character is inflexible. This is irrespective of the activity it indulges in. It will continue to be haunted by the mandate of Article 14 to act fairly. There has been a stunning expansion of the frontiers of the Court's jurisdiction to strike at State action in matters arising out of contract, based, undoubtedly, on the facts of each case. It remains open to the Court to refuse to reject a case, involving State action, on the basis that the action is, per se, arbitrary.

60. We may cull out our conclusions in regard to the points, which we have framed:

i. It is, undoubtedly, true that the writ jurisdiction is a public law remedy. A matter, which lies entirely within a private realm of affairs of public body, may not lend itself for being dealt with under the writ jurisdiction of the Court.

ii. The principle laid down in Bareilly Development Authority (supra) that in the case of a non-statutory contract the rights are governed only by the terms of the contract and the decisions, which are purported to be followed, including Radhakrishna Agarwal (supra), may not continue to hold good, in the light of what has been laid down in ABL (supra) and as followed in the recent judgment in Sudhir Kumar Singh (supra).

iii. The mere fact that relief is sought under a contract which is not statutory, will not entitle the respondent-State in a case by itself to ward-off scrutiny of its action or inaction under the contract,

if the complaining party is able to establish that the action/inaction is, per se, arbitrary.

iv. An action will lie, undoubtedly, when the State purports to award any largesse and, undoubtedly, this relates to the stage prior to the contract being entered into [See R.D. Shetty (supra)]. This scrutiny, no doubt, would be undertaken within the nature of the judicial review, which has been declared in the decision in Tata Cellular v. Union of India.

v. After the contract is entered into, there can be a variety of circumstances, which may provide a cause of action to a party to the contract with the State, to seek relief by filing a Writ Petition.

vi. Without intending to be exhaustive, it may include the relief of seeking payment of amounts due to the aggrieved party from the State. The State can, indeed, be called upon to honour its obligations of making payment, unless it be that there is a serious and genuine dispute raised relating to the liability of the State to make the payment. Such dispute, ordinarily, would include the contention that the aggrieved party has not fulfilled its obligations and the Court finds that such a contention by the State is not a mere ruse or a pretence.

vii. The existence of an alternate remedy, is, undoubtedly, a matter to be borne in mind in declining relief in a Writ Petition in a contractual matter. Again, the question as to whether the Writ Petitioner must be told off the gates, would depend upon the nature of the claim and relief sought by the petitioner, the questions, which would have to be decided, and, most importantly, whether there are disputed questions of fact, resolution of which is necessary, as an indispensable prelude to the grant of the relief sought. Undoubtedly, while there is no prohibition, in the Writ Court even deciding disputed questions of fact, particularly when the dispute surrounds demystifying of documents only, the Court may relegate the party to the remedy by way of a civil suit.

viii. The existence of a provision for arbitration, which is a forum intended to quicken the pace of dispute resolution, is viewed as a near bar to the entertainment of a Writ Petition (See in this regard, the view of this Court even in ABL (supra) explaining how it distinguished the decision of this Court in State of U.P. v. Bridge & Roof Co., by its observations in paragraph-14 in ABL (supra)].

ix. The need to deal with disputed questions of fact, cannot be made a smokescreen to guillotine a genuine claim raised in a Writ Petition, when actually the resolution of a disputed question of fact is unnecessary to grant relief to a writ applicant.

x. The reach of Article 14 enables a Writ Court to deal with arbitrary State action even after a contract is entered into by the State. A wide variety of circumstances can generate causes of action for invoking Article 14. The Court's approach in dealing with the same, would be guided by, undoubtedly, the overwhelming need to obviate arbitrary State action, in cases where the Writ remedy provides an effective and fair means of preventing miscarriage of justice arising from palpably unreasonable action by the State.

xi. Termination of contract can again arise in a wide variety of situations. If for instance, a contract is terminated, by a person, who is demonstrated, without any need for any argument, to be the person, who is completely unauthorised to cancel the contract, there may not be any necessity to drive the party to the unnecessary ordeal of a prolix and avoidable round of litigation. The intervention by the High

Court, in such a case, where there is no dispute to be resolved, would also be conducive in public interest, apart from ensuring the Fundamental Right of the petitioner under Article 14 of the Constitution of India. When it comes to a challenge to the termination of a contract by the State, which is a non-statutory body, which is acting in purported exercise of the powers/rights under such a contract, it would be over simplifying a complex issue to lay down any inflexible Rule in favour of the Court turning away the petitioner to alternate Fora. Ordinarily, the cases of termination of contract by the State, acting within its contractual domain, may not lend itself for appropriate redress by the Writ Court. This is, undoubtedly, so if the Court is duty-bound to arrive at findings, which involve untying knots, which are presented by disputed questions of facts. Undoubtedly, in view of ABL Limited (supra), if resolving the dispute, in a case of repudiation of a contract, involves only appreciating the true scope of documentary material in the light of pleadings, the Court may still grant relief to an applicant. We must enter a caveat. The Courts are today reeling under the weight of a docket explosion, which is truly alarming. If a case involves a large body of documents and the Court is called upon to enter upon findings of facts and involves merely the construction of the document, it may not be an unsound discretion to relegate the party to the alternate remedy. This is not to deprive the Court of its constitutional power as laid down in ABL (supra). It all depends upon the facts of each case as to whether, having regard to the scope of the dispute to be resolved, whether the Court will still entertain the petition.

xii. In a case the State is a party to the contract and a breach of a contract is alleged against the State, a civil action in the appropriate Forum is, undoubtedly, maintainable. But this is not the end of the matter. Having regard to the position of the State and its duty to act fairly and to eschew arbitrariness in all its actions, resort to the constitutional remedy on the cause of action, that the action is arbitrary, is permissible (See in this regard Kumari Shrilekha Vidyarthi v. State of U.P.). However, it must be made clear that every case involving breach of contract by the State, cannot be dressed up and disguised as a case of arbitrary State action. While the concept of an arbitrary action or inaction cannot be cribbed or confined to any immutable mantra, and must be laid bare, with reference to the facts of each case, it cannot be a mere allegation of breach of contract that would suffice. What must be involved in the case must be action/inaction, which must be palpably unreasonable or absolutely irrational and bereft of any principle. An action, which is completely malafide, can hardly be described as a fair action and may, depending on the facts, amount to arbitrary action. The question must be posed and answered by the Court and all we intend to lay down is that there is a discretion available to the Court to grant relief in appropriate cases.

xiii. A lodestar, which may illumine the path of the Court, would be the dimension of public interest subserved by the Court interfering in the matter, rather than relegating the matter to the alternate Forum.

xiv. Another relevant criteria is, if the Court has entertained the matter, then, while it is not tabooed that the Court should not relegate the party at a later stage, ordinarily, it would be a germane consideration, which may persuade the Court to complete what it had started, provided it is otherwise a sound exercise of

jurisdiction to decide the matter on merits in the Writ Petition itself.

xv. Violation of natural justice has been recognised as a ground signifying the presence of a public law element and can found a cause of action premised on breach of Article 14. [See Sudhir Kumar Singh (supra)]."

(emphasis supplied)

51. This Court has carefully gone through the agreement and finds that it is an agreement between a private Insurance Company and the petitioner and the main relief sought by the petitioner is with respect to giving of a direction to the Insurance Company to make payment to the petitioner for the service provided in treating the beneficiaries.

52. This Court also finds that it is a non statutory contract which has an arbitration clause appended to it which had been signed by the petitioner with open eyes. If the petitioner claims any breach of such contract, the appropriate remedy for the petitioner is to approach the alternative Dispute Redressal Forum/Arbitral Tribunal as mentioned in clause 16.7 of the agreement signed between the private Insurance Company and the petitioner. The State Government is not a party to such Contract.

53. This Court therefore finds no good ground to show interference moreso, looking into the disputed questions of fact raised in the form of various affidavits filed by the parties.

54. In the result, the writ petition stands **dismissed**, leaving it open for the petitioner to approach the appropriate forum.

(2023) 3 ILRA 360
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.01.2023

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ C No. 30151 of 2022

Piyush Kumar Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Surya Prakash Pathak

Counsel for the Respondents:
C.S.C.

A. Economic Weaker Section Scheme – EWS Certificate – Cancellation by the Tahsildar – Office Memorandum dated 31.01.2019 – Clause 4.1 and 4.2 – Word 'family' – Meaning – Total residential plot owned by the family of the petitioner is much more than the maximum asset specified in paragraph 4.1 of the EWS Scheme – Effect – Test to determine EWS status – The property held by a "Family" in different locations or different places/cities would be clubbed while applying the land or property holding test to determine EWS status. (Para 15 and 16)

B. Economic Weaker Section Scheme – False claim made to obtain EWS Certificate – Effect – Held, if any person gets an appointment on the basis of such false claim, his/her services shall be terminated invoking conditions contained in the offer of appointment – Any vacillation or dilution of the strict provisions of the EWS scheme regarding issuance of EWS certificate would hit the root of the very purpose of the EWS scheme rendering such an act abhorrent

to the scheme of the Constitution of India. (Para 17 and 18)

Writ petition dismissed. (E-1)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Jayant Banerji, J.)

1. Heard learned counsel for the petitioner and the learned standing counsel.

2. Petitioner has filed a supplementary affidavit dated 31.01.2023, which is taken on record.

3. The petitioner had moved an Amendment Application No.2 of 2022 dated 09.11.2022 which was allowed by order dated 08.12.2022 but the amendments were not incorporated. On the request of learned counsel for the petitioner, today we permitted him to incorporate the amendments in the writ petition.

4. This writ petition has been filed praying for the following relief:

"I. Issue a writ order or direction in the nature of mandamus by direct the respondents nod. 2 & 3 to renew the E.W.S. certificate of the petitioner.

(I-a) Issue a writ order or direction in the nature of Certiorari quashing the order dated 23rd of June 2022 passed by respondent no.3 whereby his application for grant of E.W.S. (Economically Weaker Section) certificate has been rejected.

II. Issue a writ order or direction in the nature of mandamus by directing the respondent no.3 to lodged the first information report against the Lekhpal, Jogendra Singh Solanki."

5. Briefly stated facts of the present case are that the petitioner had earlier obtained a certificate of "Economically Weaker Section" (EWS) being Certificate No.1252 dated 28.09.2021 valid for the year 2021-22, on a declaration made by him that annual income of his family is below eight lacs rupees and his family does not possess any of the specified assets. Subsequently, some complaint was made and a verification was carried in which it was found by the authorities that the petitioner's family possesses a 183 square yard residential house with 100 square yards "Gher' at village Khandeha and also owns a residential plot of 150 square yards in village Chhajjupur which is much more than the maximum limit of area of land/ house prescribed to be owned by a family of a person intending to obtain a certificate of EWS. Consequently, EWS certificate issued by the authorities to the petitioner was cancelled by order dated 23.06.2022 passed by the Tehsildar, Khair, Aligarh which is reproduced below:

"कार्यालय तहसीलदार खैर, अलीगढ़।

पत्रांक- मीमो आर०सी०/आई०जी०आर०एस०/2022
दिनांक-23 जून 2022
प्रभारी अधिकारी शिकायत
अलीगढ़।
महोदय,

श्री पीयूष कुमार शर्मा पुत्र सतीश चन्द्र शर्मा नि० खण्डेहा पर० टप्पल तह० खैर जिला अलीगढ़ की जनसुनवाई पोर्टल पर प्राप्त शिकायती प्रार्थना पत्र शिकायत सं०- 92214300026602 का संदर्भ ग्रहण करने का कष्ट करें।

उपरोक्त के सम्बन्ध में रा०नि० से जाँच आख्या प्राप्त की गयी। राजस्व निरीक्षक खैर द्वारा अपनी जाँच आख्या में उल्लिखित किया गया कि आवेदक व उसके परिवार के पास ग्राम खण्डेहा में 183 वर्गगज का आवासीय मकान व 100 वर्गगज का घेर तथा ग्राम छजूपुर में 150 वर्गगज का आवासीय प्लाट है। इस प्रकार पैतृक सम्पत्ति मिलाकर इनकी कुल परिसम्पत्ति 200 वर्गगज

से अधिक है। उपरोक्त विवरण के अनुसार आवेदक प्रथम दृष्टिया ई०डब्लू०एस० हेतु पात्र प्रतीत नहीं होता है।

अतः रा०नि० की जाँच आख्या सन्दर्भित प्रार्थना पत्र को निक्षेपित किये जाने हेतु सादर प्रेषित है।

ह० अप०
तहसीलदार खैर।
अलीगढ़"

प्रतिलिपिः- श्री पीयूष कुमार शर्मा पुत्र सतीश चन्द शर्मा नि० खण्डेहा पर० टप्पल तह० खैर जिला अलीगढ़ को सूचनार्थ।

ह० अप०
तहसीलदार खैर।
अलीगढ़"

6. Aggrieved with the aforesaid order dated 23.06.2022, the petitioner has filed the present writ petition.

7. Learned counsel for the petitioner submits that house at village Khandeha is an ancestral house in which his father's brother and two sisters have shares and, therefore, the share of the petitioner's father comes to only 20 square yards and the **petitioner** is not in possession of 100 square yards "Gher'. Referring to paragraph-6 of the supplementary affidavit dated 31.01.2023, he submits that thus, the petitioner's family does not own residential plot/ house of more than 200 square yards and therefore, the cancellation of EWS certificate of the petitioner by the impugned order dated 23.06.2022 is wholly arbitrary and illegal.

8. Learned standing counsel supports the impugned order.

9. We have carefully considered the submissions of the learned counsel for the parties and perused the records of the writ petition.

10. Before we proceed to consider rival submissions of learned counsel for the parties, it would be useful to reproduce the Office Memorandum No.36039/1/2019-Estt. (Res) issued by Government of India, Ministry of Personnel, Public Grievances and Pensions Department & Training, New Delhi, dated 31.01.2019, which provides for reservation for economically weaker sections, as under:

"No.36039/1/2019-Estt (Res)
Government of India
Ministry of Personnel, Public Grievances & Pensions
Department of Personnel & Training

North Block, New Delhi
dated the 3lst January, 2019

OFFICE MEMORANDUM

Subject: Reservation for Economically Weaker Sections (EWSs) in direct recruitment in civil posts and services in the Government of India.

In continuation of this Department's Office Memorandum of even number dated 19.01.2019, the following instructions are issued in consultation with Ministry of Social Justice and Empowerment and Department of Legal Affairs regarding reservation for EWSs not covered under the reservation scheme for SCs/STs/OBCs in respect of direct recruitment in civil posts and services in' the Government of India.

2. QUANTUM OF RESERVATION

The persons belonging to EWSs who, are not covered under the scheme of reservation for SCs, STs and OBCs shall get 10% reservation in direct recruitment in civil posts and services in the Government of India.

3. EXEMPTION FROM RESERVATION:

3.1 "Scientific and Technical" posts which satisfy all the following conditions can be exempted from the purview of the

reservation orders by the Ministries/ Departments:

(i) The posts should be in grades above the lowest grade in Group A of the service concerned.

(ii) They should be classified as "scientific or technical" in terms of Cabinet Secretariat [OM No. 85/11/CF-61(1) dated 28.12.1961], according to which scientific and technical posts for which qualifications in the natural sciences or exact sciences or applied sciences or in technology are prescribed and, the incumbents of which have to use that knowledge in the discharge of their duties.

(iii) The posts should be 'for conducting research' or 'for organizing, guiding and directing research'.

3.2 Orders of the Minister concerned should be obtained before exempting any posts satisfying the above condition from the purview of the scheme of reservation.

4. CRITERIA OF INCOME & ASSETS:

4.1 Persons who are not covered under the scheme of reservation for SCs, STs and OBCs and whose family has gross annual income below ***Rs 8.00 lakh (Rupees eight lakh only)*** *are to be identified as EWSs for benefit of reservation. Income shall also include income from all sources i.e. salary, agriculture, business, profession, etc. for the financial year prior to the year of application.*

Also persons whose family owns or possesses any of the following assets shall be excluded from being identified as EWS, irrespective of the family income:-

i. 5 acres of agricultural land and above;

ii. Residential flat of 1000 sq ft. and above;

iii. Residential plot of 100 sq. yards and above in notified municipalities;

iv. Residential, plot of 200 sq. yards and above in areas other than the notified municipalities.

4.2. The property held by a "Family" in different locations or different places/cities would be clubbed while applying the land or property holding test to determine EWS status.

4.3 The term "Family" for this purpose will include the person who seeks benefit of reservation, his/her parents and siblings below the age of 18 years as also his/her spouse and children below the age of 18 years.

5. INCOME AND ASSET CERTIFICATE ISSUING AUTHORITY AND VERIFICATION OF CERTIFICATE:

5.1 The benefit of reservation under EWS can be availed upon production of an Income and Asset Certificate issued by a Competent Authority. The Income and Asset Certificate issued 'by any one of the following authorities in the prescribed format as given in ***Annexure -I*** *shall only be accepted as proof of candidate's claim as 'belonging to EWS: -*

(i) District Magistrate/Additional District Magistrate/ Collector/ Deputy Commissioner/Additional' Deputy Commissioner/ 1st Class Stipendary Magistrate/ Sub-Divisional Magistrate/ Taluka Magistrate/ Executive Magistrate/ Extra Assistant Commissioner

(ii) Chief Presidency Magistrate/Additional Chief Presidency Magistrate/ Presidency Magistrate

(iii) Revenue Officer not below the rank of Tehsildar and

(iv) Sub-Divisional Officer or the area where the candidate and/or his family normally resides.

5.2 The Officer who issues the certificate would do the same after carefully verifying all relevant documents

following due process as prescribed by the respective State/UT.

5.3 The crucial date for submitting income and asset certificate by the candidate may be treated as the closing date for receipt of application for the post, except in cases where crucial date is fixed otherwise.

5.4 The appointing authorities should, in the offer of appointment to the candidates claiming to be belonging to EWS, include the following clause :-

"The appointment is provisional and is subject to the Income and asset certificate being verified through the proper channels and if the verification reveals that the claim to belong to EWS is fake/false the services will be terminated forthwith without assigning any further reasons and without prejudice to such further action as may be taken under the provisions of the Indian Penal Code for production of fake/false certificate."

The appointing authority should verify the veracity of the Income and asset certificate submitted by the candidate through the certificate issuing authority

5.5 Instructions referred to above should be strictly followed so that it may not be possible for an unscrupulous person to secure employment on the basis of a false claim and if any person gets an appointment on the basis of such false claim, her/his services shall be terminated invoking the conditions contained in the offer of appointment

6. EFFECTING RESERVATION - MAINTENANCE OF ROSTERS:

6.1 Department of Personnel and Training had circulated Office Memorandum No.36012/2/96-Estt(Res) dated July 2, 1997 regarding implementation of post based reservation roster. The general principles for making and operating post based reservation roster would be as per the principles laid down in the said Office Memorandum.

6.2 Every Government establishment shall now recast group-wise post-based reservation roster register for direct recruitment in accordance with format given in Annexure II, III, IV and V, as the case may be, for effecting 10% reservation for EWSs interpolating them with the SCs, STs and OBCs. While fixing roster point, if the EWS roster point coincides with the roster points of SCs/STs/OBCs the next available UR roster point has been allotted to the EWSs and also the principle of "squeezing" has been kept in view. While drawing up the rosters, the cadre controlling authorities may similarly "squeeze" the last points of the roster so as to meet prescribed 10% reservation.

6.3 Where in any recruitment year any vacancy earmarked for EWS cannot be filled up due to non availability of a suitable candidate belonging to EWS, such vacancies for that particular recruitment year shall not be carried forward to the next recruitment year as backlog.

6.4 Persons belonging to EWS selected against the quota for persons with benchmark disabilities/ex-servicemen shall be placed against the roster points earmarked for EWS.

7. ADJUSTMENT AGAINST UNRESERVED VACANCIES:

A person belonging to EWS cannot be denied the right to compete for appointment against an unreserved vacancy. Persons belonging to EWS who are selected on the basis of merit and not on account of reservation are not to be counted towards the quota meant for reservation.

8. FORTNIGHTLY/ANNUAL REPORTS REGARDING REPRESENTATION OF EWS:

The Ministries/Departments shall send single consolidated fortnightly report including their attached/subordinate offices beginning from 15.2.2019 as per format at ***Annexure-VI.***

From 01.01.2020, the Ministries/Departments shall upload data on representation of EWSs in respect of posts/services under the Central Government on the URL i.e. www.rrcps.nic.in as on 1st January of every year. All Ministries/Departments have already been provided respective usercode and password with guidelines for operating the URL.

9. MAINTENANCE OF REGISTER OF COMPLAINTS BY THE GOVERNMENT ESTABLISHMENT:

9.1 Every Government establishment shall appoint a senior officer of the Department as the Grievance Redressal Officer.

9.2 Any person aggrieved with any matter relating to discrimination in employment against any EWS may file a complaint with the Grievance Redressal Officer of the respective Government establishment. The name, designation and contact details of the Grievance Redressal Officer may be displayed prominently on the website and in the office of the concerned establishment.

10. LIAISON OFFICER:

Ministries/Departments/Attached and Subordinate Offices shall appoint Liaison Officer to monitor the implementation of reservation for EWSs.

11. The above scheme of reservation will be effective in respect of all direct recruitment vacancies to be notified on or after 01.02.2019.

12. All the Ministries/Departments are requested to bring the above instructions to the notice of all appointing authorities, under their control. In case of any difficulty with regard to implementation of the provisions of this OM, the concerned authorities may consult DOP&T through their administrative Ministry/Department.

Encl: As above.
(G. Srinivasan)
Director
Ph.No.011-23093074"
A

11. The definition of the word "family' given in the aforesaid Office Memorandum dated 31.01.2019 (hereinafter referred to as the "EWS Scheme") provides that the family for the purposes of the EWS Scheme will include the person who seeks benefit of reservation, his/her parents and siblings below the age of 18 years as also his/her spouse and children below the age of 18 years. Thus, the family in the matter of the petitioner would include his parents. The petitioner claims himself to be aged about 21 years. Clause 4.2 of the aforesaid EWS Scheme provides that the property held by a "Family" in different locations or different places/cities would be clubbed while applying the land or property holding test to determine EWS status.

12. In paragraphs-26 and 27 of the writ petition, the petitioner has stated as under:

"26. That, the father of the petitioner has only one plot/ property measuring area 150.05 Sq.Meters, which is situated at Pargana- Tappal, Village Chhajupur. For kind perusal of this Hon'ble Court, the copy of the registered sale deed of the aforesaid property is being filed herewith and marked as ***Annexure No.10*** *to this writ petition.*

27. That, as per guideline of E.W.S., any person who has more than 200

Sq. Meter and more than 5 acre, where as the father of the petitioner has only 150.05 Sq. Meters, and the petitioner has two persons."

13. In paragraphs-4, 5 and 6 of the supplementary affidavit dated 23.01.2023, the petitioner has stated as under:

"4- That, so for as the property mention in the order dated 23.06.2022 are concerned, the house which is alleged to belong to the petitioner is infact an ancestral house situated in Abadi land belonging to grandfather of the petitioner and father of the petitioner is 2 brother and 2 sister, who all have partition the said house in five shares, therefore father of the petitioner has got only one fifth share. The house only small house of absent 100 squire yard and thereafter share of father of the petitioner only 20 gaj and not beyond.

5- That, there is no Gher of 100 Square Gaj in possession of the petitioner.

6- That, the other land which is in the name of the father in Chhajupur village is only of 150 Squire Yard Village Chhajupur is a Gram Panchayat and is not a Municipality."

14. Thus, from the facts as admitted by the petitioner in aforequoted paragraphs of the writ petition and the supplementary affidavit, it is evident that a residential plot measuring 150 square yards is owned by father of the petitioner. The petitioner has also admitted that there is a residential house in 183 square yards but he vaguely alleged it to be an ancestral house belonging to his grandfather in which one brother of his father and two sisters have shares. Neither any proof of recording of the name of the father's brother and sisters over the house in question nor their names have been disclosed either in the writ petition or in the supplementary affidavit. No proof has been filed that house in village Khandeha is an ancestral house in which some persons other than the petitioner's father have shares. With regard to "Gher' of 100 square yards, the petitioner has merely stated that **he** is not in possession over the "Gher' of 100 square yards and thus, has not denied the possession of his family over 100 square yards Gher. Thus, it is admitted to the petitioner that his family owns 150 square yards residential plot in village Chhajupur and 100 square yards residential land/ Gher at Khandeha besides a house standing on 183 square yards residential land in village Khandeha of which the father of the petitioner is the owner or, according to the petitioner, that 183 square yards house is apparently owned by his father. Thus, the total residential plot owned by the family of the petitioner is much more than the maximum asset specified in paragraph 4.1 of the EWS Scheme.

15. Since as per own admitted case of the petitioner, the assets owned by his family is more than the specified maximum assets under Para-4 of the EWS Scheme, therefore, the petitioner is not entitled for the EWS certificate.

16. Where the State seeks to make provision for reservation in appointments or posts in respect of certain class of citizens (in present case the EWS), any scheme that is framed by the Government for identification of EWS and issuance of certificate of EWS, such scheme has to be strictly construed and interpreted. A perusal of the aforesaid EWS scheme leaves no manner of doubt that criteria for income and assets mentioned therein have to be strictly interpreted. As already held above, the term "Family" has been specified in the

scheme and the property held by a "Family" in different locations or different places/cities would be clubbed while applying the land or property holding test to determine EWS status. The EWS scheme enjoins the officer who issues EWS certificate to do so only after careful verification of the relevant documents following due process as prescribed by the respective State/Union Territory. The appointing authorities are also enjoined to include a clause in the offer of appointment to the candidate belonging to EWS as follows:-

"The appointment is provisional and is subject to the Income and asset certificate being verified through the proper channels and if the verification reveals that the claim to belong to EWS is fake/false the services will be terminated forthwith without assigning any further reasons and without prejudice to such further action as may be taken under the provisions of the Indian Penal Code for production of fake/false certificate."

17. The EWS scheme also specifically mentions that the instructions should be strictly followed so that it may not be possible for an unscrupulous person to seek employment on the basis of false claim and if any person gets an appointment on the basis of such false claim, his/her services shall be terminated invoking conditions contained in the offer of appointment.

18. Any vacillation or dilution of the strict provisions of the EWS scheme regarding issuance of EWS certificate would hit the root of the very purpose of the EWS scheme rendering such an act abhorrent to the scheme of the Constitution of India.

19. 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) 3 ILRA 367
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.02.2023

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIPIN CHANDRA DIXIT, J.

Writ C No. 31153 of 2022
Alongwith
other connected cases

Anuj Kumar & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Sunil Kumar Singh, Sri Awadhesh Kumar Malviya, Sri G.K. Singh (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Atiqur Rahman Siddiqui, Sri Rakesh Pande (Sr. Advocate)

A. Local body Law – UP Kshettra Panchayat and Zila Panchayat Act, 1961 – Section 15(13) – No confidence motion against Pramukh – Amendment on 04.10.2022 – Caveat of not receiving notice of no confidence within period of 'one year' was changed by 'two years' – Applicability – Prospective or retrospective – Held, general rule against retrospective operation of statute does not apply to amendments in procedural provisions/statute – Action of the Collector concerned in cancelling the motion expressing want of confidence in the Pramukh of Kshettra Panchayat received by him, 'within two years' 'of the assumption of office by the Pramukh' cannot be said to be illegal. (Para 44 and 59)

B. Interpretation of Statute – Rules against retrospectivity – Applicability – Distinction between procedural and substantive provisions drawn – Exception to the rules explained – Held, it is fundamental rule that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require such a construction. A statute is not to be construed so as to have a greater retrospective operation than its language renders necessary – Held further, rigid rule against retrospectivity does not apply in relation to procedural provisions. There is distinction between procedural and substantive provisions for the purpose of application of rule relating to retrospectivity – Indeed, a general presumption is that the statutory change in procedure applies to pending as well as future proceedings. (Para 33, 35 and 36)

C. Interpretation of Statute – Literal rules – Applicability – Any interpretation of statute which leads to absurdity should be avoided. It is presumed that the legislature does not intend an absurdity, or that absurd consequences shall follow from its enactment – If by applying the literal rule of interpretation, the construction is being absurd then it should be avoided. (Para 45)

Writ petition dismissed. (E-1)

List of Cases cited :-

1. Isha Valimohamed & anr. Vs V. Haji Gulam Mohamad & Haji Dad Trust ; 1974 (2) SCC 484

2. Bansidhar & ors. Vs St. of Raj. & ors.; 2. 1989 (2) SCC 557

3. Vikas Trivedi & ors. Vs St. of U.P. & ors.; 2013 (8) ADJ 523

4. Municipal Council Palai Vs T.J. Joseph; 1963 AIR SC 1561

5. Zile Singh Vs St. of Har.; 2004 (8) SCC 1

6. Bhagat Ram Sharma Vs U.O.I.; 1988 (Supp) SCC 30

7. St. of Rajasthan Vs Mangilal Pindwal; 1996 (5) SCC 60

8. Fibre Boards Private Limited, Banglore Vs Commissioner of Income Tax, Banglore; 2015 (10) SCC 333

9. Cheveti Venkannya Yadav Vs St. of Telangana & ors.; 2017 (1) SCC 283

10. Dharam Dutt & ors. Vs U.O.I. & ors.; 2004 (1) SCC 712

11. Mohan Lal Tripathi Vs D.M., Rae Bareilly; 1992 (4) SCC 80

12. Writ Petition No.7717 of 2020; Smt. Geetha Pandit Rao Vs The St. Of Karnataka

13. Trimbak Damodhar Rajpurkar Vs Assaram Hiraman Patil & Ors.; AIR 1966 SC 1758

14. Gajraj Singh & ors. Vs St. Transport Appellate Tribunal & ors.; 1997 (1) SCC 650

15. Vijay Vs St. of Mah.; 2006 (6) SCC 289

16. University of Kerala & ors. Vs Merlin J.N. & anr. etc. etc.; 2022 (9) SCC 389

17. N. T. Devin Katti Vs Karnataka Public Service Commission; 1990 (3) SCC 157

18. Civil Appeal No.8919 of 2012; Ajay Makan Vs Adesh Kumar Gupta

19. Criminal Appeal No.34 of 2020; Shilpa Mittal Vs NET Delhi

20. P. Suseela & ors. Vs University Grants Commission & ors.; 2015 (8) SCC 129

21. Bhanumati Vs St. of U.P. & ors.; 21. 2010 (12) SCC 1

22. Vikas Trivedi Vs St. of U.P. & ors. 2013 (8) ADJ 523 (FB); 2013 SCC Online Alld 14264

23. Writ Petition No.3171 (MB) of 2012; Radhey Shyam Maurya Vs St. of U.P. decided on 01.05.2012

24. Anand Gopal Vs St. of Bom; AIR 1958 SC 915

25. Commissioner of Police, Delhi & anr. Vs Dhaval Singh; AIR 1999 SC 2326

26. Mohan Lal Tripathi Vs D.M., Rae Bareilly; 1992 (4) SCC 80

27. Usha Bharti Vs St. of U.P.; 2014 (7) SCC 663

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Vipin Chandra Dixit, J.)

1. Heard Sri Navin Sinha learned Senior Advocate assisted by Sri Saiful Islam Siddiqui and Ms. Tahira Kazmi, Sri Rakesh Pandey, learned Senior Advocate assisted by Sri Ramesh Chandra Tiwari and Sri G.K. Singh, learned Senior Advocate assisted by Sri Sunil Kumar Singh, learned counsels appearing for the petitioners; Sri Ajit Kumar Singh, learned Additional Advocate General assisted by Sri Sudhanshu Srivastava, learned Additional Chief Standing Counsel on behalf of the State and Sri Ashok Khare, learned Senior Advocate assisted by Sri K.S. Kushwaha and Sri B.K. Shukla, Sri Sanjeev Kumar Tyagi, Sri Prabhakar Dubey, Sri A.R. Siddiqui, learned counsels appearing for the private-respondents

2. In this batch of writ petition, a common question arises about the applicability of the amendment brought by the Ordinance No.8 of 2022, in Section 15 (13) of U.P. Kshettra Panchayat and Zila Panchayat Act, 1961, (in short as 'the Act' 1961') whereby the period of "one year" prescribed therein has been substituted to "two years". The said amendment has been enforced on 04.10.2022 and published in the official gazette dated 06.10.2022. In all the connected matters, the application to make the motion of No Confidence was received by the District Magistrate/ Collector concerned, in accordance with sub-section (2) of Section 15 and the date to convene the meeting for consideration of the motion had been fixed prior to the enforcement of the amendment. But before the motion could be tabled, due to the amendment brought by the Ordinance in Sub-Section (13) of Section 15, the Collector concerned passed individual orders that the motion cannot be carried out in view of the amendments. The motion of No-Confidencce were, thus, cancelled.

3. Challenging the said action of the Collector concerned, it was argued by Sri Navin Sinha learned Senior Counsel that the application to make a motion of No-Confidence was duly received by the Collector. The date of the meeting was intimated to the elected members, the meeting was adjourned for one or other reasons and before the date fixed for the adjourned meeting, the amendment by way of Ordinance No.8 of 2022 has been brought into force. The date of enforcement of the ordinance is 04.10.2022. The elected members, who moved the motion of No-Confidence have a right to bring the said motion. The requirements of Section 15 (2) and (3) to carry out the motion of No-Confidence had been fulfilled, summary enquiry by the Collector concerned had been concluded, the right accrued to the elected members to carry out No-Confidence motion after the scrutiny of the notice of intention in writing, in the form prescribed under the rule framed under the 1961 Act, cannot be taken away. The Ordinance No.8 of 2022 does not express

intention to make the substituted provisions retrospective. The repeal/substitution of sub-section (13) of Section 15 can only be given prospective effect. Section 6(c) of the General Clauses Act' 1897 has been pressed before us to submit that where any statutory provisions/Act or regulation is repealed by any enactment made, unless a different intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued, or incurred under the enactment so repealed. It was argued that the right to bring No-Confidence Motion by elected members has been accrued in their favour with the steps taken by them in exercise of their right. The applications moved by the elected members before the repeal of the old provisions/enactment of new provisions is the expression of No-Confidence which has to be brought to its logical end by convening a meeting for the purpose.

4. The aid of the decision of the Apex Court in **Isha Valimohamed & another Vs. V. Haji Gulam Mohamad & Haji Dad Trust1; Bansidhar & others Vs. State of Rajasthan & others2** has been taken, to place the effect of the repeal in view of Section 6 of the General Clauses Act, to assert that an accrued right would survive the repeal of that enactment as the right accrued are saved unless they are taken away expressly.

5. It was argued that it would have been another case, had the right conferred upon the members by Section 15 to bring No-Confidence Motion not been exercised and the repeal was made effective. Even otherwise, it is held in a catena of decisions of this Court that the provisions of Section 15 (3) of the Act' 1961 are mandatory in nature, the Collector has no option but to fix a meeting to carry out No-Confidence Motion, after scrutiny of the written notice of intention, delivered to him in accordance with sub-section (2) of Section 15. The Full Bench decision in **Vikas Trivedi & others Vs. State of U.P. & others3** has been relied to substantiate the said submissions. It was argued that the Collector could not have withheld the motion brought by the elected members or cancel the same on account of changes in the then existing laws.

6. Sri Rakesh Pande learned Senior Advocate adding to the submission of Sri Navin Sinha, learned Senior Counsel would argue that the No-Confidence Motion in the cases before us was moved by the elected members after one year of assumption of office of the Pramukh, Kshettra Panchayat. The motion was brought in accordance with sub-section (2) of Section 15, the meeting fixed by the Collector was postponed, the old provisions providing period of 'one year' has been substituted wef 04.10.2022 by an ordinance which was notified on 06.10.2022. It is a case of substitution of the old provisions and not a case of repeal or saving. The normal rule is that the substituted provisions are to be considered prospective in nature; retrospectivity by implication is only an exception. Section 15 is a substantive provision prescribing the entire structure of process for No-Confidence Motion. Section 15(11) amended by the Ordinance No.8 of 2022 is procedural whereas Section 15 (13) is substantive. The rider or prohibition on the power of the District Magistrate/Collector under Section 15(13) is to receive notice of a motion within the prescribed period therein, from the assumption of office by a Pramukh and not to proceed with it. At the relevant point of time, the date, when the motion of No-Confidence was delivered to the Collector or received by him, the period prescribed

was "one year", which was adhered to by the elected members. Once the motion is moved, the substituted provisions of sub-section (13) prescribing 'two years' instead of old provision of 'one year' would have no application, either to reject or return the motion of No-Confidence moved by the elected members presuming that the Collector has no power to receive it after the amendment. The undisputed position is that when the motion was moved, the Collector was well within its power to receive and process the same. Moreover, once the motion has been processed, the substitution provisions will have no application, in as much as, presumption is about the prospectivity of the substituted provisions and against the implied retrospectivity. Reliance is placed on the decision of the Apex Court in **Municipal Council Palai Vs. T.J. Joseph4;** to substantiate the above noted submissions.

7. The arguments of Sri Navin Sinha and Sri Rakesh Pande learned Senior Counsels have been adopted by Sri G.K. Singh learned Senior Advocate appearing for the petitioner in the connected matters.

8. Sri Ajit Kumar Singh learned Additional Advocate General for the State respondents would submit, in rebuttal, that the question is not as to whether the Ordinance to substitute the provisions of Section 15(13) of the Act' 1961 is retrospective or not. It was contended that the Ordinance brought substitution of the existing provisions. The words used in the Ordinance No.8 of 2022 "shall be substituted" have been highlighted with the aid of decision of the Apex Court in **Zile Singh Vs. State of Haryana5** to assert that the substitution by amendment Act deleted the old provisions and made the new provisions operative. The old ceases to exists and new rule comes into existence. The substitution is different from "super-session" or "repeal". With the substitution of one text in the Statute, the pre-existing text cannot be kept alive.

9. Reference has further been made to the decisions of the Apex Court in **Bhagat Ram Sharma Vs. Union of India6, State of Rajasthan Vs. Mangilal Pindwal7, Fibre Boards Private Limited, Banglore Vs. Commissioner of Income Tax, Banglore8, Cheveti Venkannya Yadav Vs. State of Telangana & others9 and Dharam Dutt & others Vs. Union of India & others10** to substantiate the said submissions.

10. With the aid of the decision in Mohan Lal Tripathi Vs. District Magistrate, Rae Bareilly11, it was argued that the right to remove an elected representative stem out of the statute and its existence can be decided on the basis of the provisions of the Act. In the facts of that case, reduction of period from 'two years' to 'one year' during which vote of No-Confidence Motion could be tabled against a President of the Municipal Board by Ordinance, which later became Act, was challenged on the ground that there was absence of any discernible and rational principle and the legislature had resorted to as "spoils system", the amendment was thus, constitutionally invalid. It was held therein that but for lack of legislative competence or for being arbitrary, a legislative action cannot be struck down on the ground of malafide. The amendment about the period during which a No-Confidence Motion could be brought against the elected President is a matter of legislative policy, the wisdom of which cannot be scanned by the Apex Court.

11. It was also argued by the learned Additional Advocate General that the Apex Court has noted therein that the right to continue in office of an elected representative is neither a fundamental right nor a common law right, but a special right created by the statute or a political right or privilege and not a natural or absolute or vested right. Similarly, the right to remove an elected official from his office before his or her term expires is a statutory right, which can be exercised only within the limits of the statute, i.e. within the ambit of the existing provisions prevailing on the date of exercise of the right to move the No-Confidence Motion. As in the instant case, the right to move No-Confidence Motion conferred upon the elected members has been altered by the legislative amendment brought within the legislative competence, No-Confidence Motion cannot be carried out as the elected members have lost their right to carry out the No-Confidence Motion on or after 04.10.2022.

12. Reliance has further been placed on the decision of the Karnatka High Court in **Smt. Geetha Pandit Rao vs The State Of Karnataka12** to submit that in a challenge to the amendment brought by the State of Karnataka to reduce the period for moving No-Confidence Motion against President/Vice President of Zila Panchayat from '30 months' to '15 months' under the Ordinance No.2 of 2020, the question considered by the Karnatka High Court was as to whether the impugned amendment to the Act and rules are prospective or retrospective in nature. Considering the decision of the Apex Court with regard to the interpretation to the word "substitution", it was held therein that the amendment which is procedural in nature is retrospective in nature and not prospective as the 'vested right' or 'accrued right' of the member of the Zila Panchayat to retain the elected office would begun from the date of their assumption of office as member of Zila Panchayat. The reduction in the period to bring No-Confidence Motion against an elected President/Vice President of Zila Panchayat from '30 months' to '15 months' under the Ordinance No.2 of 2020 would be operative from the date of assumption of the office by such President/Vice President.

13. Reliance has been placed therein on the decision of the Apex Court in **Mohan Lal Tripathi (supra)** to hold that the provisions of No-Confidence Motion, the recall of the elected representative, so long it is in accordance with law, cannot be assailed on abstract law of democracy. The challenge to the validity of the Ordinance in curtailing the period barring No-Confidence motion by the elected representative, thus, was turned down.

14. On the same analogy, it was argued by the learned Additional Advocate General, that by interpretation of the amendment in sub-section (13) of Section 15, it may be held that the elected representative has a 'vested right' or 'accrued right' to remain in his elected office for a period of 'two years' which would begun from the date of his assumption of office as Pramukh, Kshettra Panchayat and in that view of the matter, the amendment with that perspective has to be given retrospectivity. From another angle, on the right of elected members to bring No-Confidence Motion, it may be held that they have left with no right to carry out the No-Confidence Motion after the amendment wef 04.2.2010, as the Collector is prohibited from proceedings with the same. The submission thus, is that from both the angles, No-Confidence

Motion moved by the petitioners, the elected members of the Kshettra Panchayat, cannot be carried out. The District Magistrate/Collector, therefore, cannot be said to have committed any illegality in cancelling the motion of No-Confidence brought by them.

15. Sri Ashok Khare learned Senior Advocate appearing for the elected Pramukhs has relied on the decision of the Apex Court in **Trimbak Damodhar Rajpurkar Vs. Assaram Hiraman Patil & Ors.13** to elaborate and would submit that the expression of the right of elected member to bring the motion has to be given its true meaning in terms of the scheme of the statute. It was argued that the right to bring a No-Confidence Motion under Section 15 would not be a "vested right" or "right accrued" only on the motion being received by the Collector. Such a right accrued only on the motion being put to vote, i.e. on the date of discussion on voting by the elected members on the motion of No-Confidence. Before such a right could be accrued upon the elected members, the amendment came into force. Sub-section (1) of Section 15 only speaks of a contingent right by stating that a motion expressing want of confidence in Pramukh of a Kshettra Panchayat may be made, in accordance with the procedure laid down in the sub section (2) to (13) followed thereafter. The written notice of intention to make the motion though received and scrutinized by the Collector but after the amendment brought in sub-section (13) of Section 15, it became impossible for the District Magistrate/Collector to process the motion of intention. There is no discretion with the District Magistrate to carry out the motion of No-Confidence as restriction by the legislature has been put in place on the power of the District Magistrate to process the No-Confidence Motion, for a period of 'two years', against an elected Pramukh from the date of his assumption of the office.

16. The discussion in **Trimbak Damodhar Rajpurkar (supra)** has been placed before us, as an instance, to argue that on the same analogy, it was held therein that the right of landlord to eject the tenant was subject to termination of tenancy under the Amendment Act. Unless and until the notice was served upon the tenant with the intention to terminate the tenancy, no right to eject the tenant could be accrued in favour of the landlord, under the unamended provisions by serving a notice to vacate the premises on expiry of the tenure of the lease.

17. Sri S.K. Tyagi learned counsel appearing for the elected representatives, has relied upon the decisions of the Apex Court in **Gajraj Singh and others versus State Transport Appellate Tribunal and others14, Vijay Vs. State of Maharashtra15; University of Kerala & others Vs. Merlin J.N. & another etc. etc16** to assert that purposive interpretation has to be given to an enactment or an amendment, depending upon the scheme of the enactment, the legislative intend to bring the amendment. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other persons or on the public generally, and where to confer such benefit appears to have been the legislature's object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. A procedural provision has to be interpreted keeping in mind of the above principle to

give it retrospectivity, to apply on the pending applications.

18. In rejoinder, learned Senior Counsels for the petitioners would submit that the answer to the issue pertaining to impossibility of action on the part of the Collector after amendment, as agitated by Sri Ashok Khare learned Senior Counsel for the elected Pramukh, lies in the provision of the Section 6 of the General Clauses Act, which saves the right of the elected members to carry out the No-Confidence Motion moved by them prior to the amendment. The doctrine of impossibility cannot be invoked in the facts and circumstances of the case, in as much as, the elected members have right to effectuate the motion. Reference has been made to the decision of the Apex Court in **N. T. Devin Katti vs. Karnataka Public Service Commission17** to draw an analogy that a person who has applied for selection against the post has a vested right to be considered for selection in accordance with the existing rule or order applicable on the date of the application. He cannot be deprived of the limited right of being considered for selection in accordance with the rules as they existed on the date of advertisement, on the amendment of the rules during the pendency of the selection unless the amended rules are retrospective in nature.

19. Learned counsels for the State-respondents adding to their submissions, as noted above hereinabove, relied upon the decisions of the Apex Court in **Ajay Makan Vs. Adesh Kumar Gupta18, Shilpa Mittal Vs. NET Delhi19** to place the principles of interpretation of statute, to assert that for giving purposive interpretation, it has to be kept in mind that interpretation is best which makes the textual interpretation match the contextual. Reference has also placed to the decision of the Apex Court in **P. Suseela and others Vs. University Grants Commission and others20** to narrate the distinction between an 'existing right' and the 'vested right' and the circumstances in which such rights can be asserted in case of amendment/substitution of the existing provisions.

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

21. To deal with the rival arguments of the learned counsel for the parties, we are required to understand the legislative scheme, the set up in which Section 15 has been put in place in the Act' 1961.

22. With the introduction of Article 243 to 243-O, by the Constitution 73rd Amendment Act' 1992 w.e.f. 24.04.1993, the word "Panchayat" has been defined in Article 243 (d) to mean an institution (by whatever name called) of self government constituted under Article 243-B for the rural areas. As per Article 243-B, the Panchayats are constituted in every State, at the village level, intermediate and district level in accordance with the provisions of Part IX of the Constitution of India. Prior to the Constitution (73rd Amendment) Act' 1992, the constitutional provisions relating to Panchayat were confined to Article 40, in the Directive principles of State policy.

23. The introduction of Article 243 to 243-O provided for self governance in the pyramidical structure of local self government. Under the 73rd Amendment of the Constitution, Panchayat became an `institution of self governance' which was previously a mere unit under Article 40. Decentralization is perceived as a pre-

condition for preservation of the basic values of a free society. The 73rd amendment has been termed as a very powerful `tool of social engineering' which has unleashed tremendous potential of social transformation to bring about a sea-change in the age-old, oppressive, anti human tradition of Indian society. (Reference **Bhanumati Vs. State of U.P. & others21**). It was observed by the Apex Court in paragraph No.26 therein as under:-

"26.In other representative democracies of the world committed to a written Constitution and rule of law, the principles of self Government are also part of the Constitutional doctrine. It has been accepted in the American Constitution that the right to local self- Government is treated as inherent in cities and towns. Such rights cannot be taken away even by legislature. The following excerpts from American Jurisprudence are very instructive:-

"Stated differently, it has been laid down as a binding principle of law in these jurisdictions that a statute which attempts to take away from a municipal corporation its power of self-Government, except as to matters which are of concern to the State as a whole, is in excess of the power of the legislature and is consequently void. Under this theory, the principle of home rule, or the right of self-Government as to local affairs, is deemed to have existed before the constitution."

24. The democratically organized unit have been conferred power of governance and the purpose as envisioned is to instill a sense of satisfaction in the people at the grass root level. With this idea of decentralization of power, giving it at the hands of the people at the grassroot level, the Constitution requires the State to make law providing for structure of the Panchayat, the concept of Gram Sabha, the composition of Panchayats, reservation of seats, term of Panchyats, disqualification for membership, powers, authority and responsibility of Panchayats and conferment of power to impose taxes, duties, toll and fees, election to the Panchayats and creation of bar for courts to interfere in electoral matter, under Article 243 to 243-O.

25. The Act' 1961 was enacted for establishment of Kshettra Panchayat and Zila Panchayat in the districts of U.P. to undertake certain government function at Kshettra and district level, respectively in furtherance of the principle of democratic decentralization of government function and for ensuring, proper Municipal Government in rural areas, and to correlate the powers and functions of Gram Sabhas under the U.P. Panchayat Raj Act' 1947, with Kshettra Panchayats and Zila Panchayats. The Act provides for constitution and incorporation of Kshettra Panchayats, Composition, election to the office of Pramukhs, tenure of Pramukh, disqualifications for membership of Kshettra Panchayat and the method for motion of No-Confidence. The term of the office of Pramukh of Kshettra Panchayat which shall commence upon his election, shall extend upto the term of the Kshettra Panchayat (as per Section 9) which shall be for five years from the date appointed for the first meeting of Kshettra Panchayat. The elected Pramukh, thus, retains his office until the expiry of the term of the Kshettra Panchayat, subject to disqualifications and a motion of No-Confidence.

26. Section 15(1) confers a right on the members of the Kshettra Panchayat to

bring a motion expressing want of confidence in the Pramukh. The motion so made is to be proceeded in accordance with the procedure laid down in sub-sections (2) to (13) of Section 15. The provisions of sub-sections (2) to (13) as is evident are procedural in nature, as they provide the manner in which the motion of No-Confidence brought by the elected members would be received by the Collector and shall be carried out. The Full Bench of this Court in **Vikas Trivedi Vs State of U.P. others** 2013 (8) ADJ 523 (FB); **2013 SCC Online Alld 14264** has held that Section 15 of the 1961' Act is a statutory provision recognizing the right of an elected members to bring the motion of No-Confidence against the Pramukh. The Collector is entrusted with public duty to issue notice.

27. A Division Bench of this Court in **Radhey Shyam Maurya Vs. State of U.P.22** decided on 01.05.2012 while considering the legislative aspect of the motion of No-Confidence under Section 15 of the 1961' Act, has held that no ground has to be disclosed while moving the motion. It was held that the right to motion or to participate in the debate is a statutory right in the members, conferred by Section 15 of the Act. The legislature to its wisdom has conferred power on the members of the Kshettra Panchayats to move requisition in the prescribed format for motion of No-Confidence. The elected representative are accountable to their electorate and electorate chose their members as well as Pramukh. It is the right of the elected representatives to show their lack of confidence by moving motion of No-Confidence in accordance with the statutory provisions. This is inherent philosophy in the policy of the motion of No Confidence. Election for five years does not mean that the elected representative has got blanket power to move on his/her own way without taking care of public interest. Persons holding public office as a leader of elected body are elected to discharge public obligation and can continue till the confidence reposed in them by the people.

28. The Full Bench in **Vikas Trivedi (supra)** having noted the above observations of the Division Bench has put a note of caution that all provisions of the statute are required to be complied with and there is no discretion in the authorities and they are not free to disregard the provisions of statute to carry out No-Confidence motion at their whims. The question before the Full Bench was, however, with regard to the mandatory or directory nature of the prescribed procedure, the requirement of giving notice by the Collector under Section 15(3) (ii) in the prescribed form as required by the rule.

29. The above noted observations about the import of Section 15 of the 1961' Act, are relevant to understand that the provisions of Section 15 are procedural provisions and the right to carry out a motion of No-Confidence brought by the elected members against the Pramukh of Kshettra Panchayat has to be, exercised within the framework of the statute. The statutory provisions are to be followed strictly.

30. We may further note that while sub-section (1) of Section 15 confers statutory right upon the elected members of Kshettra Panchayat to bring a motion expressing want of confidence in the Pramukh of a Kshettra Panchayat, the said right is curtailed by sub-section (13) of Section 15 itself which provides a caveat that no notice of motion under Section 15

shall be received within the time prescribed therein of the assumption of office by the Pramukh. This time period prescribed in sub-section (13), which was 'one year' has been substituted by Ordinance No.8 of 2022 w.e.f. 4.10.2022 to 'two years' of the assumption of office by a Pramukh. The Collector concerned is, thus, prohibited from receiving a motion expressing want of confidence in a Pramukh of Kshettra Panchayat within 'two years' of his assumption of office since the date of enforcement of the amendment which is 04.10.2022.

31. The dispute is that whether the substitution of words "two years" in place of "one year' would operate prospectively or retrospectively. The argument of learned counsels for the petitioners is that once the motion of No Confidence has been received by the Collector, having been moved by the elected members in accordance with the provisions of sub-section (1) & (2) of Section 15, there was no option before the Collector but to proceed, to carryout the motion, in accordance with the provisions of sub-section (5) to (11) of Section 15, as the date fixed by the Collector, after scrutiny of the written motion, to consider the motion of No-Confidence had been adjourned and the amendments were brought in between. The submission is that with the moving of the motion of No-Confidence, the elected members have exercised their right to vote in the meeting to be convened by the Collector in accordance with the procedure prescribed in the Section 15. With the right exercised by the elected members created a further right in favour of them which is a "vested right" or "right accrued/acquired". The effect of repeal without any saving clause of the existing provisions, would imply the application of the substituted provisions as prospective. With the substitution of the old provisions, the normal rule is to give prospective effect to the new provisions and the retrospectivity, by implication is an exception. There is presumption against implied retrospectivity, with the effect of repeal, the 'accrued right' would survive by virtue of Section 6 of the General Clauses Act, unless they are taken away expressly. We are, thus, required to consider the effect of the right exercised by the petitioner/elected members, which is a statutory right, by bringing the motion of No-Confidence, before the Collector in the prescribed format.

32. Having noted above that the provisions of Section 15 are based on democratic principles, in order to preserve the rule of self-governance at the grassroot level, and that they are procedural in nature, we are first required to consider the principles of application of procedural amendments.

33. It is fundamental rule that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require such a construction. A statute is not to be construed so as to have a greater retrospective operation than its language renders necessary. Generally, there is strong presumption that a legislature does not intent to impose a new liability in respect of something that has already happened, because generally it would not be reasonable for a legislature to do that. But this presumption may be overcome not only by express words in the Act but also by circumstances sufficiently strong to displace it.

34. The principle applied by the Court in construing legislation as expressed in

Craies on Legislation 9th Edition is that retrospective application is to be rebuttably presumed not to be intended, that retrospectivity should be avoided except where necessary. However, this rule both fundamentally and in a straightforward manner cannot be applied as a number of difficulties arise in determining its precise extent and how to apply it. One of such is in determining whether a statute is retrospective concerns the possibility of action under a statute which has effect not only for the future but is brought about in part by reference to past events i.e. future action in relation to past events. A further necessary distinction is that retrospective operation is one matter, interference with existing rights is another. As noted in the Craise on Legislation 9th Edition at placitum 10.3.7 in Chapter 10:-

"Distinction between retrospectivity and affecting existing rights

A further necessary distinction between what is and is not retrospectivity is illustrated in the following passage of the judgment of Buckley L.J. In West v Gwynne

Retrospective operation is one matter. Interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case..... As a matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights."

35. However this rigid rule against retrospectivity does not apply in relation to procedural provisions. There is distinction between procedural and substantive provisions for the purpose of application of rule relating to retrospectivity. As noted in 'Craise at placitum 10.3.9 at page No.436,' the nature of exception and its justification are clearly encapsulated in the passage from the speech of Lord Brightman in noted in Craise on Legislation (9th Edition):-

"Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing rights or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is, however, said to be an exception in the case of a statue which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed."

36. The general rule against the retrospective operation of statute does not apply to procedural provisions. Indeed, a general presumption is that the statutory change in procedure applies to pending as well as future proceedings.

37. The distinction between the substance and procedure is, however, not always easy to ascertain or apply as stated by Lord Brightman in his speech noted at

placitum 10.3.9 at page '437' in Craise on Legislation (9th Edition):-

"But these expressions 'retrospective' and 'procedural', though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (e.g. because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (e.g. because it applies only to the post-statute commencement of proceedings to enforece that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself."

38. The general preposition outlined above in Craise on Legislation is that for the consideration of retrospectivity, there is no substitute for consideration of the substance of the provisions concerned, and taking all the circumstances into account, considering what result the legislature can reasonably be presumed to have wanted or not wanted to achieve.

39. As stated by Lord Denim in Blyth and Blyth23, the rule that an Act of Parliament is not to be given retrospective effect applies only to statutes which affects vested right. It does not apply to statute which only alter the form or procedure or the admissibility of evidence or the effect which the courts give to evidence.

40. In stating the principle that "a change in the law of procedure operates retrospectively and unlike the law relating to vested right is not only prospective" the Supreme Court has quoted with approval the reason of the rule as expressed in Maxwell:- In **Anand Gopal Vs. State of Bom24**

"No persons has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending, and if, by an Act of Parliament, the mode of procedure is altered, he has no other right than to proceed according to the altered mode".

41. In **Commissioner of Police, Delhi & another Vs. Dhaval Singh25**, it has been said that:-

"The law relating to forum and limitation is procedural in nature whereas law relating to right of action and right of appeal even though remedial is substantive in nature; that a procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligation or to impost new duties in respect of transaction already accomplished; that statute which not only changes the procedure but also creates new right and obligation shall be construed to be prospective, unless otherwise provided either expressly or by necessary implication."

42. It was, thus, expressed that in deciding the question of applicability of a particular statute to past events, the language used is no doubt the most important factor to be taken into account but the real issue in each case is as to the dominant intention of the legislature to be gathered from the language used, the object indicated, the nature of rights affected, and the circumstances under which the statute is passed.

43. Keeping in mind of the above legal principles, we are required to examine the nature of amendments in the instant case, considering the arguments of Sri Rakesh Pande one of the learned Senior Counsel for the petitioner that the effect of "substitution" of the words "two years" in place of "one year" would be to apply the amendments prospectively. This argument is plainly based on the general principle of presumption against retrospectivity.

44. As noted above, general rule against retrospective operation of statute does not apply to amendments in procedural provisions/statute. If simplistic interpretation of amendment with the words "substitution" of the old provisions, as asserted, is applied, the result would be that an elected Pramukh in the last election, against whom the motion of No Confidence has not been brought till the amendment enforced in sub-section (13) will be able to continue for a period of 'two years' from the date of assumption of his office. Whereas another Pramukh who is elected in the same election, against whom the motion of No Confidence has been brought prior to the amendments i.e. 04.10.2022, may be removed before expiry of period of 'two years' from assumption of his office, if the motion is carried out in the meeting called by the Collector.

45. It would be quixotic to suppose that the State legislature intended to curtail the right of members to move No-Confidence motion against a Pramukh for a period of 'two years' of the assumption of office, only of such members who did not or could not bring such a motion after expiry of period of one year, under the pre-existing provisions. And simultaneously, it will allow the elected members to carry out or vote on the motion of No-Confidence brought by them within the period of 'two years' (as per the amended provisions), simply because the motion was moved prior to the amendment. It is settled rule of interpretation that any interpretation of statute which leads to absurdity should be avoided. It is presumed that the legislature does not intend an absurdity, or that absurd consequences shall follow from its enactment. Such a result will, therefore, be avoided, if the terms of the Act admit it, by reasonable construction of the statute. It is applicable, like all other presumptions, thus if by applying the literal rule of interpretation, the construction is being absurd then it should be avoided.

46. In our considered opinion, having gone through the object and substance of the provision concerned, the legislature can reasonably be assumed to have wanted to curtail the right of an elected members to bring motion of No-Confidence within a period of 'two years' of the assumption of office by a Pramukh, by bringing amendment in sub-section (13) of Section 15.

47. The arguments against retrospectivity of the amendments by applying the normal rule of prospectivity or rule of presumption against implied retrospectivity, are liable to be turned down.

48. Now the question remains as to the nature of the rights, conferred by the legislature by virtue of sub-section (1) of Section 15 on the elected members to bring a motion expressing want of Confidence in the Pramukh.

49. The contention of Sri Navin Sinha learned Senior Counsel for the petitioner is that with the moving of the motion of No

Confidence by elected members before the Collector and the Collector having fixed a date to convene the meeting of Kshettra Panchayat for consideration of the motion thereon, a "vested right" is created in favour of the elected members. The rights accrued to the elected members cannot be curtailed with the repeal of the existing provisions. Section 6 of the General Clauses Act has been pressed into service to assert that such a right has to be saved by considering the effect of repeal without any retrospective operation of the substituted provisions.

50. This submission though seemed convincing at the first blush but on a deeper scrutiny of the same, we find that no "vested right" or "accrued right" can be said to have been created in favour of the elected members by mere moving of the motion of No-Confidence against the Pramukh. The observations of the Apex Court in **Mohan Lal Tripathi Vs. District Magistrate, Rae Bareilly26** while dealing with the challenge to the amendment for reduction of period during which a motion of No Confidence could be tabled against the President of the Municipal Board, from 'two' to 'one' year are relevant to be noted here:-

"2.....Right to remove an elected representative, too, must stem out of the statute as `in the absence of a constitutional restriction it is within the power of a legislature to enact a law for the recall of officers'. (American Jurisprudence Vol. 63 2nd Edn. p.238.) Its existence or validity can be decided on the provision of the Act and not, as a matter of policy....."

51. It was observed therein that the validity or otherwise of a No-Confidence Motion for removal of a President would have to be examined on the applicability of statutory provisions; so long as it is in accordance with law, the recall of an elected representative cannot be assailed either on political philosophy or on abstract notions of democracy.

52. In **Usha Bharti Vs. State of U.P27**, the Apex Court had considered the concept of the provisions of No-Confidence Motion under Section 28 of the Act' 1961. It was observed therein that:-

"45. .....The provision of No Confidence Motion, in our opinion, is not only consistent with Part IX of the Constitution, but is also foundational for ensuring transparency and accountability of the elected representatives, including Panchayat Adhyakshas. The provision sends out a clear message that an elected Panchayat Adhyaksha can continue to function as such only so long as he/she enjoys the confidence of the constituents.

53.In our opinion, the provision for removing an elected representative such as Panchayat Adhyaksha is of fundamental importance to ensure the democratic functioning of the Institution as well as to ensure the transparency and accountability in the functions performed by the elected representatives."

53. In light of the above, it can be seen that the object for making provisions for removing an elected Pramukh though is to ensure the transparency and accountability in the functions performed by an elected representatives but the right conferred on the elected members to bring a motion expressing want of Confidence in the Pramukh, can be exercised only in accordance with the provisions of the statute, Section 15 of the Act' 1961.

54. The exercise of such a right by moving a motion of No-Confidence as conferred under sub-section (1) and (2) of Section 15, in our considered opinion, is only an expression of intention to bring the motion. The intention to make the motion, does not confer any 'vested right' with the elected members to carry-out the motion of No-Confidence in the meeting convened by the Collector. The obligation cast upon the Collector for compliance of mandatory provisions of sub-section (3) of Section 15, would have no bearing on the right of an elected members to bring the motion. No "vested right" or "accrued right" can be said to be created in favour of elected members for consideration of motion by mere fixing a date to convene the meeting in accordance with sub-section (3) and (4-B) of Section 15.

55. Moreover, carrying out a motion of No-Confidence would depend upon the result of voting thereon. It would be another case where the meeting had been held and the motion was considered, the elected members in that case will have a right to carry-out the motion of No-Confidence according to the result of the meeting fixed by the Collector. "Vested right" would have been created in that case with the elected members, which could not have been curtailed by substitution of sub-section (13) of Section 15.

56. Mere exercise of right to bring the motion by the elected members would come within the meaning of "existing right" to proceed with the motion of No-Confidence received by the Collector as on the date of amendment. The said right has been curtailed by the substitution of the period during which a No-Confidence motion could be tabled against the Pramukh, from 'one year' to 'two years'. With the coming into force of the amendment w.e.f 04.10.2022, it became impermissible for the Collector/Presiding Officer to table the motion for consideration by convening a meeting and declare it to be open for debate. The right of the elected members to debate on the motion in the meeting convened by the Collector/Presiding Officer, being mere "existing rights", has been curtailed by retrospective operation of the procedural amendment, wherein No-Confidence Motion cannot be brought against a Pramukh within 'two years' of the assumption of office by him.

57. Moreover, in light of language of sub-section (13) of Section 15, because of the words "of the assumption of office by a Pramukh", the period of two years" prescribed therein would relate back to the date of the assumption of office by a Pramukh.

58. From all angles, taking into consideration of the substance of the provisions, taking all circumstances into account, considering what result the legislature can reasonably be presumed to have wanted to achieve, we find that the substitution of procedural provisions under sub-section (13) of Section 15 has to be applied retrospectively. The No-Confidence moved by the elected members cannot be tabled for discussion or declare open to debate by the Collector after substitution of the period from "one year" to "two year" during which such a motion could be moved.

59. For the above discussion, on all counts, the action of the Collector concerned in cancelling the motion expressing want of confidence in the Pramukh of Kshettra Panchayat received by

him, "within two years" "of the assumption of office by the Pramukh" cannot be said to be illegal. There is no merit in the challenge.

60. All the writ petitions are, accordingly, **dismissed.**

(2023) 3 ILRA 383
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.02.2023

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIPIN CHANDRA DIXIT, J.

Writ C No. 32101 of 2022

Smt. Jayantra Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Kumar Tripathi, Sri Rahul Agarwal

Counsel for the Respondents:
C.S.C., Sri Aditya Kumar Singh, Sri Amit Kumar Singh, Sri Tarun Agrawal, Ajit Kumar Singh (A.A.G.), Sri Ashok Khare (Sr. Advocate)

A. Local body Law – Constitution of India – Article 226, 243O & 243ZG – Writ – Maintainability – Alternative remedy – No confidence motion – Validity thereof challenged – Objection of alternative remedy of Election petition – Permissibility – Held, as regards the validity of the meeting dated 30.09.2022 being in contravention of the provisions of S. 15 of the Act, 1961, the issue of resultant vacancy being dependent upon the 'No-confidence motion', cannot be subject matter of election petition – In case, the challenge raised by the petitioner to the validity of meeting convened on 30.8.2022 is sustained being in violation of the mandatory provisions of Section 15(3)(ii) of the Act, the resolution passed on said date has to be quashed. The result is that there would be no removal of the petitioner and, thus, no vacancy. The subsequent notification dated 14.10.2022 has to fall on its own – High Court turned down the objection regarding the maintainability of the writ petition. (Para 10)

B. Local body Law – UP Kshettra Panchayat and Zila Panchayat Act, 1961 – Sections15 (3) & (4B) – No confidence motion against Pramukh – Notice dated 23.08.2022 for convening the meeting on 08.09.2022 was issued by the D.M. – However, leave was sought by the Presiding Officer expressing inability due to illness of his mother, which was duly granted – Validity of adjourned meeting held on 30.09.2022 was challenged on the ground that the Notice dated 23.08.2022 fixing 08.09.2022 would be the mandatory valid notice of fifteen days as per clause (ii) of Sub-Section (3) of S. 15 of the Act, 1961 – Permissibility – Motion carried out in meeting on 30.09.2022 – Validity challenged – Held, on account of the unprecedented adverse situation faced by the Presiding Officer to preside at the meeting fixed by the Collector on 8.9.2022, the mere fact that he himself did not adjourn the meeting or did not fix the date and time of the meeting at the time of adjournment itself but intimated it later on assumption of his office after leave, would not invalidate the motion carried out in the meeting held on 30.9.2022. The defect in adjournment of the meeting fixed on 8.9.2022, if any, in not fixing the date and time of the adjourned meeting, is curable. (Para 23 and 29)

Writ petition dismissed. (E-1)

List of Cases cited :-

1. Yadu Nath Pandey Vs District Panchayat Raj Officer; 1986 UPLBEC 62

2. Kamla Devi Vs St. of U.P. & ors.; 2014 (2) ADJ 327

3. Kamal Sharma Vs St. of U.P. & ors.; 2013 SCC Online All 8448

4. Kiran Singh Vs St. of U.P. & ors.; 2017 (5) AWC 5096

5. Surendra Kumar Yadav Vs St. of U.P. & ors.; 2017 (3) AWC 2367 (LB)

6. Adesh Singh Yadav Vs Collector Bareilly; 2020 (5) ADJ 418

7. Niyazuddin Vs St. of U.P. & ors.; 2020 (1) AWC 794

8. Hari Shankar Jain Vs Sonia Gandhi; 2008 (1) SCC 233

9. Amar Nath Jaiswal Vs St. of U.P. & ors.; 1992 SCC Online

10. Aijaz Ahmad Vs Niyaz Ahmad & ors.; 1975 SCC Online All 111

11. Sardar Gyan Singh Vs D.M. Bijnore & ors.; 1975 SCC Online All 144

12. Akhilesh Kumar Katiyar Vs St. of U.P. & ors.; 2012 SCC Online All 4282

13. St. of U.P. Vs Manbodhan Lal Srivastava; AIR 1957 SC 912

14. Raza Buland Sugar Co. Ltd. Rampur Vs the Municipal Board, Rampur; AIR 1965 SC 895

15. Gyan Singh Vs the D.M., Bijnor & ors.; AIR 1975 Allahabad 315

16. Sharif-Ud-Din Vs Abdul Gani Lone; 16 (1980) 1 SCC 403

17. Vikas Trivedi Vs St. of U.P. & ors.; 2013 SCC OnLine All 14264

18. Kiran Pal Singh Vs St. of U. P. & ors.; (2018) 7 SCC 521

19. Bhanumati & ors. Vs St. of U.P. Through Its Principal Secretary & ors.; 19 2010 (12) SCC 1

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Vipin Chandra Dixit, J.)

1. Heard Sri Rahul Agarwal and Sri Ashok Kumar Tripathi learned counsel for the petitioner, Sri Ajit Kumar Singh learned Additional Advocate General assisted by Sri Sudhanshu Srivastava learned Additional Chief Standing Counsel for State-respondents and Sri Ashok Khare learned Senior Counsel assisted by Sri Aditya Kumar Singh learned Counsel for respondent No. 6.

2. This writ petitioner is challenging the 'No-confidence motion' carried out against her in the meeting held on 30.9.2022 as also the resultant notification issued by the Election Commission of India notifying the vacancy of the post of Block Pramukh/Pramukh, Kshettra Panchayat Haisar Bazar, District Sant Kabir Nagar.

3. The relevant facts to determine the controversy at hands are that a notice to bring 'No-confidence' motion against the petitioner herein, signed by 76 members out of total 99 members of the constituency namely Kshettra Panchayat Haisar Bazar was received by the District Magistrate, Sant Kabir Nagar. The District Magistrate by a notice dated 23.8.2022 called a meeting to consider 'No-confidence motion' on 8.9.2022. It is submitted by the learned counsel for the petitioner that the said notices were dispatched on 24.8.2022 by registered post. The period between the date of dispatch and the schedule date of meeting being less than 15 days, 'No-confidence motion' could not have been

carried out on the date fixed, i.e. 8.9.2022 in view of mandatory provisions of Section 15(3)(ii) of the U.P. Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961 (hereinafter referred to as "the Act, 1961").

4. It is an admitted fact of the matter that the meeting could not be convened on 8.9.2022. It was adjourned on account of an emergency leave applied by the Sub-Divisional Officer, Dhanghata, District Sant Kabir Nagar who was to preside over the meeting. The emergency leave application dated 6.9.2022 was moved by the Presiding Officer due to ill health of his mother with the prayer that he may be permitted to leave the station to go to District Meerut. Another leave application dated 7.9.2022 was moved by the Presiding Officer for extension of leave till 11.9.2022 due to prolonged illness of his mother. The leave was duly granted to the Sub-Divisional Officer, Dhanghata, Sant Kabir Nagar namely the Presiding Officer as per the service rules, by the competent Authority.

The District Magistrate, Sant Kabir Nagar has issued an office order dated 7.9.2022 intimating that the meeting of 'No-confidence' scheduled on 8.9.2022 could not be held due to unavoidable circumstances and had been postponed. Further, the Sub-Divisional Officer, Dhanghata/the Presiding Officer intimated the District Magistrate, Sant Kabir Nagar by the letter dated 15.9.2022 that the next date of the meeting was fixed on 30th September, 2022 to be held at 11:30 AM in the meeting hall in the office of Kshettra Panchayat, Haisar Bazar. The intimation of the date fixed of the meeting had been given to all the members, Kshettra Panchayat and the minutes of the meeting dated 30.9.2022, the result of the voting, shows that out of total 99 members, 95 had participated in the meeting and exercised their franchise. Out of 95 votes, 72 were in favour of "No-confidence motion' and hence it was passed with the strength of more than 50% of the members present and voting.

There is no dispute about the above noted facts. Sri Rahul Agarwal learned Advocate appearing for the petitioner, however, argued that the initial notice dated 23.8.2022 fixing 8.9.2022 for the meeting was dispatched on 24.8.2022 and hence the mandatory requirement of 15 days of intimation of the date fixed for meeting had not been fulfilled. Two terminal days, i.e. the first and the last date, i.e. the date of dispatch of notice and the date fixed for meeting have to be excluded from the time to be reckoned for compliance of Sub-Section (3) of clause (ii) of Section 15 of the Act, 1961.

Reliance is placed on the decisions of this Court in **Yadu Nath Pandey vs. District Panchayat Raj Officer1; Kamla Devi vs. State of U.P. and others2; Kamal Sharma vs. State of U.P. and other3; Kiran Singh vs. State of U.P. and others4; Surendra Kumar Yadav vs. State of U.P. and others5; Adesh Singh Yadav vs. Collector Bareilly6 and Niyazuddin vs. State of U.P. and others7** to assert that 15 days clear notice is mandatory in terms of Section 15(3)(ii) and non-compliance of the said provision would vitiate the proceeding.

5. The contention is that since the initial notice dated 23.8.2022 (dispatched on 24.8.2022) was bad in law, the subsequent adjournment of meeting and the motion carried out on 30.9.2022 within the extended time provided under Sub-Section (4-B) of Section 15 would have to be held bad in law. The entire proceeding being in

contravention of the provisions of Section 15 of the Act, 1961. It is argued that the provisions of Section 15(3)(ii) are mandatory in nature and any violation thereof is not curable defect and cannot be rectified by adjournment of the meeting scheduled on 8.9.2022.

Moreover, as per Sub-Section (4-B), the Officer who is to preside at such meeting is to record his reasons for adjournment of the meeting, if he is unable to preside at such meeting. While adjourning such meeting, he has to fix the date and time which shall not be later than 25 days for the date appointed for such meeting. The requirement of Sub-Section (4-B), thus, is that only the Presiding Officer himself can adjourn the scheduled meeting by fixing date and time of the adjourned meeting recording reasons for his inability to preside at such meeting. The intimation by the Collector of the next meeting as per Sub-Section (4-B) of Section 15 is, thus, followed by the intimation given by the Presiding Officer of the date and time of the adjourned meeting. The recording of reasons and fixing date and time of the adjourned meeting are simultaneous acts to be performed by the Presiding Officer. The deferment of meeting on 7.9.2022 with the office order issued by the District Magistrate, thus, is in contravention of the provisions of Section 4-B of the Act, 1961. Further the meeting dated 30.9.2022 has been held under the directions issued by this Court in the order dated 13.9.2022. The Presiding Officer himself failed to follow the mandatory procedure of adjournment. The contention is that the Executive Authorities namely the Presiding Officer and the Collector had given the provisions of Section 15 to a toss to buy time to hold the meeting as an adjourned meeting. The result of such an illegally convened meeting cannot be sustained in the eyes of law.

6. The submission, thus, is that since the entire process of carrying out 'No-confidence motion' in the meeting held on 30.9.2022 was per se illegal. The consequent vacancy and the notification issued by the State Election Commission, U.P., Lucknow dated 14.10.2022 for the post of Pramukh Kshettra Panchayat are also liable to be set aside. The submission is that the vacancy cannot be presumed to be validly existing if the meeting itself was invalid and the consequential 'No-confidence motion' is illegal, as any consequential election is dependent upon the result of the 'No-confidence motion'.

7. Sri Ashok Khare learned Senior Counsel assisted by Sri Aditya Kumar Singh learned Advocate for respondent No. 6 has challenged the maintainability of the writ petition with the assertion that in view of the second prayer made in the present writ petition, challenging the notification issued by the State Election Commission with the election of respondent no. 6, the only remedy before the petitioner is to file an election petition as issue of validity of the election can be raised only by way of an election petition in view of the bar under Article 243-O read with Article 243ZG of the Constitution of India. The writ petition is, thus, liable to be dismissed as not maintainable.

Reliance is placed on the decisions of the Apex Court in **Hari Shankar Jain vs. Sonia Gandhi8; Amar Nath Jaiswal vs. State of U.P. and others9** and of this Court in **Aijaz Ahmad vs. Niyaz Ahmad and others10; Sardar Gyan Singh vs. District Magistrate Bijnore and others11 and Akhilesh**

Kumar Katiyar vs. State of U.P. and others12 to substantiate the said assertion.

8. Learned Standing Counsel for the State respondents, however, has relied upon the averments in the personal affidavit of the District Magistrate, Sant Kabir Nagar to assert that there is no infirmity in the process of carrying out 'No-confidence motion'. The meeting was validly held on 30.9.2022 and the fact that 95 out of 99 members had participated in the meeting prove that information giving adequate time had been given to all the members. With regard to the meeting scheduled on 8.9.2022, it is submitted that the District Magistrate, Sant Kabir Nagar on receipt of the notice of intention to move the motion of 'No-confidence' against the petitioner, signed by 76 members of Kshettra Panchayat along with the notary affidavit on 22.8.2022, had formed a Committee comprising of three officers for scrutiny/verification of signatures/thumb impressions on the said written notice. All 76 members of Kshettra Panchayat Haisar Bazar who signed the written notice of intent dated 22.8.2022 were asked to present their credible and attested identity cards for verification of their signatures on the notice as also the affidavits filed by them, on 23.8.2022 at about 3:00 PM. On prima facie satisfaction of the signatures/thumb impressions of 76 members, three Member Committee recorded satisfaction of matching of signatures on the written notice of intent dated 22.8.2022 and the notary affidavits. The District Magistrate then directed the Sub-Divisional Officer, Dhanghata, Sant Kabir Nagar to preside at the meeting scheduled on 8.9.2020 at 11:30 AM at the designated place mentioned therein by issuing a letter dated 23rd August, 2022.

Simultaneously, notices were issued to 99 members on 23rd August, 2022 giving them intimation of the date fixed for motion of 'No confidence' on 8.9.2022 at 11:00 AM and the designated place of the meeting. The Block Development Officer was directed to serve notice to all 99 members and submit a report. Vide letter dated 24.8.2022, the Block Development Authority had submitted a report that out of 99 members, 78 had received the notice and out of remaining 21, the notice was pasted at the conspicuous places of the house of 15 members. The remaining members had assured to receive notice within one or two days. It is submitted by the learned Standing Counsel that adjournment of the meeting scheduled on 8.9.2022 was on account of unavoidable circumstances faced by the Presiding Officer and on the intimation given by the Presiding Officer, the District Magistrate had issued the Office Order dated 7.9.2022 intimating the reason for adjournment of the date fixed. The intimation about the date and time fixed for the meeting as 30.9.2022 at 11:30 AM was sent by the Presiding Officer to the District Magistrate pursuant to which the notices were sent and received by the members. No infirmity, therefore, can be attached to the 'No-confidence motion' carried out on 30.9.2022.

9. Dealing with the above submissions of the learned counsels for the parties, we are required to first deal with the submissions of Sri Ashok Khare learned Senior Advocate for the respondent no. 6 about the maintainability of the writ petition, on the plea that the writ petition challenging the no confidence motion cannot be entertained as after election as against the vacancy, the only remedy before

the petitioner is to challenge the election petition.

10. Dealing with this submission, suffice it to note that the issue raised in the present writ petition is about the validity of the 'No-confidence motion' carried out in the meeting held on 30.9.2022 against the petitioner herein. As regards the validity of the same being in contravention of the provisions of Section 15 of the Act, 1961, the issue of resultant vacancy being dependent upon the 'No-confidence motion', cannot be subject matter of election petition. Suffice it to note that the vacancy cannot be presumed to be existing if the meeting itself was invalid and the consequent 'No-confidence motion' is illegal. The consequential election against the resultant vacancy if found illegal, would itself fall. The vacancy in the present case undoubtedly occurred on account of the motion having been passed on the strength of a meeting, validity of which is subject matter of challenge herein. The filling up of such a vacancy is dependent upon the availability of the vacancy itself, which arises out of the 'No-confidence motion'. In our opinion, the question of validity of 'No-confidence motion' or the consequent vacancy occurring after the meeting held on 30.9.2022 cannot be subject matter of an election petition. Further on the date when the present writ petition has been filed, only the notification dated 14.10.2022 was issued by the State Election Commission and the date fixed for voting was 21st October, 2022. The lis before the Court was about the validity of the 'No-confidence motion' and notification of the consequent vacancy by the State Election Commission. In case, the challenge raised by the petitioner to the validity of meeting convened on 30.8.2022 is sustained being in violation of the mandatory provisions of Section 15(3)(ii) of the Act, the resolution passed on said date has to be quashed. The result is that there would be no removal of the petitioner and, thus, no vacancy. The subsequent notification dated 14.10.2022 has to fall on its own. The view taken by us is supported with the decision of the Division Bench of this Court in Kamla Devi (supra).

The objection as to the maintainability of the writ petition, for invoking jurisdiction under Article 226 of the Constitution of India, thus, is liable to be turned down.

11. Coming on the merits of the instant case, in order to deal with the contentions of the learned counsel for the petitioner, we are required to look to the scheme of the Act. The procedure for carrying out 'No-confidence motion' provided under Section 15 of the Act, 1961.

12. Before adverting to the provisions of the Act, we may note that to decide the question as to whether the statutory provisions are mandatory or directory in nature, no universal rule can be laid down. The use of the word "shall" or "may" is also not a decisive factor in determining this question. In considering the question, the purpose and the object of the provision as contained in the statute, the setting and the context in which the provisions occur and the purpose which is sought to be achieved by the provisions and the legislative intent in making the provision are necessary to be considered. [Reference **State of U.P. vs. Manbodhan Lal Srivastava13]**

In **Raza Buland Sugar Co. Ltd. Rampur vs. the Municipal Board, Rampur14,** while considering this question

at length, certain principles were laid down which are relevant to be noted as under:-

*"**Para 7** The question whether a particular provision of a statute which on the face of it appears mandatory, inasmuch as it uses the word "shall" as in the present case-is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the; provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory."*

13. Before a Full Bench of this Court in **Gyan Singh vs. the District Magistrate, Bijnor and others15**, the question was referred as to whether the second part of sub-Section (3) of Section 87A of the U.P. Municipalities Act, 1916 which provides the procedure for sending notice of meeting for consideration of "No-confidence motion' by the District Magistrate is mandatory or directory.

Considering the principles laid down in **Raza Buland Sugar Co. Ltd. Rampur** (supra), having gone through the scheme of the said statute, the setting and the context in which the provisions occur and the purpose which is sought to be achieved by the provisions, it was held therein that though the first part of Sub-Section (3) of Section 87-A which requires the District Magistrate to convene meeting of the Board for considering the motion of No-confidence against a President is mandatory. The District Magistrate is required to perform a public- duty in convening a meeting of the Board for consideration of the motion at the office of the Board on the date and time as fixed by him, he has no choice in the matter. He has to convene a meeting on a date within 30 and 35 days from the date of presentation of the motion to him. The District Magistrate is further enjoined to perform a public duty of sending notice of the meeting to the members, this again is a mandatory requirement of law which must be strictly complied with. But the second part of the Sub-Section (3) of Section 87-A which lays down the manner required to be followed in sending notices to the members and lays down that notice of the meeting shall be sent by registered post to every member of the Board at his place of residence, is directory. It was observed that the essence of this provision is to give information to the members to enable them to avail opportunity of participating in the meeting convened for the purpose of considering the "No-confidence motion'. It was held that the first part of Sub-Section (3) of Section 87-A requiring the District Magistrate to convene meeting and to send notices to the members being mandatory, any disregard of that provision would defeat the very purpose of the meeting. However, the manner of service of notice and publication of the same being directory in nature, a substantial compliance of the same would meet the requirement of law. It is held therein that the purpose of service of notice by registered post and publication of the notice otherwise is to ensure that members should get adequate notice, of the

meeting to enable them to participate in the debate over the "No-confidence motion' at the meeting. That purpose is not defeated if the notice is sent to the members not by registered post but by other methods and seven clear days are given to the members. The legislature never intended that unless notice is sent by registered post to the members, the proceedings of the meeting would be vitiated.

14. In **Sharif-Ud-Din vs. Abdul Gani Lone16**, it was held that the difference between a mandatory rule and a directory rule is that while the former must be strictly observed, in the case of the latter substantial compliance may be sufficient to achieve the object regarding which the rule is enacted. The broad propositions regarding the rules of construction that should be followed in determining whether a provision of law is directory or mandatory have been summarised as under:-

*"**Para 9.** ...xxxxxxxx...The fact that the statute uses the word 'shall' while laying down a duty is not conclusive on the question whether it is a mandatory or directory provision. In order to find out the true character of the legislation, the Court has to ascertain the object which the provision of law in question is to subserve and its design and the context in which it is enacted. If the object of a law is to be defeated by non-compliance with it, it has to be regarded as mandatory. But when a provision of law relates to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as a directory one. Where however, a provision of law prescribes that a certain act has to be done in a particular manner by a person in order to acquire a right and it is coupled with another provision which confers an immunity on another when such act is not done in that manner, the former has to be regarded as a mandatory one. A procedural rule ordinarily should not be construed as mandatory if the defect in the act done in pursuance of it can be cured by permitting appropriate rectification to be carried out at a subsequent stage unless by according such permission to rectify the error later on, another rule would be contravened. Whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow."*

15. A Full Bench of this Court in **Vikas Trivedi vs. State of U.P. & others17** has considered the questions about the validity of the notice sent by the Collector under Section 15(2) and (3) of the Act, 1961 as follows:- (i) whether the notice can be held invalid because the copy of the notice with the names of persons who had signed the written notice of their intention to bring motion of No-confidence was not sent along with the same; (ii) whether the notices convening the meeting can be invalidated merely on the ground that some pages of the proposed motion containing signatures of some members only were not included in the copy of the proposed motion of no confidence sent along with the said notice.

As regards the earlier decision of the Full Bench in **Gyan Singh** (supra), an issue was raised with regard to the

relevance of the said decision after insertion of Part IX-A of the Constitution of India by 74th Amendment Act, 1992. Considering the constitutional scheme in Articles 243P to 243ZG regarding the Municipalities, it was held by the Full Bench in **Vikas Trivedi** (supra) that the interpretation of Section 87-A of the U.P. Municipalities Act, 1916 by the Full Bench in **Gyan singh** (supra) is very much relevant and in no manner its precedencial value can be ignored after 74th Amendment of the Constitution.

16. Further having gone through the relevant statutory provisions, the principles of statutory interpretation, it was considered as to whether the requirement of sending the notice in accordance with the prescribed proforma with annexures is mandatory and non-compliance of the same would vitiate the entire proceeding.

It was further held that *"As noted above, Section 15 of the 1961 Act is a statutory provision recognising the right of elected members to bring motion of no confidence against the Pramukh. The Collector is entrusted with public duty to issue notice. As noted above, the Apex Court in Dattaraya Moreshwar vs. the State of Bombay and others case (supra) had laid down that provisions of statute creating public duty are directory and those conferring private rights imperative. If the contention is accepted that while sending notice by the Collector although relevant information regarding date, time and place of meeting has been given and notice also mentions that no confidence motion has been proposed against such and such officer bearers but the copy of the motion of no confidence is not annexed, whether the same shall frustrate the very object of the Act or shall advance the object and purpose of the statutory provision, is the question to be answered. Obviously, if the members are given notice and information which is primary object and purpose of giving notice by the Collector of the meeting and the motion of no confidence is read as soon as the meeting is convened, we are of the view that to hold that not sending of copy of no confidence motion shall vitiate the entire proceeding, shall be defeating the very purposes and object of Section 15 of the 1961 Act. "*

The ratio of the judgment of the Apex court in **Raza Buland Sugar Co. Ltd. Rampur** (supra) has been held to be applicable for interpretation of Section 15 of the Act, 1961 and considering the provisions of Section 15(3) of the 1961 Act, it was held that the manner of sending notice in the prescribed proforma as per the rules framed under the Act, 1961 cannot be said to be mandatory, breach of which shall vitiate the entire proceeding. It was held that the proceeding of "No-confidence motion' shall be carried out if there is a substantial compliance of the provisions of Rule 2 read with Form-2, the prescribed format of sending notice under the rules. The substantial compliance of the said provision shall not vitiate the proceeding of No-confidence.

17. It was, thus, held that:- (1) The requirement of giving notice by the Collector under Section 15(3)(ii) in the prescribed form as required by Rule 2 and Form-2 is not mandatory and on substantial compliance of the provisions, the proceedings shall not be vitiated. However, the question whether there has been substantial compliance of the said provision would depend on the facts and circumstances of each case. It was, thus, concluded that when proposed motion of No-confidence is signed by the requisite

members, the notice convening the meeting cannot be invalidated merely on the ground that some pages of the proposed motion containing signatures of some members only, were sent along with the notice.

18. In **Kiran Pal Singh vs. State of Uttar Pradesh and others18,** the Apex Court was considering a challenge to the second notice of No-confidence motion, at the instance of an elected Pramukh Kshettra Panchayat. In the facts of that case, an application under Section 15(2) of the U.P. Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961 intimating intention to bring No-confidence motion against a Pramukh was received by the District Magistrate/Collector of the District concerned. As no action was taken by the District Magistrate/Collector, one of the applicants moved the High Court at Allahabad seeking a direction to the Collector to accept the notice under Section 15(2) of the Act and to take appropriate steps for bringing the proceeding of the No-confidence motion to its logical end. During pendency of the said writ petition, another written notice of intention to make the motion of No-confidence was delivered to the District Magistrate/Collector concerned. The Collector issued notice to convene a meeting of Kshettra Panchayat for consideration of the motion of No-confidence at the date and time fixed therein in the office of Kshettra Panchayat. The No-confidence motion was carried out after casting of votes. The elected Pramukh Kshettra Panchayat against whom No-confidence motion was carried out assailed the second notice on the foundation of statutory impermissibility during pendency of the first notice. It was contended therein that during pendency of first notice, second notice could not have been issued and the meeting could not be carried out as per the provisions of sub-Section (2) of Section 15.

19. Having considered the scheme of sub-Section (2) of Section 15, it was held by the Apex Court therein that on receipt of a written notice of intention to make the No-confidence motion in such form as may be prescribed, signed by at least half of the total number of elected members of Kshettra Panchayat for the time being together with a copy of the proposed motion, to be delivered in person, by any one of the members signing the notice, to the Collector having jurisdiction over the Kshettra Panchayat, the requirement under sub-Section (3) to convene the meeting by the Collector is fulfilled. At this stage, the jurisdiction that the Collector is only to scan the notice to find out whether it fulfills the essential requirements of a valid notice. The exercise of the said discretion, is summary in nature and there cannot be a detail inquiry with regard to the validity of the notice. Sub-Section (3) of Section 15 mandates that a meeting has to be convened not later than 30 days from the date of delivery of the notice and further there should be at least 15 days' notice to be given to all the elected members of the Kshettra Panchayat. The Collector, therefore, has no power to enter into an arena to record a finding on seriously disputed questions of facts relating to fraud, undue influence or coercion. His only duty is to determine whether there has been a valid notice as contemplated under Sub-Section (2) of Section 15. His delving deep to conduct a regular inquiry would frustrate the provision. He must function within his own limits and leave the rest to be determined in the meeting. The submission that once a notice was given under Section 15(2), another notice of no confidence should not be received until after expiration of one year, was turned down being without any substance, inasmuch as, the prohibition under Section 15(12) would come into play

only when there is a meeting and the motion is "not carried out" as per the provisions of Section 15 or meeting could not be held for want of quorum.

20. Taking note of the above decisions laying down principles for determination of the nature of the statutory provisions being mandatory or directory, the scheme of the Articles 243 to 243-O in Part IX of the Constitution which require for Constitution of Panchayats in every State at the village and district level in accordance with the provisions of Part IX, it was observed therein that Article 243(d) defines "Panchayat' to mean an institution (by whatever name called) of self-government (constituted under Article 243B) for the rural areas. The said articles ignited the spirit of self-governance in the pyramidical structure of local self-government. The purpose as envisioned in conferring power of governance in the democratically organized units is to instill a sense of satisfaction in the people at the grass root level.

The observation of the Apex Court in **Bhanumati and others vs. State of Uttar Pradesh Through Its Principal Secretary and others19** while considering the 73rd Constitutional Amendment in paragraph '26' has been noted therein as under:-

"26. What was in a nebulous state as one of Directive Principles under Article 40, through 73rd Constitutional Amendment metamorphosed to a distinct part of Constitutional dispensation with detailed provision for functioning of Panchayat. The main purpose behind this is to ensure democratic decentralization on the Gandhian principle of participatory democracy so that the Panchayat may become viable and responsive people's bodies as an institution of governance and thus it may acquire the necessary status and function with dignity by inspiring respect of common man. In our judgment, this 73rd Amendment of the Constitution was introduced for strengthening the perambular vision of democratic republicanism which is inherent in the constitutional framework."

21. Considering the purpose of the statutory scheme framed under U.P. Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961, the Apex Court in **Kiran Pal Singh** (supra) delve into the scheme of Article 243-243O. It was noted that the source of power on the States to frame law, thus, has been incorporated in the Constitution. The legislations made by the State legislatures, inter alia, have fixed the tenure of the panchayats and also grant protection for continuance of the elected members subject to the disqualifications and further the method for vote of No-confidence. The provisions of Sub-Section (13) of Section 15 which provides that no notice of a motion under Section 15 shall be received within the time prescribed therein, from the assumption of office by a Pramukh is in consonance with the principle of stability of rural governance. There are provisions for removal in case of misconduct by an elected person. The statutory scheme, thus, has been framed to bring stability in the governance at the grass root level in furtherance of the principles of democratic decentralisation of Governmental functions. It also provides that the democracy at the rural level must cherish the values of democracy and, therefore, a Pramukh can be removed when a vote of No-confidence is passed against him and once the No-confidence motion fails, it cannot be brought again for one year.

22. Considering the above principles of construction of statute as mandatory or directory and the statutory scheme as envisaged by the State Legislature as discussed in **Kiran Pal Singh** (supra), we are required to note the procedure for carrying out No-confidence motion as laid down in Section 15 of the Act, 1961 which reads as under:-

*"**15. Motion of non-confidence in Pramukh or** [***] (1) A motion expressing want of confidence in the Pramukh or any [***] of a Kshettra Panchayat may be made and proceeded with in accordance with the procedure laid down in the following sub-sections.*

(2) A written notice of intention to make the motion in such form as may be prescribed, singed by at least half of the total number of elected members of the Kshettra Panchayat for the time being together with a copy of the proposed motion, shall be delivered in person, by any one of the members signing the notice, to the Collector having jurisdiction over the Kshettra Panchayat.

(3) The Collector shall thereupon-

(i) convene a meeting of the Kshettra Panchayat for the consideration of the motion at the office of the Kshettra Panchayat on a date appointed by him, which shall not be later than thirty days from the date on which the notice under sub-section (2) was delivered to him; and

(ii) give to the elected members of the Kshettra Panchayat notice of not less than fifteen days of such meeting in such manner as may be prescribed.

Explanation- In computing the period of thirty days specified in this sub-section, the period during which a stay order, if any, issued by a Competent Court on a petition filed against the motion made under this section is in force plus such further time as may be required in the issue of fresh notices of the meeting to the members, shall be excluded.

(4) The sub-divisional officer of the sub-division in which the Kshettra Panchayat exercises jurisdiction shall preside at such meeting:

Provided that if the Kshettra Panchayat exercises jurisdiction in more than one sub-division or the sub-divisional officer cannot for any reason preside, any stipendiary additional or Assistant Collector named by the Collector shall preside at the meeting:

(4-A) If within an hour from the time appointed for the meeting such officer is not present to preside at the meeting, the meeting shall stand adjourned to the date and time to be appointed by him under sub-section (4-B).

(4-B) If the officer mentioned in sub-section (4) is unable to preside at the meeting, he may, after recording his reasons, adjourn the meeting to such other date and time as he may appoint, but not later than 25 days from the date appointed for the meeting under sub-section (3). He shall without delay inform the Collector in writing of the adjournment of the meeting. The Collector shall give to the members at least ten days notice of the next meeting in the manner prescribed under sub-section (3).

(5) Save as provided in sub-sections (4-A) and (4-B), a meeting convened for the purpose of considering a motion under this section, shall not be adjourned.

(6) As soon as the meeting convened under this section commences, the Presiding Officer shall read to the Kshettra Panchayat the motion for the consideration of which the meeting has been convened and declare it to be open for debate.

(7) No debate on the motion under this section shall be adjourned.

(8) Such debate shall automatically terminate on the expiration of two hours from the time appointed for the commencement of the meeting, if it is not concluded earlier. On the conclusion of the debate or on the expiration of the said period of two hours, whichever is earlier, the motion shall be put to vote which shall be held in the prescribed manner by secret ballot.

(9) The Presiding Officer shall not speak on the merits of the motion and he shall not be entitled to vote thereon.

(10) A copy of the minutes of the meeting, together with a copy of the motion and the result of the voting thereon, shall be forwarded forthwith on the termination of the meeting by the Presiding Officer to the State Government and the Zila Panchayat having jurisdiction.

(11) If the motion is carried with the support of [more than half] of the total number of elected members of the Kshettra Panchayat for the time being-

(a) the Presiding Officer shall cause the fact to be published by affixing a notice thereof on the notice board of the office of the Kshettra Panchayat and also by notifying the same in the Gazette; and

(b) the Pramukh or [***], as the case may be, shall cease to hold office as such vacate the same on and from the date next following that on which the said notice is fixed on the notice board of the office of the Kshettra Panchayat.

(12) If the motion is not carried as aforesaid or if the meeting could not be held for want of quorum, no notice of any subsequent motion expressing want of confidence in the same Pramukh or [***] shall be received until after the expiration of [one year] from the date of such meeting.

(13) No notice of a motion under this section shall be received within [one year] of the assumption of office by a Pramukh or [***], as the case may be."

The sub-Section (1) of Section 15 of the Act, 1961 provides that a motion expressing want of confidence in the Pramukh of a Kshettra Panchayat can be made and proceeded with in accordance with the procedure laid down in sub-Sections (2) to (13) of Section 15. Sub-Section (2) of Section 15 requires the manner in which a written notice of intention to make motion can be moved to the Collector having jurisdiction over the Kshettra Panchayat. Sub-Section (3) mandates the Collector to convene a meeting of the Kshettra Panchayat for the consideration of the motion, at the office of the Kshettra Panchayat on a date appointed by him, not later than thirty days from the date of delivery of notice under sub-Section (2) to him. It also mandates the Collector to give notice to the elected members of Kshettra Panchayat of such meeting in not less than fifteen days, in the manner as prescribed (under the Rules). Sub Section (4) further states that the Sub-Divisional Officer of the concerned sub-division in which the Kshettra Panchayat exercises jurisdiction shall preside at such meeting. The procedure for adjournment of meeting fixed by the Collector in accordance with the provisions of Sub-Section (3)(i), has been provided in Sub-Sections (4-A) and (4-B) of the Act, 1961. Sub-Section (5) further provides that a meeting convened for the purpose of considering a motion under Section 15 cannot be adjourned save as provided in Sub-Sections (4-A) and (4-B). The procedure as to how the motion shall be carried out in a meeting convened under Section 15 has been provided in Sub-Section (6) to Sub-Section (11). The consequence, in case the motion is not carried out or the meeting could not be

held for want of quorum has been provided in Sub-Section (12). Sub-Section (13) puts the embargo on receiving a notice of motion of No-confidence within one year of the assumption of office by a Pramukh.

We may note that the provisions of Sub-Section (13) have been amended to change the period of one year to two years by amendments brought on 4.10.2022. But we are not concerned with the said amendment as motion of No-confidence, in this case, has been carried out prior to the said amendment.

23. The question before us in the facts of the instant case are as to whether the notice dated 23.8.2022 fixing 8.9.2022 would be the mandatory valid notice of fifteen days as per clause (ii) of Sub-Section (3) of Section 15 of the Act, 1961 intimating the elected members of Kshettra Pahchayat of the date and time fixed for convening a meeting by the Collector. We are further required to consider in view of the arguments of the counsel for the petitioner that in case, the notice under Sub-Section (3)(ii) of Section 15 was given fixing a date of meeting in a period of less than 15 days as against the requirement of the said provision, whether the No-confidence motion carried out in the adjourned meeting held on 30.9.2022 would fall being in violation of the statutory requirement.

As per the stand of the District Magistrate, Sant Kabir Nagar, the meeting of No-confidence motion was initially fixed on 8.9.2022 at 11:00 AM in the meeting hall of the office of the Kshettra Panchayat, Haisar Bazar and a notice in that regard was issued on 23.8.2022. The report dated 24.8.2022 of the Block Development Officer, Sant Kabir Nagar who was deputed to serve the notice has been brought on record wherein it is indicated that out of 99 members, 78 members of Kshettra Panchayat had been served with the notice on 23.8.2022 itself. Fifteen members out of remaining 21 had refused to receive the notice and hence it was pasted at the conspicuous places of their house. For the remaining 6 members, who had refused to receive notice by saying that they will receive it within one or two days, the directions have been issued to the Gram Panchayat Secretary and Assistant Development Officer (Panchayat). Further the notice through post had been sent on 24.8.2022 to 99 members of Kshettra Panchayat.

24. In reply to the said assertion of the District Magistrate in his personal affidavit dated 31.10.2022, it is asserted in the rejoinder affidavit that it was not possible for the petitioner to able to collect the proof of the averments made in the paragraph under reply. The contention is that no other procedure had been given in the Act for service of notice of no confidence motion except the dispatch of notice through registered post. The averments with regard to the personal service of notice is an afterthought and it could not be proved in any manner which is known to the proceedings under the Act, 1961. As such, in computing the period of 15 days as per Sub-Section (3)(ii) of Section 15, the date of dispatch of notice, i.e. 24.8.2022 and the date fixed for meeting i.e. 8.9.2022 are to be excluded. As the said period would fall short of fifteen days as against the mandatory requirement of the aforesaid provision, the initial notice dated 23.8.2022 fixing the date of meeting as 8.9.2022 would fall being in violation of the mandatory provisions of the statute.

25. In support of this submission, reliance has been placed by the learned counsel for the petitioner on the decisions

noted above wherein the motion of No-confidence was carried out in violation of the mandatory provision which requires fifteen days clear notice, have been held to be invalid.

26. We may note that the position in this case is different, inasmuch as, the meeting for No-confidence motion could not be held on the date fixed by the Collector i.e. 8.9.2022, because of emergency situation faced by the Presiding Officer, the Sub-Divisional Officer of the sub-division concerned, on account of illness of his mother.

27. The reliance placed by the learned counsel for the petitioner on the above noted decisions to challenge the validity of the No-confidence motion which has been carried out on 30.9.2022 in the instant case, therefore, is of no benefit. Even if it is accepted for a moment that the notice of No-confidence motion was not served personally on the elected members of the Kshettra Panchayat on 23.8.2022 as per the report of the Block Development Officer dated 24.8.2022 and the period of clear fifteen days was not given to the elected members to discuss on the motion of No-confidence in accordance with the provisions of Sub-Section (3)(ii) of Section 15, the same will not have any bearing on the validity of the subsequent meeting held on 30.9.2022, inasmuch as, motion of No-confidence had not been carried out on the date fixed by the Collector on 8.9.2022.

28. As regards the non-adherence to the requirement of Sub-Section (4-B) by the Presiding Officer at the time of adjournment of the meeting, it may be noted that Sub-Section (4-B) is in two parts. The first part mandates the Presiding Officer to record his reasons for adjournment of the meeting fixed by the Collector in the notice given under Sub-Section (3) of Section 15. While adjourning the meeting, on account of his inability to preside at such meeting, he is required to fix a date and time which shall not be later than 25 days from the date appointed for the meeting under Sub-Section (3). He is further required to intimate the Collector in writing without delay of the adjournment of the meeting. The recording of reasons for adjourning the meeting fixed by the Collector at the end of the Presiding Officer is mandatory. It is also mandatory that the adjourned meeting is held within the period prescribed under clause (4-B) which is not later than 25 days from the date of meeting fixed by the Collector. The intimation of the adjournment of meeting to the Collector by the Presiding Officer is also mandatory. The mandatory procedure prescribed by the legislature is to restrict the power of the Presiding Officer/Sub-Divisional Officer to adjourn the meeting fixed by the Collector under Sub-Section (3) of Section 15 at his own whims and fancies and to adhare the timeline provided in the meeting to carry out the No-confidence motion. Under sub-Section (4-B), the Collector is required to give notice to the members with clear 10 days of the next meeting fixed by the Presiding Officer in the manner prescribed under sub-Section (3). The intimation by the Collector to the members of the adjourned meeting with 10 clear days of notice is also mandatory, being in the spirit of the provision, but the requirement of fixing the date and time of the adjourned meeting by the Presiding Officer, i.e. Sub-Divisional Officer of the sub-division concerned at the time of adjournment itself is directory. The setting and the context in which the Sub-Section (4-B) occur and the purpose which is sought to be achieved by the said provision and the legislative intent in making the provision can be found as:-

(i) The Presiding Officer shall unless there are reasons recorded in writing showing his inability, not adjourn the meeting fixed by the Collector under Sub-Section (3) of Section 15;

(ii). The notice of intention to make the motion moved by the elected members in accordance with Sub-Section (2) of Section 15, the motion of confidence, shall be considered within the period of thirty days prescribed in Sub-Section (3)(i) of Section 15;

(iii) However, in a case of adjournment of meeting fixed under Sub-Section (3), the date of the adjourned meeting has to be fixed in not later than twenty five days from the date appointed for the meeting under sub-Section (3).

(iv) The purpose and the legislative intent for providing the period of adjourned meeting and requirement to record reasons by the Sub-Divisional Officer to adjourn the meeting is to ensure that the motion of No-confidence moved by the elected members is considered in the spirit of the democratic principles on the foundation of which the provision of Section 15 has been construed and it shall not be delayed on account of any slackness on the part of the administrative authorities such as the Collector or the Presiding Officer, who are mandated to receive the motion and preside over the meeting; respectively.

The phrase "adjourn the meeting to such other date and time as he may appoint" occurring in Sub-Section (4-B) of Section 15 cannot be held to be mandatory so as to affect the validity of the meeting held within 25 days from the date appointed for the meeting under Sub-Section (3), as required under Sub-Section (4-B) of Section 15.

29. In the instant case, the Sub-Divisional Officer who was required to preside at the meeting in accordance with Sub-Section (4) could not hold the meeting on 8.9.2022 because of having proceeded on leave due to emergent situation of sudden illness of his mother. The leave application was duly submitted by the Sub-Divisional Officer giving intimation of the reason of his inability to preside at the meeting. The leave application moved by the said officer on 7.9.2022, a day prior to the meeting was allowed and the leave was granted as per the leave rules. The intimation of the adjournment of meeting was given to the members by issuing an office order dated 7th September, 2022 by the Collector/District Magistrate, Sant Kabir Nagar. The date and time of the adjourned meeting fixed by Sub-Divisional Officer/Presiding Officer as on 30.9.2022 at 11:30 AM had been intimated to the Collector, Sant Kabir Nagar soon after he returned from leave. Clear ten days notice had been given to the elected members of Kshettra Panchayat and the motion of No-confidence was carried out by majority votes on 30.9.2022, at the date and time fixed by the Sub-Divisional Officer. On account of the unprecedented adverse situation faced by the Presiding Officer to preside at the meeting fixed by the Collector on 8.9.2022, the mere fact that he himself did not adjourn the meeting or did not fix the date and time of the meeting at the time of adjournment itself but intimated it later on assumption of his office after leave, would not invalidate the motion carried out in the meeting held on 30.9.2022. The defect in adjournment of the meeting fixed on 8.9.2022, if any, in not fixing the date and time of the adjourned meeting, is curable for the fact that the date of the adjourned meeting had been fixed by the Presiding Officer at the earliest

opportunity, within the period of twenty five days prescribed in Sub-Section (4-B) and intimation of the adjourned meeting had been duly given by the Collector to the elected members within the time prescribed under the said provision.

30. The contention of the learned counsel for the petitioner that the adjournment of meeting by the Presiding Officer on 7.9.2022 by giving intimation to the District Magistrate, Sant Kabir Nagar was a device to get over the provisions of Sub-Section (3)(ii) of Section 15 as clear notice of fifteen days initially was not given to the elected members does not impress us, inasmuch as, nothing could be brought before us to contend that the Presiding Officer did not apply for leave or leave was not duly granted to him. The truth of the circumstance faced by the Presiding Officer, the reason for adjourning the meeting, cannot be examined by us.

For the above discussion, we find that there is no violation of the mandatory provisions of Sub-Section (4-B) of Section 15 of the Act, 1961 on the part of the Presiding Officer. There is no error in the decision making process. The challenge to the resolution dated 30.9.2022, therefore, cannot be sustained.

The writ petition is **dismissed** being devoid of merits.

(2023) 3 ILRA 399
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.02.2023

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Writ C No. 32847 of 2022

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

Counsel for the Petitioner:
Sri Prashant Pandey

Counsel for the Respondents:
C.S.C., Sri Udit Chandra

A. UP Electricity Supply Code, 2005 – Para 2(oo), 4.1 & 4.3 – Electricity connection – Entitlement of occupier of a shop of the premises – Dues on the other portion of premises, but no dues on the shop – Effect – Held, as per Scheme of the Act, 2003, an occupier of the premises is entitled for electricity connection and licensee cannot deny the electric connection to such an occupier of the premises – Licensee shall not refuse electric connection to an applicant on the ground that dues on other portions of such premises have not been paid, nor shall the licensee demand record of last paid bills of other portions from such applicants. (Para 13 and 17)

Writ petition disposed of . (E-1)

List of Cases cited :-

1. Seema Mansoor Vs U.P. Power Corporation & ors.; 2014 (6) ADJ 672

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

1. Heard Sri Prashant Pandey, learned counsel for the petitioner, learned Standing Counsel for the State respondent no.1 and Sri Udit Chandra, learned counsel for the respondents no.2 and 3.

2. Learned counsel for the petitioner submits that the petitioner is tenant of a small shop measuring 7'4" x 7' in House No. CK-48/207 Rehmat Market, Hadha

Saray, Varanasi. It is alleged that he is tenant of the aforesaid shop since 1997 and he uses alternative sources of energy. Now, he wants an electric connection and for that purpose moved an application on 22.2.2022 before the respondent no.3 for electric connection in the aforesaid premises, but the respondents are not granting electric connection on the pretext that there are certain dues in respect of the building in which the shop of the petitioner is situated.

3. Aggrieved with the non-grant of electricity connection by the respondents, the petitioner has filed the present writ petition praying for the following relief:-

"i. issue, a writ, order or direction in the nature of mandamus directing the respondent no.3 to provide the electricity connection in the shop of the petitioner i.e. Shop at CK-48/207 Rehmat Market, Hadaha Saray, Varanasi in accordance with the provisions."

4. Learned counsel for the respondents no.2 and 3 submits that since there are dues with respect to the building in question, therefore, no new electric connection can be granted for the shop occupied by the petitioner.

5. Learned counsel for the petitioner submits that there are no electricity dues either against the petitioner or in respect of premises in question i.e. shop occupied by the petitioner, therefore, there is no legal impediment to grant new electric connection to the petitioner.

6. We have carefully considered the submission of learned counsel for the parties.

7. We find that para 4.1 of the Uttar Pradesh Electricity Supply Code, 2005 (hereinafter referred to as "the Code, 2005") provide for grant of supply of electricity, which is reproduced below:-

"CHAPTER 4

PROCEDURE FOR GRANT OF SUPPLY

4.1 Licensee's Obligation to Supply :

The Licensee shall on an application by the owner or occupier of any premises, located in his area of supply, give supply of electricity to such premises within the one month after receipt of completed application showing payments of necessary charges and other compliances :

Provided also in case of application for supply from a village or hamlet or areas wherein no provision for supply of electricity exists, the Commission shall extend the time period for provision of supply appropriately on a case-to-case basis:

Provided further that, in case of arrears of electricity dues in respect of any of old consumers / premises where ownership has changed, the new connection shall be released to the new owners only after submission of No-Dues Certificate as provided in clause 4.3(f): and

Provided that, if there are arrears of electricity dues on a premises, a new connection shall not be released *to a new applicant/or the old consumer* ***on the same premises.*** *The connection shall also not be released if--*

(i) The applicant (being an individual) is an associate or relative (as defined in Section 2 and 6 respectively of the Companies Act, 1956) of the defaulting consumer,

(ii) Or where the applicant being a company or body corporate or

association or body of individuals, whether incorporated or not, or artificial juridical person, is controlled, or having controlling interest in the defaulting consumer, provided, the Licensee shall not refuse electric connection on this ground, unless an opportunity to present his case is provided to the applicant and a reasoned order is passed by an officer as designated by the licensee."

8. Learned counsel for respondent nos. 2 and 3 has heavily relied upon the third proviso to para 4.1 of the Code, 2005 and submits that since there are electricity dues on the premises i.e. the building in question, therefore, no new connection can be granted with respect to the shop occupied by the petitioner.

9. We find that the submissions made by learned counsel for the respondent nos.2 and 3 is totally misplaced.

10. The word "Occupier" and the word "Premises" have been defined in para 2(oo) and para 2(ss) of the Code, 2005 as under:-

*"(oo) **"Occupier"** means the owner or authorised person in occupation of the premises where energy is used or proposed to be used.*

*(ss) **"Premises"** means the area / portion of the building / shed / field etc., for which, the electric connection has been applied for or sanctioned for a single consumer."*

11. Restriction on a new electric connection on account of dues in respect of the same premises, has been provided in the third proviso to para 4.1 of the Code, 2005. The word "premises" has been defined in Section 2(ss) of the Code, 2005, that premises is an area/portion of the building/shed/field etc., for which the electric connection has been applied for or sanctioned for a single consumer. Thus, the shop occupied by the petitioner is a premises within the meaning of para 2(ss) of the Code, 2005, and if the petitioner is a tenant of the shop then he being a tenant i.e. the authorised person in occupation shall be the occupier within the meaning of para 2(oo) of the Code, 2005.

12. In **Seema Mansoor v. U.P. Power Corporation and 3 Others** reported in **2014 (6) ADJ 672,** this Court, relying upon the Statement of Objects and Reasons and Section 42 and 43 of Electricity Act, 2003, read with Clause 4.4 of the Electricity Supply Code, 2005, observed as under:

"7. Electrical undertakings have acquired the character of public utility by reason of their monopolistic position. The State in exercise of its legislative power has enacted the Electricity Act 2003 to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry as also to protect the interest of consumers and supply of electricity to all areas. The same is reflected from the statement of objects and reasons of Electricity Act, 2003.

8. Section 42 of the Act deals with duties of distribution licensee. The said section reads as under :

"42. Duties of distribution licensee and open access. - (1) it shall be a duty of a distribution licensee to develop and maintain an efficient, coordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.

9. Section 43 of the Act cast duty upon licensee to supply electrical energy on request. Sub-section (1) of the said section reads as under :

"43. Duty to supply on request. - (1) Every distribution licensee, shall, on an application by the owner or occupier of any premises, given supply of electricity to such premises, within one month after receipt of the application requiring such supply:

Provided that where such supply requires extension of distribution mains, or commissioning of new sub-stations, the distribution licensee shall supply the electricity to such premises immediately after such extension or commissioning or within such period as may be specified by the Appropriate Commission:

Provided further that in case of a village on hamlet or area wherein no provision for supply of electricity exists, the Appropriate Commission may extend the said period as it may consider necessary for electrification of such village or hamlet or area.

(2). It shall be the duty of every distribution licensee to provide, if required, electric plant or electric line for giving electric supply to the premises specified in sub-section (1):

Provided that no person shall be entitled to demand, or to continue to receive, from a licensee a supply of electricity for any premises having a separate supply unless he has agreed with the licensee to pay to him such price as determined by the Appropriate Commission.

(3). If a distribution licensee fails to supply the electricity within the period specified in sub-section (1), he shall be liable to a penalty which may extend to one thousand rupees for each day of default.

10. A bare reading of the provisions of the Electricity Act, 2003 go to show that every distribution licensee is under an obligation not only to develop but also to maintain efficient, coordinated and economical distribution system in the area of its supply. The provision of Section 43 of the Electricity Act cast a statutory duty upon the distribution licensee to supply electricity not only to owner but also occupier of premises located within the limits of the area of its supply subject to an application being made by owner or occupier in this regard and correspondingly the owner or occupier of any premises, as the case may be, has statutory right to supply and obtain such electricity supply from the distribution licensee. Of course, the right is subject to completion of formalities provided for the purpose.

11. Electricity Supply Code, 2005 reference of which has been made by learned counsel for the respondents to contend that electricity connection cannot be granted without consent from the owner enforced in 2005 enlists the obligations of the licensee and consumers vis-a-vis each other and specifies the set of practices to provide efficient, cost effective and consumer friendly service to the consumers. Under Clause 2.2 (oo) of 2005 Code 'Occupier' means the owner or authorized person in occupation of the premises where energy is used or proposed to be used. Clause 4.4 prescribes procedure for processing of application for supply. Clause 4.4 (a) which is relevant for the purpose of the present case reads as under :

"4.4. Processing of Application for Supply.

(a) Application for new connections, in prescribed form (Annexure 4.1) and complete in all respects and accompanied by the prescribed Registration-cum-processing fee, shall be

filed in duplicate in the office, specified by the Licensee, along with attested true copies of the following documents:

(i)Proof of ownership of the premises in the form of registered sale deed or partition deed or succession or heir ship certificate or deed of last will or proof of occupancy such as valid power of attorney or latest rent paid receipt or valid lease deed or indemnity form as per Annexure 4.2. Order copy of appropriate court, in case of litigation regarding ownership of the premises, has to be enclosed.

(ii)Approval/permission/NOC of the local authority, if required under any law/statute.

(iii)In case of a partnership firm, partnership deed.

(iv) In case of a Limited Company, Memorandum, articles of Association, Certificate of incorporation and list of Directors/certificate addresses.

Owner's consent for getting new supply connection (Annexure 4.3).

12. Reference at this stage may also be made to the relevant annexure of Electricity Supply Code 2005. Annexure 4.3 in reference to clause 4.4 is a formate of owner consent for getting new supply connection. Annexure 4.2 in reference to clause 4.4 is a form of indemnity bond which is to be given in case the intending consumer is not the owner of the premises. The same is reproduced herein below :

ANNEXURE 4.2

(Ref. Clause 4.4)

This form is available free of cost

INDEMNITY BOND

(If the intending consumer is not the owner of the premises)

To From

_____Engineer,

_____

_____

_____

Whereas the land/premises detailed hereunder, belongs to Sri/Smt. _____and I am only lessee/tenant/occupier of the said land/premises where I have applied for the electricity connection the said/premises and I am not able to obtain the consent of Sri/Smt.....but produced the proof of occupancy, i. e. valid power of attorney/latest rent paid receipt/registered lease deed.

Thereto I, in consideration of the grant of electricity connection to me on the conditions of supply for which I have executed the Agreement, further agree to indemnify and keep harmless the Licensee from all damages and claims whatsoever, including costs of suit, original petitions and all manner of legal or other proceedings that the Licensee may incur or likely to incur on account of any action of threat by or at the instance of the owner of the said Land/premises (whether such owner be the said Sri/Smt. _____or any other). I also further agree that such loss, damages and any other claim resulting out of the electricity connection being given to me without the consent of the owner of the land/premises are also recoverable from me and my properties under the provisions of the Revenue Recovery Act, in force at the time of such recovery, or by such other proceedings as the Licensee may deem fit to initiate.

I hold myself answerable to costs of such recoveries and proceedings also.

Place

Date

Witnesses Signature of lessee/tenant/occupier

(1)

(2)

13. Section 43 of the Act enjoins a duty upon the licensee not only to supply electrical energy on an application in this behalf not only by a owner of a premises but also a occupier which has been defined under the Code 2005 to include any authorized person in occupation of the premises. A tenant would be an authorized person in occupation of a premises.

14. A perusal of Clause 4.4 of the Code 2005 goes to show that indemnity form as per Annexure 4.2 can also be filed along with an application for new connection. The purpose is to enable such tenants, in respect of whom the owner or landlord refuses to give no objection for a new connection.

15. A perusal of Annexure 4.2 reproduce herein-above goes to show that the purpose as is obvious from the reading of the aforesaid form is to indemnify the licensee for any loss that may accrue on account of any act of a person in occupation of the building though he may not be owner. Thus, the Code 2005 provides either for consent letter of owner of the premises or in the absence thereof indemnity bond by the lessee/tenant or occupier of the premises. Intention is, thus, clear that either there should be owner's consent to indemnify the licensees in case the tenant/lessee or occupier vacates and vanishes without leaving his address or in the alternative tenant/lessee or occupier may give an undertaking indemnifying any loss or damage to licensee on account of electricity connection being given to him without the consent of the owner of the land or premises making it recoverable from him and his property under the provisions of the Revenue Act in force at the time of such recovery, or by such other proceedings as the Licensee may deem fit to initiate.

16. From the reading of the aforesaid provisions, it is clear that licensee is under an obligation to supply electrical energy on a proper application being made and every owner or occupier, which will include a tenant, of the premises has statutory right to apply and obtain electricity supply from the licensee subject to his fulfilling requirements under the provisions of the Electricity Act, 2003 and the Electricity Supply Code 2005. ..."

13. Thus, from the observations made in the aforequoted judgment in the case of **Seema Mansoor (supra)** and as per Scheme of the Act, 2003, an occupier of the premises is entitled for electricity connection and licensee cannot deny the electric connection to such an occupier of the premises.

14. The above conclusion also finds support from the **sub clause (f) (v) and (h) of Clause 4.3 of the Code, 2005,** which read as follows:

"(f) (i) .....
(ii) .....
(iii) .....
(iv) .....
(v) ***The recovery proceedings against the defaulting consumer,*** *and where there defaulting consumer is a company, from the Directors of the company,* ***shall be ensured.*** *Where a financial institution has auctioned the property without consideration to licensees charge on assets, claims may be lodged with the concerned financial institution with diligent pursuance.*

(h) A new connection to such sub-divided premises shall be given only after the share of outstanding dues attributed to such sub-divided premises, is duly paid by the applicant. ***Licensee shall not refuse connection to an applicant only on the ground that, due on the other portions(s)***

of such premises have not been paid, nor shall the licensee demand record of last paid bills of other portion(s) from such applicants."

15. It is admitted case of the respondent no. 3 that there are no dues specific to the shop in question occupied by the petitioner. The dues which are alleged were against M/s Rajasthan Thread, Azamul Khan, Sri Sharda Pd Singh, Mohiuddin Ahmed. Those persons are stated to have no connection with the shop in question occupied by the petitioner.

16. If there were dues against the aforesaid persons as alleged by respondent nos. 2 and 3, then they could have initiated proceedings for recovery of the dues against the defaulting consumers in terms of sub-clause (f) (v) of Clause 4.3 of the Code, 2005.

17. Under sub-clause (h) of Clause 4.3 of the Code, 2005, it has been mandated that licensee shall not refuse electric connection to an applicant on the ground that dues on other portions of such premises have not been paid, nor shall the licensee demand record of last paid bills of other portions from such applicants. The counsel for the respondents have not been able to produce any material as to any dues specifically to the premises occupied by the petitioner.

18. Therefore, in view of the scheme as enumerated from the aforesaid provisions of the Act and the Code, the applicantion of the petitioner for electric connection in the specific premises in question occupied by the petitioner cannot be rejected by the respondent nos. 2 and 3 and instead it needs to be considered and processed by the respondent nos. 2 and 3 in accordance with law.

19. For all the reasons aforestated, this writ petition is finally **disposed of** with a direction to the respondent no.3-Sub Divisional Officer, Urban Electricity Distribution Sub Division, Hathua Market, Varanasi to consider the application of the petitioner for new electric connection and take appropriate decision in accordance with law within four weeks from the date of submission of a certified copy of this order, after affording reasonable opportunity of hearing to the petitioner and the owner of the building.

20. It is made clear that any of the observations made in the body of this order shall not be treated as a finding on landlord-tenant relationship between the landlord of the building, who is not before us, and the petitioner.

(2023) 3 ILRA 405
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.03.2023

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE AJIT SINGH, J.

Writ C No. 36691 of 2004

Jor Singh @ Chhote Lal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri K.K. Tripathi, Sri Ram Dayal Tiwari, Sri Subhash Chandra Yadav, Sri Vaibhav Goswami, Sri. M.D. Singh Sekhar (Sr. Advocate)

Counsel for the Respondents:

C.S.C., Sri Abhinava Krishna Srivastava

A. Ceiling Law – Urban Land (Ceiling and Regulation) Act, 1976 – Sections 8(4) & 10(6) – Surplus land – Not taking possession thereof – Effect – Notice, how far necessary before taking action u/s 10(6) – Held, even though there is no requirement of a notice before action is taken u/s 10(6), but as per the Supreme Court decision in 2013 (4) SCC 280 (paragraph 37) a notice before action is taken under Section 10(6) of the Act of 1976 is mandatory – When there was no notice u/s 10(6), transfer of possession also could not have taken place – High Court commanded that the petitioner may not be dispossessed from the land, in question. (Para 25, 26 and 27)

Writ petition allowed. (E-1)

List of Cases cited :-

1. St. of U.P. Vs Hari Ram; 2013 (4) SCC 280

2. Harinam Singh & ors. Vs St. of U.P.; 2018 (4) ADJ 749

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

1. This writ petition has been filed with a prayer that the surplus land comprised in Gata No. 61 areas 204.8 square meter, Gata No. 219 areas 8106.10 square meters, Gata No. 220 areas 1638.80 square meters, Gata No.62 areas 1229.10 square meters, Gata No. 63 areas 4199.10 square meters, Gata No. 64 areas 13127.37 square meters and Gata No. 61 areas 1024.25 square meters of village Teeklapura, Majra Bingawan, Pargana and Tehsil and District- Kanpur Nagar may be entered in the Khataunis in the name of the petitioner. A further prayer has been made that the possession of the total area of 30512.63 sq. meter contained in Gata No. 61 areas 204.8 square meter, Gata No. 219 areas 8106.10 square meters, Gata No. 220 areas 1638.80 square meters, Gata No.62 areas 1229.10 square meters, Gata No. 63 areas 4199.10 square meters, Gata No. 64 areas 13127.37 square meters and Gata No. 61 areas 1024.25 square meters of village Teeklapura, Majra Bingawan, Pargana and Tehsil and District - Kanpur Nagar (herein after referred to as "the land in question) may not be taken away from the petitioner.

2. The petitioner's case is that when the petitioner's predecessor-in-interest, and thereafter the petitioner, had remained in possession over the land in question which was earlier declared surplus and which was never taken away from the petitioner, then the Ceiling Authorities were wrongly treating the land as that of the State.

3. Learned counsel for the petitioner has stated that the Khasras of the year 1398F to 1401F(annexure 3 to the writ petition) and thereafter the khasras of the year 1420F(Annexure SA-3 to the supplementary affidavit filed on 7.2.2017) would go to indicate that the petitioner's predecessor-in-interest and thereafter the petitioner had continued to be in possession over the land in question.

4. Learned counsel for the petitioner has submitted that if under the Urban Land (Ceiling and Regulation) Act, 1976, (hereinafter referred to as "the Act of 1976'), the land in question was declared surplus under Section 8(4) of the Act of 1976, and the possession of the land had not been taken over on or before the commencement of the Urban Land (Ceiling and Regulation) Repeal Act, 1999 (hereinafter referred to as "the Act of 1999'), the petitioner shall not be dispossessed in pursuance of any orders

whatsoever of the Ceiling Authorities. Since the learned counsel for the petitioner has read out Section 3 of the Act of 1999, the same is being reproduced here as under:-

"**3. Saving.** - (1) The repeal of the principal Act shall not affect -

(a) the vesting of any vacant land under sub-section (3) of Section 10, possession of which has been taken over the State Government or any person duly authorized by the State Government in this behalf or by the competent authority;

(b) the validity of any order granting exemption under sub-section (1) of Section 20 or any action taken thereunder, notwithstanding any judgement of any court to the contrary;

(c) any payment made to the State Government as a condition for granting exemption under sub-section (1) of Section 20.

(2) Where -

(a) any land is deemed to have vested in the State Government under sub-section(3) of Section 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorized by the State Government in this behalf or by the competent authority; and

(b) any amount has been paid by the State Government with respect to such land

then, such land shall not be restored unless the amount paid, if any, has been refunded to the State Government.

5. Learned counsel for the petitioner, therefore, has submitted that since the petitioner had continued to be in physical possession of the aforesaid khatas, which were earlier declared surplus under the Act of 1976, because of the coming of the Act of 1999, the petitioner shall continue to be the owner of the land in question and the petitioner shall continue to be in possession.

6. In the instant case, learned counsel for the petitioner has stated that the petitioner whose predecessor-in-interest was Sri Bheekhu son of Deshraj and who was the owner in possession over the land in question, at no point of time, was dispossessed in pursuance of any of the orders passed by the Ceiling Authorities.

7. In the paragraph no. 13 of the writ petition, the petitioner has stated that the predecessor-in-interest, in fact, had no knowledge about any of the orders being passed under Section 8(3) and 8(4) of the Act of 1976 and in fact the predecessor-in-interest only came to know about the various proceedings under the Act of 1976 when he was sought to be dispossessed in the month of April 2003. It has been stated that, thereafter, unfortunately he died on 9.6.2003.

8. Learned counsel for the petitioner submits that thereafter the petitioner who had stepped into the shoes of Bheekhu because of an unregistered Will dated 27.5.2003 started contesting the matter and when the dispossession was being effected, he filed the instant writ petition. Learned counsel submitted that the petitioner was thereafter made aware of the order dated 28.5.1985, certified copy of which was obtained on 6.2.2004. This document was an order under Section 10(5) of the Act of 1976 and by this order under Section 10(5) of the Act of 1976, learned counsel for the petitioner submits the predecessor-in-interest of the petitioner was sought to be

dispossessed from the plots in question, the area of which was 30512.60 square meters.

9. Learned counsel for the petitioner has submitted that the order under Section 10(5) of the Act of 1976 was not preceded by any notice under Section 10(5) of the Act of 1976. He further submitted that, in fact, the possession from the petitioner or his predecessor-in-interest was never taken and that all transfer of possession was only paper transaction.

10. Upon being confronted by a document which has been filed in the counter affidavit as annexure no. CA-1 which as per the State was an order by which the possession was taken under Section 10(6) of the Act of 1976, learned counsel for the petitioner submitted that this document again was only a paper transaction. He submits that under Section 10(6) of the Act of 1976 if possession was to be taken then it ought to have been preceded by a notice and also the possession ought to have been given by the land owner/tenure holder to the Collector. He submits that by this document possession was given by the District Magistrate, Kanpur Nagar, to the supervisor Kanoongo on 22.1.1987. Learned counsel also submitted that there was no signature of any independent witness on this document who might have evidenced the transfer of possession.

11. Learned counsel for the petitioner relied upon paragraphs no. 36 and 37 of the judgement reported in **2013 (4) SCC 280 (State of U.P. vs. Hari Ram)** and submitted that if a peaceful transfer of possession did not take place under Section 10(5) of the Act of 1976 then the State could have taken a forcible possession. He submitted that as per paragraph no. 37 of the aforementioned judgement, no dispossession of the tenure holder could be done under Section 10(6) of the Act of 1976 without any notice. Learned counsel since has relied heavily upon paragraphs no.36 & 37 of the judgement they are being reproduced here as under:-

"36. The Act provides for forceful dispossession but only when a person refuses or fails to comply with an order under Sub-section (5) of Section 10. Sub-section (6) of Section 10 again speaks of "possession" which says, if any person refuses or fails to comply with the order made under Sub-section (5), the competent authority may take possession of the vacant land to be given to the State Government and for that purpose, force - as may be necessary - can be used. Sub-section (6), therefore, contemplates a situation of a person refusing or fails to comply with the order under Sub-section (5), in the event of which the competent authority may take possession by use of force. Forcible dispossession of the land, therefore, is being resorted to only in a situation which falls under Sub-section (6) and not under Sub-section (5) of Section 10. Sub-sections (5) and (6), therefore, take care of both the situations, i.e. taking possession by giving notice, that is "peaceful dispossession" and on failure to surrender or give delivery of possession under Section 10(5), than "forceful dispossession" under Sub-section (6) of Section 10.

37. The requirement of giving notice under Sub-sections (5) and (6) of Section 10 is mandatory. Though the word "may" has been used therein, the word "may" in both the Sub-sections has to be understood as "shall" because a court charged with the task of enforcing the statute needs to decide the consequences that the legislature intended to follow from

failure to implement the requirement. Effect of non-issue of notice under Sub-section (5) or Sub-section (6) of Section 10 is that it might result in the land holder being dispossessed without notice, therefore, the word "may" has to be read as "shall"."

12. Learned counsel for the petitioner further submitted that as per the judgement of this Court report in **2018 (4) ADJ 749 (Harinam Singh and others vs. State of U.P.),** the memo of possession was absolutely a sham documents as it did not bear the signature of the tenure holder. Further learned counsel for the petitioner submits that as has been stated in the judgement reported in 2018 (4) ADJ 749, the transfer of the land in question from the District Magistrate to the Supervisor Kanoongo was absolutely inconceivable. Learned counsel submitted that there was no provision under any law that the District Magistrate himself would transfer the land to another State Authority i.e. the Supervisor Kanoongo. He submits that if at all there was a transfer then the District Magistrate himself or someone on his behalf ought to have taken the possession. Since the learned counsel heavily relied upon paragraphs no. 19, 20 and 21 of the judgement reported in 2018 (4) ADJ 749, they are being reproduced here as under:-

"19. Applying the above law to the facts of the present case, in the first instance, we find that there has been no notice as contemplated under Section 10(6) of the Act, 1976 to the father of the petitioners who was recorded tenure holder. After notice under Section 10(5) since tenure holder did not surrender possession, it was mandatory for the respondents to have issued notice under Section 10(6) authorizing taking forceful possession. In the second instance we find that memo of possession which has been heavily relied by the respondents and which has been presented in the counter-affidavit as document evidencing delivery of possession under Section 10(6) and has been strongly defended by learned Additional Advocate General, we find that this document does not bear signature of tenure holder and apart from this, the document also acknowledges such statement which is inconceivable in the case of possession of memo of forceful dispossession of tenure holders. The document bears the recital that District Magistrate is delivering possession under orders of Prescribed Authority to Supervisor Kanoongo. We fail to understand as to how District Magistrate would deliver possession to the Supervisor Kanoongo whereas in law it is District Magistrate on whose behalf possession has to be taken. The possession memo certifies only that possession of land is taken in presence of so and so witnesses. From the authorities cited herein above, we are sure that in matters of forceful dispossession the witnesses who have signed should be from public. If a Revenue Officer signs as a witness and other Revenue Officer delivers land to another Revenue Officer, such document would be a sham. It is indeed a sorry state of affairs that Revenue Authorities have not only defended this document but referred it in their pleadings that delivery of possession has been effectively taken on the basis of this document. The contention raised in the writ petition was that the signatures of the person delivering the possession in the alleged possession memo is not of Ram Singh father of the petitioners. The District Magistrate in his letter dated 9.7.2017 has acknowledged this fact that the person who delivered the possession is Nayab Tehsildar namely Ram Asre Verma. Thus, contention raised in the writ petition stands admitted

that it was not Ram Singh, the tenure holder, who had delivered the possession. Under the circumstances, we are bound to hold that no forceful dispossession as contemplated under Section 10(6) of the Act, 1976 had taken of petitioners' father and he continued in possession and after his death the petitioners came into possession and have continued to be in actual physical possession of land in question and are entitled to the benefit of Repeal Act.

20. Thus, in view of the above, in respect of land in question, ceiling proceedings have stood abated under the Repeal Act, 1999 and respondents are restrained from interfering with the possession of petitioners of the land in question in any manner whatsoever and Revenue Authorities are directed to carry out necessary correction in the land records accordingly.

21. In this case, we find very peculiar circumstance existing where Revenue Authorities prepared a manipulated document showing delivery of possession and then thereafter, contested the matter on the basis of said document knowing fully that the document does not constitute a valid document of Memo of possession and that there has never been a notice under Section 10(6) of the Act, 1976. The petitioners have not only been unnecessarily harassed and forced for the present litigation but the respondents have in a most mischievous manner contested the issue on a fraudulent document. We would be failing in our duty, if we let State respondents' conduct go unnoticed. State authorities are expected to present correct facts and with utmost sense of sincerity, but we find it most lacking in present case. To present a document purported to be one prepared under law may be incorrect for many defects but to present a document as one lawfully executed knowing it to be illegal is something impermissible act and conduct during judicial proceedings. We are shocked that instead of giving up its stand in given facts and circumstances of the case, the State respondents not only defended the document through pleadings but also advanced arguments in defense thereof. We are of considered opinion that this litigation has been forced by State authorities as they did not allow petitioners' claim illegally treating the ceiling proceedings as not abated and hence petitioner is entitled for exemplary cost. The petitioners are entitled to cost which we quantify as Rs. 2 lakhs. The cost shall be paid at the first instance by the State to the petitioners. However, it will be open for the State to recover the said amount from the persons who have been responsible for such act of carelessness and negligence and deliberate act of playing fraud and forging a document meant to be official one."

13. Further learned counsel for the petitioner submitted that there was absolutely a non-compliance of the direction which was issued in the year 1983 which was called the Uttar Pradesh Urban Land Ceiling (Taking of Possession payment of amount and Allied Matters) Directions, 1983.

14. Since the U.L.C. Form-I, II and III were produced in the Court by the learned Standing Counsel, the Court perused them and found that definitely the clauses where it had to be mentioned that the possession had been taken were not filled in accordance with law and on this fact the learned counsel for the petitioner heavily laid stress upon.

15. Further learned counsel for the petitioner submitted that in paragraph no.

11 of the writ petition, the petitioner had stated the following:

"11. That, the petitioner is still in physical possession of the disputed land and doing agriculture work."

16. He submitted that this paragraph had been replied to in paragraph no. 16 of the counter affidavit. Since learned counsel for the petitioner relied upon paragraph no. 16 of the counter, the same is being reproduced here as Under:

"16. That the contents of paragraph no. 11 of the writ petition stands denied. The alleged possession of the petitioner is illegal and on the basis of that possession the petitioner is not entitled for any relief under the Repeal Act."

17. Learned counsel for the petitioner further submitted that in paragraph no. 6 of the Supplementary Affidavit which the petitioner had filed on 7.2.2017 it was stated that the petitioner was in possession over the land in question. The paragraph no. 6 of the supplementary affidavit is being reproduced here as under:

"6. That the actual possession of petitioner over the land in dispute is apparent from the Khasra 1420 Faseli. Copy of which obtained by the petitioner on 26.11.2016. The extract of Khasra 1420 faseli is being filed herewith and marked as Annexure No. S.A.-3 to this supplementary affidavit. In the Khasra cultivation of crop is already recorded are shows the actual possession of the petitioner predecessor over the land in dispute."

18. In paragraph no. 9 of the supplementary counter affidavit, the reply was that the possession though was there it was illegal. Since learned counsel for the petitioner read out paragraph 9 of the counter affidavit the same is being reproduced here as under:

"9. That the contents of paragraph no. 6 of the supplementary affidavit, as stated, are not admitted hence denied. The correct facts are that in the khasra for the year 1420 fasli, the agriculture as well as urban ceiling both is recorded. From the aforesaid it is evident that the agriculture on the land in question is illegal and amounts to encroachment and any possession of the petitioner are illegal. The aforesaid facts also gets strength from the decision of this Hon'ble Court in Writ Petition No. 28180 of 2007 (Suresh Kumar vs. State of U.P. and others) and Writ Petition No. 37193 of 2017 (Suresh Kumar vs. State of U.P. and others) in which the Hon'ble Court has been pleased to hold that such kind of agricultural use would be treated and deemed as illegal and unauthorized."

19. Learned counsel for the petitioner further submitted that the petitioner had the locus standi to file the writ petition as he had stated in the writ petition itself that he had inherited the property in question because of the will dated 27.5.2003. This fact was mentioned in paragraph no. 9of the writ petition. Paragraph no. 9 of the writ petition which states this fact is being reproduced here as under:-

"9. That, the Bheekhu has executed a un-resgistered will in favour of the petitoiner on 27.5.2003. The true/photostat copy of the un-registered will dated 27.5.2003 executed by the Bheekhu in favour of the petitioner, is being filed

here with and marked as Annexure no.6 to this writ petition."

20. In the counter affidavit of the State, learned counsel for the petitioner submitted that the State had only vaguely denied the contents of paragraphs no. 8 & 9 in paragraph no. 14 of the counter affidavit. The paragraph no. 14 of the counter affidavit is being reproduced here as under:-

"14. That the contents of paragraph no. 8 and 9 of the writ petition are within the specific knowledge of the petitioner as such he is to put strict proof in respect thereto."

21. The State was represented by the Additional Advocate General Sri M.C. Chaturvedi, Senior Counsel, who was assisted by Sri Mohan Srivastava and Ms. Shubhra Singh learned Standing Counsel. Sri M.C. Chaturvedi, Senior Counsel, submitted that firstly the petitioner had no locus standi as he was only a legatee of the original tenure holder Sri Bheekhu who had died on 9.6.2003. He had submitted that if at all any objection had to be made to the possession being taken by the State then it was Bheekhu who should have come forward. Secondly, the learned Additional Advocate General submitted that the possession of the plots in question was taken way back on 22.1.1987 and, therefore, the petitioner had approached the High Court very belatedly .

22. The record of the case was produced by the learned Additional Advocate General in sealed cover and he showed the original documents by which the possession was taken over. This document was also filed as annexure no. CA-1 to the counter affidavit which was filed on 19.3.2005. Learned Additional Advocate General, therefore, submitted that the petitioner could not argue that he was in possession.

23. Learned Additional Advocate General thereafter further submitted that as per the statutory mandate there was no requirement to issue a notice after an order was passed under Section 10(5) of the Act of 1976. Learned Additional Advocate General, therefore, submitted that there was no merit in the case and the writ petition be accordingly dismissed.

24. Having heard Sri M.D. Singh Shekhar, Senior Advocate, assisted by Sri Vaibhav Goswami learned counsel for the petitioner and Sri M.C. Chaturvedi, learned Additional Advocate General, assisted by Ms. Shubhra Singh for the State and Sri Abhinava Krishna Srivastava learned counsel for the Kanpur Development Authority, this Court is of the view that the writ petition deserves to be allowed.

25. The petitioner is a legatee of the original tenure holder. He had inherited the property by means of a Will. The Will had not been questioned in any court of law. Therefore, the objection of the learned Additional Advocate General that the petitioner had no locus standi has no legs to stand. Further from the record, we find that the petitioner had throughout been in possession over the plots in question. Even in the counter affidavit which was filed on 19.3.2005 in paragraph 16 the State had admitted the possession of the petitioner. So also was the case in paragraph no. 9 of the Supplementary Affidavit which had been filed by the State on 16.5.2018. Under the Act of 1999, the only determining factor was whether the State Government had taken actual physical possession of the

excess land before 18.3.1999. The question whether the land holders had accepted the orders passed under Section 8(4) of the Act of 1976 was irrelevant. What had to be only looked into was as to whether the petitioner was in possession. In the instant case, we find that the document dated 22.1.1987 which has been filed as annexure-I to the Counter Affidavit, and the original of it was also seen by us when the record was produced by the Additional Advocate General, was a sham document. No possession definitely was taken over by the State and there was no de facto transfer of possession. Even though under Section 10(6) of the Act of 1976, we find that there is no requirement of a notice before action is taken under Section 10(6) of the Act of 1976, but as per the Supreme Court decision in 2013 (4) SCC 280 (paragraph 37) a notice before action is taken under Section 10(6) of the Act of 1976 is mandatory.

26. Under such circumstances, we find that when there was no notice under Section 10 (6) of the Act of 1976, transfer of possession also could not have taken place. The document annexure CA-I was also a document which evidenced a sham transfer. The tenure holder had not handed over possession. Instead the District Magistrate had handed over the possession to the Supervisor Kanoongo. This could not be done. Also there was no independent witness to witness the transfer. Also, we find that the ULC Forms I, II and III have not been filled in accordance with law. Everything appears to have been done in the most inappropriate manner. Also since the document dated 22.1.987 has been held to be a sham document, definitely no transfer had taken place. What is more even in the counter affidavit there is an admission that the petitioner was in possession, though illegal.

27. Under such circumstances, the writ petition is allowed. The petitioner may not be dispossessed from the land in question which had been declared as excess land. Also in the revenue entries if the petitioner's name had been deleted the same may be restored vis-a-vis Gata No. 61 areas 204.8 square meter, Gata No. 219 areas 8106.10 square meters, Gata No. 220 areas 1638.80 square meters, Gata No.62 areas 1229.10 square meters, Gata No. 63 areas 4199.10 square meters, Gata No. 64 areas 13127.37 square meters and Gata No. 61 areas 1024.25 square meters village Teekapurva, Majra Bingawan, Pargana and District Kanpur Nagar.

28. We are conscious of the fact that during the pendency of the writ petition there was no interim order operating. Under such circumstances, not only should the petitioner's name be entered in the revenue record but also the State Authorities should ensure that the petitioner should be given possession over the land in question if he has been forcibly dispossessed during the pendency of the writ petition. Also we provide that if the dispossession has resulted in certain irreversible changes i.e. to say that the petitioner cannot be given possession then the petitioner may be compensated treating the land to have been acquired.

29. The original documents which were handed over to the Court be put in sealed cover and be returned to the Registrar General for being handed over to the relevant authorities.

(2023) 3 ILRA 414
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.02.2023

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE VIVEK KUMAR SINGH, J.

Writ C No. 38977 of 2022

Mithai Lal & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Yadavendra Kumar Yadav, Ms. Poonam Yadav, Sri Raj Karan Yadav

Counsel for the Respondents:
C.S.C., Sri Ravi Prakash Pandey

A. Constitution of India – Article 226 – Writ – Maintainability – Laches – Land was declared as surplus land on 03.06.1981 u/s 8(3) of the Urban Land (Ceiling and Regulation) Act, 1976 – Publication was too made – No remedy of statutory appeal u/s 33 of Ceiling Act was availed – Application filed u/s 45 of the Ceiling Act was too rejected in 1998 – Effect – Petitioners have raised the issue of possession and notice u/s 10 (6) of the Ceiling Act after lapse of more than 40 years and there is no explanation for the delay – Effect – The equitable doctrine, namely, "delay defects equity" has its fullest application in the matter of grant of relief under Article 226 of the Constitution – Shah Hyder Beig's case relied upon – Held, writ petition is highly time barred and no reason for the inordinate delay has been given in the writ petition. (Para 10, 12 and 19)

Writ petition dismissed . (E-1)

List of Cases cited:

1. Lalla & ors. Vs St. of UP & ors.; 2014 AIR (107) 484

2. St. Vs Hari Ram; JT 2013 (4) SC 275

3. St. of Assam Vs Bhaskar Jyoti Sarma & ors.; (2015) 5 SCC 321

4. W.A. No.91/2006; Lalji Choubey Vs The St. of M.P. & anr.

5. Writ-C No.41628 of 2011; Smt. KaLawati Devi Vs St. of U.P. & ors. decided on 18.1.2023

6. Writ -C No.69115 of 2009; Lal Singh & Ors. Vs Competent Authority Urban Land Ceiling and Regulation & Ors. decided on 23.1.2023

7. Dehri Rohtas Light Railway Vs District Board Bhojpur & ors.; (1992) 2 SCC 598

8. Shivgonda Anna Patil Vs St. of Mah.; (1999) 3 SCC 5

9. Municipal Council, Ahmednagar Vs Shah Hyder Beig; (2000) 2 SCC 48

10. U.P. Jal Nigam & anr. Vs Jaswant Singh & anr.; (2006) 11 SCC 464

11. Tukaram Kana Joshi & ors. Vs MIDC & ors.; (2013) 1 SCC 353

12. St. of Assam Vs Bhaskar Jyoti Sharma & ors.; (2015) 5 SCC 321

13. Shiv Ram Singh Vs St. of U.P. & ors.; 2015 (7) ADJ 630

14. Kapilaben Ambalal Patel & ors. Vs St. of Guj.; 2021 (12) SCC 95

15. Writ C No.41628 of 2011; Smt. KaLawati Devi Vs St. of UP & ors. decided on 18.01.2023

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.
&
Hon'ble Vivek Kumar Singh, J.)

1. Heard Sri Raj Karan Yadav, learned counsel for the petitioners; Sri Raj Mohan Upadhyay, learned Standing Counsel for State respondent nos.1 to 2 and Sri Ravi Prakash Pandey, learned counsel for Varanasi Development Authority.

2. By means of this petition, the petitioners have prayed for following reliefs:-

"A. Issue a writ, order or direction in nature of certiorari for quashing the order dated 18.03.1998 as well as 20.04.2022 passed by respondent No.2 as Annexure Nos.4 &5 in the aforesaid writ petition.

B. Issue a writ, order or direction in the nature of mandamus directing the respondents to abate the proceeding of Case No.323/1613/2166/80-81 (State vs. Musamat, wife of Bachchan Singh) Village Susuwahi, Pargana Dehat Ammanat, District Varanasi under Section 3 (2) (A) of the Urban Land (Ceiling and Regulation) Repeal Act, 1999 (Act No.15 of 1999).

C. Issue a writ, order or direction in the nature of mandamus directing the respondents to correct the revenue record in name of the land holder situated in Village Susuwahi, Pargana Dehat Ammanat, District Varanasi."

3. This writ petition under Article 226 of the Constitution of India has been reported by the office to be 142 days beyond the usual period of 90 days of passing of the impugned order.

4. The facts of the case in short are that father of petitioner nos.1 to 4 and grand-father of petitioner nos.5-12 Bachchan died before 17.02.1976. For declaring the land of original owner namely Bachchan to be surplus, the Collector/Competent Authority, Urban Land Ceiling, Varanasi instituted a case under the provisions of the Urban Land (Ceiling and Regulation) Act, 19761 and therefore, mother of the petitioner nos.1 to 4 filed ceiling return under Section 6 (1) of the Ceiling Act. The case was registered as Case No.323/1613/2166/80-81 (State vs. Musamat Kewali, Village Susuwahi, Pargana Dehat Ammanat, District Varanasi) and a notice under Section 8 (3) of the Ceiling Act was served upon the original owner on 10.3.1981. She did not submit any objection to the notice within 30 days and as such, it was presumed that she did not have any objection to the said notice. Finally, the Competent Authority declared the land owned by the original owner to the extent of 7097.49 square meters to be surplus on 03.6.1981 and published a draft statement under Section 9 of the Ceiling Act and a notification in the official gazette as per the requirement of Section 10(1) of the Ceiling Act. Thereafter, describing the details of surplus land in letter dated 03.6.1981 (Annexure-1 to the writ petition), the Collector was directed to carry out the proceeding of taking possession over the land in question.

5. Learned counsel for the petitioners submits that father/grand father of petitioners died before 17.02.1976. The mother of the petitioner nos.1 to 4 filed ceiling return under Section 6 (1) of the Ceiling Act. The petitioners are in actual possession over the land in question. Neither the respondents have taken possession of the said land from the original owner nor she had given possession to the respondents. No third party interest has been created by the respondents in the aforesaid land till date. The State Government issued a Government order on 02.4.1994 directing

to all competent authorities of the State of U.P. to stop further proceedings in respect of agricultural land, which is declared as ceiling land under Section 8 (4) and notice issued under Section 10 (5) but no proceeding under Section 10 (6) for taking possession has been initiated. In pursuance of the said Government order, the Competent Authority has not completed proceeding under Section 10 (6) in respect of all agricultural land of the petitioners till 18.3.1999 and during the pendency of proceeding under Section 10 (6), the Act No.33 of 1976 has been repealed by Urban Land (Ceiling and Regulation) Repeal Act, 19992 with effect from 18.3.1999 and hence, all the proceedings of this case against the original owner are liable to be abated under Section 3/4 of the Repeal Act. It is submitted that earlier the petitioners had also approached this Court by preferring Writ C No.35232 of 2021 **(Mithai Lal and 11 others vs. State of UP and 2 others)** for a mandamus commanding the respondents not to dispossess them from the land in dispute and a coordinate Bench of this Court had disposed of the writ petition on 12.1.2022 with liberty to the petitioners to approach authority by filing representation within two months. In support of his submission, he has placed reliance on the judgements rendered in the case of **Lalla and ors vs. State of UP and ors3 and State vs. Hari Ram4**.

6. Per contra, learned Standing Counsel has raised a preliminary objection regarding maintainability of the writ petition on the issue of latches that the present writ petition has been filed after almost 40 years of the taking over of the possession and consequently, the same does not deserve to be entertained. He has submitted that against the predecessor-in-interest of the petitioners, the proceeding under the the Ceiling Act was drawn and notification under Section 10 (3) of the Ceiling Act was duly notified, followed by notice under Section 10 (5) of the Ceiling Act. The proceedings were finalised way back under the Ceiling Act and as such, the writ petition is liable to be dismissed on the ground of delay and laches. In support whereof, he has placed reliance upon a decision of Supreme Court reported in **State of Assam Vs. Bhaskar Jyoti Sarma and others5**. He has further placed reliance upon a decision of Division Bench of this Court passed in **Lalji Choubey Vs. The State of M.P. and another6** wherein it was observed that once a compliance under Section 10(5) of the Act, 1976 has been done then it can be considered that possession has been duly taken over. He has also placed reliance on the judgments in **Smt. Kalawati Devi v. State of U.P. & Ors.7 and Lal Singh & Ors. v. Competent Authority Urban Land Ceiling and Regulation & Ors.8**

7. We have considered the rival submissions and perused the material placed on record.

8. We find that the father/grand father of petitioners died before 17.02.1976 and therefore, mother of the petitioner nos.1 to 4 filed ceiling return under Section 6 (1) of the Ceiling Act. The proceeding under the Ceiling Act was initiated by the Competent Authority, registered as Case No.323/1613/2166/80-81 (State vs. Musamat Kewali). Thereafter, the notice under Section 8 (3) of the Ceiling Act was served upon the original owner on 10.3.1981 to which she did not submit any objection. Finally, the Competent Authority had declared the land owned by the original owner to the extent of 7097.49 square

meters to be surplus on 03.6.1981 and published the draft statement under Section 9 of the Ceiling Act and a notification in the official gazette as per the requirement of Section 10(1) of the Ceiling Act. The Collector was directed to carry out the proceeding for taking possession over the land in questioner vide letter dated 03.6.1981.

9. It is not disputed that the notice under Section 10 (5) of the Ceiling Act was issued and the same was not objected by the land owner. Therefore, there was no occasion for issuing notice under Section 10 (6) to the land owner. Record also reflects that Mithai Lal (petitioner No.1), Lalman, Rakesh Bahadur, Man Bahadur, Lal Bahadur, Vijai Bahadur sons of late Bachchan and widow Kewali Devi, wife of late Bachchan had moved applications supported by an affidavit on 07.2.1997 and 21.1.1998 in the ceiling proceeding stating therein that they had not received notices under Section 8 (3) and Section 9 of the Ceiling Act. They were entitled to have 1500 sq. meters land individually and further as there was certain discrepancy in the land use report, therefore, after summoning the master plan the authority has to confer rights to the applicants qua to their individual shares and accordingly, the order dated 05.7.1981 under Section Section 8 (4) of the Ceiling Act was liable to be set aside. Suffice to indicate that the said relief was pressed under Section 45 of the Ceiling Act, which pertains to correction of clerical errors. While considering the said application on 18.03.1998 the Prescribed Authority, Urban Land Ceiling had opined that the matter in fact would not fall under Section 45 of the Ceiling Act but in case the petitioners are aggrieved with the order dated 05.6.1981 the efficacious remedy is to prefer an appeal under Section 33 and further observed that the notification under Section 10 (3) is already notified and the disputed land was declared surplus way back on 03.6.1981 and vested in the State free from all encumbrances and accordingly, the applications dated 07.2.1992 and 21.1.1998 were rejected on 18.3.1998.

10. We further find that there is nothing on record to indicate that aforementioned orders were ever subjected to challenge by the petitioners and admittedly, the appeal under Section 33 of the Ceiling Act was also not preferred. We may also observe that the first petitioner moved the aforementioned applications alongwith other claimants under Section 45 of the Ceiling Act, which were rejected in the year 1998 and the same was in fact attained finality. Since then they have not agitated the matter and they all waited for long time. All of sudden they woke up from the deep slumber and preferred Writ C No.35232 of 2021 **(Mithai Lal and 11 others vs. State of UP and 2 others)** for mandamus commanding the respondents not to dispossess the petitioners from the land in dispute in pursuance of the provisions of the Ceiling Act and the same was disposed of by the Division Bench on 12.1.2022 with liberty to the petitioners to approach the respondents by filing representation. In response to the said order, the order dated 20.4.2022 has been passed by the Prescribed Authority indicating therein that after compliance of Sections 9, 10 (1), 10 (3) and 10 (5) the land was declared surplus. Even the names of the erstwhile owners were also expunged and the name of the State was mutated on 25.1.1992. Consequently, through letter No.147 dated 12.12.1997 the surplus land was also handed over to the Varanasi Development Authority. Therefore, the

Prescribed Authority under Urban Land Ceiling, Varanasi has no jurisdiction to proceed further in the matter and accordingly, the representation was disposed of on 20.4.2022. It is evident that the petitioners have raised the issue of possession and notice under Section 10 (6) of the Ceiling Act after lapse of more than 40 years and there is no explanation for the delay.

11. The said aspect of the matter has been considered in detail in **Dehri Rohtas Light Railway Vs. District Board Bhojpur and Others9,** wherein Hon'ble Supreme Court observed in paragraph No. 13 as under :-

"The rule which says that the Court may not inquire into belated and stale claim is not a rule of law but a rule of practice based on sound and proper exercise of discretion. Each case must depend upon its own facts. It will all depend on what the breach of the fundamental right and the remedy claimed are and how the delay arose. The principle on which the relief to the party on the grounds of laches or delay is denied is that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there is reasonable explanation for the delay. The real test to determine delay in such cases is that the petitioner should come to the writ court before a parallel right is created and that the lapse of time is not attributable to any laches or negligence. The test is not to physical running of time. Where the circumstances justifying the conduct exists, the illegality which is manifest cannot be sustained on the sole ground of laches. The decision in Trilok Chand (supra) relied on is distinguishable on the facts of the present case. The levy is based on the net profits of the railway undertaking was beyond the authority and the illegal nature of the same has been questioned though belatedly in the pending proceedings after the pronouncement of the High Court in the matter relating to the subsequent years. That being the case, the claim of the appellant cannot be turned down on the sole ground of delay. We are of the opinion that the High Court was wrong in dismissing the writ petition in limine and refusing to grant the relief sought for. We however agree that suit has been rightly dismissed."

(Emphasis added)

12. Similarly, Hon'ble Apex Court has also considered the delay and laches pertaining to ceiling matters in **Shivgonda Anna Patil Vs. State of Maharashtra10** wherein the petitioner had approached after considerable delay of ten years after the land was declared surplus and vested in the State Government and the writ petition was summarily dismissed by the High Court and the same was also approved by the Apex Court. Hon'ble Apex Court has also considered the delay and laches in preferring the petition under Article 226 of Constution of India in **Municipal Council, Ahmednagar Vs. Shah Hyder Beig11** and held that the equitable doctrine, namely, "delay defects equity" has its fullest application in the matter of grant of relief under Article 226 of the Constitution.

13. The Supreme Court in **U.P. Jal Nigam and Another Vs. Jaswant Singh and Another12** referred, with approval the law relating to laches, as summarized in Halsbury's Law of England. The relevant extract from the aforesaid judgement is reproduced below :-

"12. The statement of law has also been summarized in Halsbury's Laws of England, Para 911 , pg. 395 as follows :

"In determining whether there has been such delay as to amount to laches, the chief points to be considered are :

(i) acquiescence on the claimant's part; and

(ii) any change of position that has occurred on the defendant's part.

Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches."

(Emphasis added)

14. In **Tukaram Kana Joshi and others Vs. MIDC and others13**, the Supreme Court observed as follows :-

"12. The State, especially a welfare State which is governed by the Rule of Law, cannot arrogate itself to a status beyond one that is provided by the Constitution. Our Constitution is an organic and flexible one. Delay and laches is adopted as a mode of discretion to decline exercise of jurisdiction to grant relief. There is another facet. The Court is required to exercise judicial discretion. The said discretion is dependent on facts and circumstances of the cases. Delay and laches is one of the facets to deny exercise of discretion. It is not an absolute impediment. There can be mitigating factors, continuity of cause action, etc. That apart, if whole thing shocks the judicial conscience, then the Court should exercise the discretion more so, when no third party interest is involved. Thus analysed, the petition is not hit by the doctrine of delay and laches as the same is not a constitutional limitation, the cause of action is continuous and further the situation certainly shocks judicial conscience.

13. The question of condonation of delay is one of discretion and has to be decided on the basis of the facts of the case at hand, as the same vary from case to case. It will depend upon what the breach of fundamental right and the remedy claimed are and when and how the delay arose. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226, nor is it that there can never be a case where the Courts cannot interfere in a matter, after the passage of a certain length of time. There may be a case where the demand for justice is so compelling, that the High Court would be inclined to interfere in spite of delay. Ultimately, it would be a matter within the discretion of the Court and such discretion, must be exercised fairly and justly so as to promote justice and not to defeat it. The validity of the party's defence must be tried upon principles substantially equitable. (Vide: P.S. Sadasivaswamy vs. State of T.N. AIR 1974 SC 2271; State of M.P. & Others. vs. Nandlal Jaiswal & Others., AIR 1987 SC 251; and Tridip Kumar Dingal & Others. vs. State of West Bengal & Others, (2009) 1 SCC 768;)

14. No hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. Discretion must be exercised judiciously and reasonably. In the event that the claim made by the applicant is

legally sustainable, delay should be condoned. In other words, where circumstances justifying the conduct exist, the illegality which is manifest, cannot be sustained on the sole ground of laches. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in the injustice being done, because of a non- deliberate delay. The court should not harm innocent parties if their rights have infact emerged, by delay on the part of the Petitioners. (Vide: Durga Prasad v. Chief Controller of Imports and Exports & Others, AIR 1970 SC 769; Collector, Land Acquisition, Anantnag & Another vs. Mst. Katiji & Others, AIR 1987 SC 1353; Dehri Rohtas Light Railway Company Ltd. vs. District Board, Bhojpur & Others, AIR 1993 SC 802; Dayal Singh & Others vs. Union of India & Others, AIR 2003 SC 1140; and Shankara Co-op Housing Society Ltd. vs. M. Prabhakar & Others, AIR 2011 SC 2161)."

15. In **State of Assam vs. Bhaskar Jyoti Sharma and others14** it was held by the Apex Court as under:-

"16. The issue can be viewed from another angle also. Assuming that a person in possession could make a grievance, no matter without much gain in the ultimate analysis, the question is whether such grievance could be made long after the alleged violation of Section 10(5). If actual physical possession was taken over from the erstwhile land owner on 7th December, 1991 as is alleged in the present case any grievance based on Section 10(5) ought to have been made within a reasonable time of such dispossession. If the owner did not do so, forcible taking over of possession would acquire legitimacy by sheer lapse of time. In any such situation the owner or the person in possession must be deemed to have waived his right under Section 10(5) of the Act. Any other view would, in our opinion, give a licence to a litigant to make a grievance not because he has suffered any real prejudice that needs to be redressed but only because the fortuitous circumstance of a Repeal Act tempted him to raise the issue regarding his dispossession being in violation of the prescribed procedure.

17. Reliance was placed by the respondents upon the decision of this Court in Hari Ram's case (supra). That decision does not, in our view, lend much assistance to the respondents. We say so, because this Court was in Hari Ram's case (supra) considering whether the word 'may' appearing in Section 10(5)gave to the competent authority the discretion to issue or not to issue a notice before taking physical possession of the land in question under Section 10(6). The question whether breach of Section 10(5)and possible dispossession without notice would vitiate the act of dispossession itself or render it non est in the eye of law did not fall for consideration in that case. In our opinion, what Section 10(5)prescribes is an ordinary and logical course of action that ought to be followed before the authorities decided to use force to dispossess the occupant under Section 10(6). In the case at hand if the appellant's version regarding dispossession of the erstwhile owner in December 1991 is correct, the fact that such dispossession was without a notice under Section 10(5) will be of no consequence and would not vitiate or obliterate the act of taking possession for the purposes of Section 3 of the Repeal Act. That is because Bhabadeb Sarma-erstwhile owner had not made any grievance based on breach of Section 10(5) at any stage during his lifetime implying thereby that he had waived his right to do so.

19. In support of the contention that the respondents are even today in actual physical possession of the land in question reliance is placed upon certain electricity bills and bills paid for the telephone connection that stood in the name of one Mr. Sanatan Baishya. It was contended that said Mr. Sanatan Baishya was none other than the caretaker of the property of the respondents. There is, however, nothing on record to substantiate that assertion. The telephone bills and electricity bills also relate to the period from 2001 onwards only. There is nothing on record before us nor was anything placed before the High Court to suggest that between 7th December, 1991 till the date the land in question was allotted to GMDA in December, 2003 the owner or his legal heirs after his demise had continued to be in possession. All that we have is rival claims of the parties based on affidavits in support thereof. We repeatedly asked learned counsel for the parties whether they can, upon remand on the analogy of the decision in the case of Gyanaba Dilavarsinh Jadega (supra), adduce any documentary evidence that would enable the High Court to record a finding in regard to actual possession. They were unable to point out or refer to any such evidence. That being so the question whether actual physical possession was taken over remains a seriously disputed question of fact which is not amenable to a satisfactory determination by the High Court in proceedings under Article 226 of the Constitution no matter the High Court may in its discretion in certain situations upon such determination. Remand to the High Court to have a finding on the question of dispossession, therefore, does not appear to us to be a viable solution."

(Emphasis supplied by us)

16. The aforesaid judgment of Hon'ble Supreme Court in **Bhaskar Jyoti Sharma and others** (supra) has been followed by a coordinate Bench of this Court in the case of **Shiv Ram Singh vs. State of U.P. and others15** wherein the writ petition was dismissed on the ground of laches with following observations:-

"We must also advert to another aspect of the matter particularly having regard to the recent decision of the Supreme Court in Bhaskar Jyoti Sarma (supra). The petitioner moved the first writ petition in 2002 nearly three years after the Repeal Act had come into force. After the earlier writ petition was disposed of by directing the District Magistrate to pass an order on the representation of the petitioner, an order was passed by the District Magistrate on 10 May 2007. The petitioner thereafter waited for a period of over two years until the present writ petition was filed in July 2009. If the petitioner had been dispossessed of the land without due notice under Section 10(5), such a grievance could have been raised at the relevant time. As a matter of fact, it has been the case of the State all along that a notice under Section 10(5) was, in fact, issued in the present case which would be borne out from the original file which has been produced before the Court. The issue is whether such a grievance could be made long after, before the Court. The petitioner had waited for nearly three years after the Repeal Act came into force to file the first writ petition and thereafter for a period of over two years after the disposal of the representation despite the finding of the District Magistrate that possession was taken over on 25 June 1993. In our view, such a belated challenge should not, in any event, be entertained."

(Emphasis supplied by us)

17. In **Kapilaben Ambalal Patel and Others Vs. State of Gujarat16**, the Apex Court has considered the delay and laches in detail and declined to accept the pleas setup by the legal heirs/representatives of the original land holder on the ground of inordinate delay. Relevant paragraph of the judgement is reproduced herein below:-

"Feeling aggrieved, the landowners have approached this Court. It is urged that there is no tittle of evidence to substantiate the fact asserted by the respondent State that physical possession of the land in question has been taken over on 20-3-1986. It was merely a paper-possession in the form of possession panchnama. According to the appellants, de facto possession of the subject land as on the date of the Repeal Act is crucial and entails in abatement of all the actions of the State authorities under the 1976 Act. Mere issuance of notification under Section 10(3) of the 1976 Act regarding deemed vesting of the land in the State is not enough for the purposes of the Repeal Act. Reliance has been placed on Vinayak Kashinath Shilkar Vs. Collector & Competent Authority, (2012) 4 SCC 718, State of U.P. Vs. Hari Ram (2013) 4 SCC 280, Gajanan Kamlya Patil vs. Additional Collector & Competent Authority (ULC) (2014) 12 SCC 523 and Mangalsen Vs. State of U.P. (2014) 15 SCC 332. The consistent view of this Court is that physical possession must be taken by the State authorities, failing which the proceedings shall abate on account of the Repeal Act. The appellants have relied on revenue records to show that the continued possession remained with the appellants/landowners even after the possession panchnama was made on 20-3-1986. The revenue entries have presumptive value and the respondent State had failed to rebut the same.

"Furthermore, in the grounds all that is asserted is that the High Court erred in holding that there was delay of 14 years in filing of writ petition and in not appreciating that the notice under Section 10(5) of the 1976 Act dated 23-1-1986, was not served upon Ambalal Parsottambhai Patel as he had already expired on 31-12-1985 and notice sent to him was returned bacy on 2-2-1986 unserved with remark "said owner has expired". Further, the legal heirs of Ambalal Parsottambhai Patel ought to have been served with the said notice.....Be that as it may, we are not inclined to reverse the conclusion recorded by the Division Bench of the High court that the writ petition filed by the appellants was hopelpessly delayed and suffered from laches. That is a possible view in the facts of the present case." .

18. Recently, the coordinate Bench of this Court has also considered the Ceiling Act and Repeal Act qua to the subsequent purchaser in **Smt. Kalawati Devi vs. State of UP and others17** and dismissed the writ petition on 18.1.2023 on the ground that the owner never protested or agitated his dispossession before any authority or Court. In the circumstances, the subsequent purchaser cannot raise challenge to the procedure of dispossession at belated stage on the strength of a sale deed being void ab-initio. Relevant paragraph nos.22, 23 and 24 of the judgement are reproduced herein below:-

"22. The question of issuing notice under Section 10(5) to the petitioner after 16 years from the date of notice under Section 10(1) of the Act does not arise. The State had taken possession from the land owner way back in 1981. The subsequent transfer of the land in 1994, followed by mutation of the name of the petitioner,

would have no bearing on the right of the petitioner. The transfer of the surplus land by the erstwhile owner, in the eye of law being nullity i.e. void ab-initio would not confer any right or title upon the petitioner. The possession of the petitioner after the proceedings concluding under the Act, upon the State taking possession, would merely be a case of encroachment of State land. The Repeal Act would not come to the assistance of the petitioner, rather, the case of the petitioner would not fall within the ambit and scope of the Repeal Act being subsequent purchaser of the surplus land after notification under Section 10(1) / 10(3) of the Act.

23. Having regard to the facts and circumstances of the case, petitioner lacks locus, and any case, the proceedings came to be set up belatedly by the petitioner in 2006 by approaching this Court and filing a petition, being Writ Petition No. 14698 of 2006, which came to be disposed of directing the Collector to take a decision. Pursuant thereof, the impugned order came to be passed on 27.04.2011, whereby, the second respondent after recording the facts arrived at a conclusion that the transfer of the land by the erstwhile owner, declared surplus, vesting in the State, is a void document and does not confer any right and title upon the petitioner. The erstwhile tenure holder (Khelai), had no title or ownership to transfer the land, the petitioner on the strength of alleged possession on State land cannot agitate his dispossession in view of Repeal Act. The surplus land vested with the State upon notification under Section 10(3) followed by dispossession of the erstwhile owner of the land (Khelai) under Section 10(5) way back in 1981. The owner never protested or agitated his dispossession before any authority or Court. In the circumstances, the subsequent buyer (Petitioner) cannot raise challenge to the procedure of dispossession at belated stage on the strength of a sale deed being void ab-initio.

24. The writ petition being devoid of merit, is accordingly, dismissed."

19. For the reasons aforestated and also in view of the law laid down by Hon'ble Supreme Court in the case of **Bhaskar Jyoti Sharma** (supra), **Kapilaben Ambalal Patel** (supra) and a coordinate Bench decision of this Court in the case of **Shiv Ram Singh** (supra), we do not find any merit in the writ petition. This writ petition is also highly time barred and no reason for the inordinate delay has been given in the writ petition.

20. Consequently, the writ petition is **dismissed.**

(2023) 3 ILRA 423
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.02.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ C No. 53996 of 2012

Kailash Prasad Tewari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri S.V. Goswami, Sri Pradeep Kumar Singh

Counsel for the Respondents:
C.S.C., Sri Abhinava Krisha Srivastava, Sri Saroj Yadav, Smt. Chandra Kala Chaturvedi, Sri Vivek Verma

A. Ceiling Law – UP Urban Land (Ceiling and Regulation) Act 1976 – Section 6(1) –

Surplus land – No objection was filed within the stipulated time from the date of receipt of the notice u/s 8(3) – Order u/s 8(4) declaring land in excess of the ceiling limit was passed – Pursuant to notice u/S 10(5), the possession of the land was taken – Land owner at no stage had protested implying thereby that he waived his right to do so – Effect – Plea of being in possession over the surplus land – Permissibility – Held, only stand taken is based on a bald St.ment that he is in possession of the surplus land. But, petitioner is silent as to whether any objection at any point of time on being dispossessed, the land owner had filed objection/protest before the authorities. (Para 18 and 19)

B. Constitution of India – Article 226 – Writ – Maintainability – Laches – Writ petition was filed after 13 years from the Repeal Act, and after a lapse of over three decades (36 years) since the notice under Section 10(5) – Effect – Held, equitable doctrine, namely, "delay defeats equity" has its fullest application in the matter of grant of relief under Article 226 of the Constitution. The discretionary relief can be had provided one has not by his act or conduct given a go-by to his rights. Equity favours a vigilant rather than an indolent litigant and this being the basic tenet of Law. (Para 13)

Writ petition dismissed . (E-1)

List of Cases cited:

1. St. of U.P. Vs Hari Ram; 2013 (120) RD 241

2. Ram Singh Vs St. of U.P. & ors.; 2020 (147) RD 1

3. Ikrar & ors. Vs St. of U.P. & ors.; 2020 (2) AWC 1288

4. St. of U.P. Vs Jagdish Chandra; 2014 (1) AWC 864

5. St. of Assam Vs Bhaskar Jyoti Sharma & ors.; (2015) 5 SCC 321 (Paras-16, 17 and 19)

6. Shiv Ram Singh Vs St. of U.P. & ors.; 2015 (7) ADJ 630

7. Shivgonda Anna Patil Vs St. of Mah.; (1999) 3 SCC 5

8. Municipal Council, Ahmednagar Vs Shah Hyder Beig; (2000) 2 SCC 48

9. Kapilaben Ambalal Patel & ors. Vs St. of Guj.; 2021 (12) SCC 95

10. Civil Appeal No. 3032 of 2010; U.A. Basheer Thr. G.P.A. Holder Vs St. of Karnataka & anr. decided on 17 February, 2021

(Delivered by Hon'ble Suneet Kumar, J.
&
Hon'ble Rajendra Kumar-IV, J.)

1. Heard Shri P.K. Singh, learned counsel for the petitioner, Ms. Manisha Chaturvedi holding brief of Ms. Chandra Kala Chaturvedi, learned counsel appearing for the State-respondents and Shri Abhinav Krishna Srivastava, learned counsel appearing for the Development Authority.

2. Petitioner by the instant writ petition, *inter alia*, seeks direction to the State-respondent not to interfere in the peaceful possession of Plot Nos. 1356, 1723, 1112, 1104 and 1163, situated in Village- Bara Sirohi, Tehsil and District-Kanpur Nagar. Petitioner has also sought quashing of the order dated 27 July 2011, passed by District Judge/Appellate Authority, Kanpur Nagar, in Misc. Appeal No. 20/70 of 1999 (Kailash Prasad Vs. Competent Authority).

3. The facts of the instant case, briefly stated, is that the predecessor in interest of the petitioner filed statement/return under Section 6(1) of U.P. Urban Land (Ceiling and Regulation) Act 1976 (for short 'Act'), giving details of his land/property being

case No. 8683. Upon survey, the land/property, admeasuring 5758.81 square meter, was found in excess of the ceiling limit in possession of the petitioner.

4. Consequently, a draft statement came to be served upon the land owner under Section 8(3), along with notice dated 04 August 1979. Petitioner did not respond to the notice by filing objection, consequently, order under Section 8(4) came to be passed on 26 March 1983, declaring 5758.81 square meter of land in excess of the ceiling limit under the Act. On completion of proceedings under Sections 9 and 10(1) of the Act, on receiving no objection from the land owner or any other interested person under Section 10(2) of the Act, a notification under Section 10(3) of the Act was issued on 31 October 1985, duly published in the Official Gazette on 15 January 1986, vesting the surplus vacant land in the State. Thereafter, a notice under Section 10(5) of the Act was issued on 16 December 1986, pursuant, thereof, the authorized person of the competent authority had taken possession of the surplus land on 12 November 1991.

5. It appears that later on, one Ashok Kumar Kushwaha, son of Shri Babu, filed a representation on 1 April 2006, requesting that Plot No. 1192, declared surplus was not owned by the petitioner. It appears that the representation was accepted by the competent authority vide order dated 13 July 2006, consequently, the Plot No. 1192, was released in favour of Ashok Kumar Kushwaha and his name was duly mutated in the revenue record.

6. Learned counsel for the petitioner submits that petitioner is in possession of the plots even after repeal of the principal Act, w.e.f. 18 March 1999. It is urged that at this stage, petitioner cannot be dispossessed from the land declared surplus. Reliance has been placed on the decisions rendered by Supreme Court in **State of U.P. Vs. Hari Ram1**, as well as, decisions rendered by this Court in **Ram Singh Vs. State of U.P. and Others2, Ikrar & Others Vs. State of U.P. and Others3 and State of U.P. Vs. Jagdish Chandra4.**

7. It is not the case of the petitioner that the land owner at any stage had protested with the declaration of surplus land or had objected before the authorities with regard to dispossession not being in accordance with the law.

8. It appears that an appeal being appeal no. 20/70 of 1999, came to be filed by the petitioner before the District Judge on 18 February 1999. The cause of action set up in the appeal is that on 30 December 1998, the Kanpur Development Authority was demarcating the land. Thereafter, petitioner approached the Lekhpal on 4 January 1999, and on perusal of the revenue record, it transpired that the name of the Kanpur Development Authority was mutated in the revenue record. Thereafter, petitioner contacted his lawyer and got inspected the file pertaining to urban ceiling and obtained copy of the order dated 6 March 1982, on 12 February 1999, thereafter, instituted the appeal. In the memo of appeal, it was pleaded that Plot Nos. 1356, 1723, 1104, 1112 and 1163, predecessor in interest of the petitioner was the land owner. On perusal of the pleadings set up in the writ petition, as well as, memo of appeal instituted on 18 February 1999, it is not the case of the petitioner that the petitioner or the predecessor in interest of the petitioner at any stage of the

proceedings under the Act had protested their dispossession or declaration/acquisition of land declared in excess of the ceiling limit.

9. The Urban Land (Ceiling and Regulation) Repeal Act, 1999 (for short "Repeal Act'), came into effect on 18 March 1999, on the said date pending proceedings/appeal stood abated. Consequently, the appeal instituted by the petitioner stood abated by operation of law and the order dated 27 July 2012, passed on the said appeal rejecting the delay condonation application of the petitioner is nullity being void ab initio.

10. In **State of Assam vs. Bhaskar Jyoti Sharma and others5,** the Supreme Court was of the view that any grievance based on Section 10(5) ought to have been made within a reasonable time of dispossession and the land owner in not doing so must be deemed to have waived his right under Section 10(5) of the Act. Paragraph 16, 17, and 19 is extracted:

"16. The issue can be viewed from another angle also. Assuming that a person in possession could make a grievance, no matter without much gain in the ultimate analysis, the question is whether such grievance could be made long after the alleged violation of Section 10(5). If actual physical possession was taken over from the erstwhile land owner on 7th December, 1991 as is alleged in the present case any grievance based on Section 10(5) ought to have been made within a reasonable time of such dispossession. ***If the owner did not do so, forcible*** *taking over of possession would acquire legitimacy by sheer lapse of time.* ***In any such situation the owner or the person in possession must be deemed to have waived his right under Section 10(5) of the Act. Any other view would, in our opinion, give a licence to a litigant to make a grievance not because he has suffered any real prejudice that needs to be redressed but only because the fortuitous circumstance of a Repeal Act tempted him to raise the issue regarding his dispossession being in violation of the prescribed procedure.***

17. Reliance was placed by the respondents upon the decision of this Court in Hari Ram's case (supra). That decision does not, in our view, lend much assistance to the respondents. We say so, because this Court was in Hari Ram's case (supra) considering whether the word 'may' appearing in Section 10(5)gave to the competent authority the discretion to issue or not to issue a notice before taking physical possession of the land in question under Section 10(6). The question whether breach of Section 10(5)and possible dispossession without notice would vitiate the act of dispossession itself or render it non est in the eye of law did not fall for consideration in that case. *In our opinion, what Section 10(5)prescribes is an ordinary and logical course of action that ought to be followed before the authorities decided to use force to dispossess the occupant under Section 10(6). In the case at hand if the appellant's version regarding dispossession of the erstwhile owner in December 1991 is correct, the fact that such dispossession was without a notice under Section 10(5) will be of no consequence and would not vitiate or obliterate the act of taking possession for the purposes of Section 3 of the Repeal Act. That is because Bhabadeb Sarma-erstwhile owner had not made any grievance based on breach of Section 10(5) at any stage during his lifetime implying*

thereby that he had waived his right to do so.

19. In support of the contention that the respondents are even today in actual physical possession of the land in question reliance is placed upon certain electricity bills and bills paid for the telephone connection that stood in the name of one Mr. Sanatan Baishya. It was contended that said Mr. Sanatan Baishya was none other than the caretaker of the property of the respondents. There is, however, nothing on record to substantiate that assertion. The telephone bills and electricity bills also relate to the period from 2001 onwards only. There is nothing on record before us nor was anything placed before the High Court to suggest that between 7th December, 1991 till the date the land in question was allotted to GMDA in December, 2003 the owner or his legal heirs after his demise had continued to be in possession. All that we have is rival claims of the parties based on affidavits in support thereof. We repeatedly asked learned counsel for the parties whether they can, upon remand on the analogy of the decision in the case of Gyanaba Dilavarsinh Jadega (supra), adduce any documentary evidence that would enable the High Court to record a finding in regard to actual possession. They were unable to point out or refer to any such evidence. ***That being so the question whether actual physical possession was taken over remains a seriously disputed question of fact which is not amenable to a satisfactory determination by the High Court in proceedings under Article 226 of the Constitution no matter the High Court may in its discretion in certain situations upon such determination. Remand to the High Court to have a finding on the question of dispossession, therefore, does not appear to us to be a viable solution."***

(Emphasis supplied by us)

11. In **Bhaskar Jyoti Sharma** (supra) followed by a coordinate Bench of this Court in **Shiv Ram Singh vs. State of U.P. and others6,** the writ petition was dismissed on the ground of laches, observing as under:

"We must also advert to another aspect of the matter particularly having regard to the recent decision of the Supreme Court in Bhaskar Jyoti Sarma (supra). The petitioner moved the first writ petition in 2002 nearly three years after the Repeal Act had come into force. After the earlier writ petition was disposed of by directing the District Magistrate to pass an order on the representation of the petitioner, an order was passed by the District Magistrate on 10 May 2007. The petitioner thereafter waited for a period of over two years until the present writ petition was filed in July 2009. ***If the petitioner had been dispossessed of the land without due notice under Section 10(5), such a grievance could have been raised at the relevant time.*** *As a matter of fact, it has been the case of the State all along that a notice under Section 10(5) was, in fact, issued in the present case which would be borne out from the original file which has been produced before the Court.* ***The issue is whether such a grievance could be made long after, before the Court. The petitioner had waited for nearly three years after the Repeal Act came into force to file the first writ petition and thereafter for a period of over two years after the disposal of the representation despite the finding of the District Magistrate that possession was taken over on 25 June 1993. In our view, such a belated challenge should not, in any event, be entertained."***

(Emphasis supplied by us)

12. In **Shivgonda Anna Patil Vs. State of Maharashtra**, 7wherein, the Supreme Court while dealing with Section 10 of the Act held that the writ petition under Article 226 for reopening the proceedings on the ground that the competent authority had not taken into consideration certain facts, filed after ten years, after the excess land was vested in the State Government was rightly summarily dismissed by the High Court.

13. While deciding the question of delay and laches in preferring the petition under Article 226, Supreme Court in **Municipal Council, Ahmednagar Vs. Shah Hyder Beig8,** held that the equitable doctrine, namely, "delay defeats equity" has its fullest application in the matter of grant of relief under Article 226 of the Constitution. The discretionary relief can be had provided one has not by his act or conduct given a go-by to his rights. Equity favours a vigilant rather than an indolent litigant and this being the basic tenet of law.

14. Recently, in **Kapilaben Ambalal Patel and Others Vs. State of Gujarat9,** Supreme Court declined to accept the pleas setup by the legal heirs/representatives of the original land holder on the ground of inordinate delay. The Court noted the submission of the land owner:

"Feeling aggrieved, the landowners have approached this Court. It is urged that there is no tittle of evidence to substantiate the fact asserted by the respondent State that physical possession of the land in question has been taken over on 20-3-1986. It was merely a paper-possession in the form of possession panchnama. According to the appellants, de facto possession of the subject land as on the date of the Repeal Act is crucial and entails in abatement of all the actions of the State authorities under the 1976 Act. Mere issuance of notification under Section 10(3) of the 1976 Act regarding deemed vesting of the land in the State is not enough for the purposes of the Repeal Act. Reliance has been placed on ***Vinayak Kashinath Shilkar Vs. Collector & Competent Authority, (2012) 4 SCC 718, State of U.P. Vs. Hari Ram (2013) 4 SCC 280, Gajanan Kamlya Patil vs. Additional Collector & Competent Authority (ULC) (2014) 12 SCC 523 and Mangalsen Vs. State of U.P. (2014) 15 SCC 332.*** *The consistent view of this Court is that physical possession must be taken by the State authorities, failing which the proceedings shall abate on account of the Repeal Act. The appellants have relied on revenue records to show that the continued possession remained with the appellants/landowners even after the possession panchnama was made on 20-3-1986. The revenue entries have presumptive value and the respondent State had failed to rebut the same."*

15. In Paragraph 25 of **Kapilaben Ambalal Patel** (supra), the Court noted the delay and declined to interfere with the order of the High Court. Relevant portion reads thus:

"Furthermore, in the grounds all that is asserted is that the High Court erred in holding that there was delay of 14 years in filing of writ petition and in not appreciating that the notice under Section 10(5) of the 1976 Act dated 23-1-1986, was not served upon Ambalal Parsottambhai Patel as he had already expired on 31-12-1985 and notice sent to him was returned bacy on 2-2-1986 unserved with remark

"said owner has expired". Further, the legal heirs of Ambalal Parsottambhai Patel ought to have been served with the said notice.....Be that as it may, we are not inclined to reverse the conclusion recorded by the Division Bench of the High court that the writ petition filed by the appellants was hopelessly delayed and suffered from laches. That is a possible view in the facts of the present case."

16. The decisions relied upon by the learned counsel for the petitioner rendered by the co-ordinate Bench of this Court is based on the decision of the Supreme Court in **Hari Ram** (supra). The Supreme Court in **Bhaskar Jyoti Sharma** (supra), on considering **Hari Ram** (supra), was of the view that the word "may' appearing in Section 10(5) gave the competent authority the discretion to issue or not to issue a notice before taking physical possession of the land in question under Section 10(6). The question whether breach of Section 10(5) and possible dispossession without notice would vitiate the act of dispossession itself or render it non est in the eye of law did not fall for consideration in **Hari Ram** (supra). Thereafter, the Court proceeded that even taking a case of the appellant regarding dispossession was without a notice under Section 10(5) will be of no consequence and would not vitiate or obliterate the act of taking possession for the purposes of Section 3 of the Repeal Act. That is because the erstwhile land owner had not made any grievance based on breach of Section 10(5) at any stage during his lifetime implying thereby that he had waived his right to do so.

17. As per the Scheme of the Act, the excess land beyond the ceiling limit is to be determined on the date when the Act came into force, requiring every person holding vacant land in excess of ceiling limit to file statement of his holding (Section 6). The other persons/third party/subsequent purchasers have no locus or authority to file objection until then. The provisions of Section 8 and Section 9 of the Act, make it incumbent on the competent authority to issue notice to or provide opportunity to be heard only to the "person concerned', i.e., person who has filed the statement under Section 6 of the Act, (Refer paragraph 14 of **U.A. Basheer Thr. G.P.A. Holder Vs. State of Karnataka and Another10).** It is only after notification under Section 10(1) of the Act, the claim of other persons/subsequent purchasers are to be considered.

18. As per the record, it is not in dispute that notice under Section 8(3) along with draft statement dated 4 August 1979, was duly served upon the land owner. No objection was filed within the stipulated time from the date of receipt of the notice, thereafter, an order under Section 8(4) of the Act came to be passed on 26 March 1982, declaring land in excess of the ceiling limit. The final statement under Section 9 followed, thereafter by notification under Sections 10(1) and 10(3) of the Act, duly published in the Official Gazette. Thereafter, pursuant to notice under Section 10(5), the possession of the land was taken. The land owner at no stage had protested implying thereby that he waived his right to do so.

19. The instant writ petition has been filed after 13 years from the Repeal Act, and after a lapse of over three decades (36 years) since the notice under Section 10(5). The question of possession is being raised for the first time in writ jurisdiction. The petitioner has not pleaded all the relevant facts, rather, suppressed material facts

brought on record in the counter affidavit filed by the State-respondent. The only stand taken is based on a bald statement that he is in possession of the surplus land. But, petitioner is silent as to whether any objection at any point of time on being dispossessed, the land owner had filed objection/protest before the authorities. Neither, it is the case of the petitioner in the memo of appeal filed in 1999, that petitioner is in possession of the surplus land, nor, that his predecessor in interest had not voluntary surrendered the surplus vacant land or had protested the State action.

20. Further, the name of Development Authority, after possession was duly mutated in the revenue record as per the case setup by the petitioner. The issue of possession/dispossession being a question of fact cannot be raised belatedly after 13 years in writ jurisdiction.

21. In view thereof, the writ petition being devoid of merit is, accordingly, **dismissed.**

22. No cost.

(2023) 3 ILRA 430
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2022
BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ C No. 58897 of 2012

State of U.P. & Anr. ...Petitioners
Versus
Komal Yadav @ Ram Komal & Anr. ...Respondents

Counsel for the Petitioners:
Sri Anoop Kumar Srivastava, Sri Amit Manohar (Addl. C.S.C.)

Counsel for the Respondents:
Sri Chandra Bhan Gupta, S.C., Sri Shyam Narain, Sri Sudhanshu Narain

A. Labour Law – Constitution of India – Article 226 – Award – Scope of interference – Reference – Limitation, how far come in the way thereof – Workman' right to get adjudication – How far liable to be protected – Held, a workman working in a government department if retiring from his services, cannot be in a bargaining position – Matter if remained pending with Conciliation Officer and St. took its own time in making reference, the workman concerned should not be denied adjudication only for delay, more especially in the circumstances when no time limit is prescribed for making reference – High Court denied to interfere with the award under equitable jurisdiction under Article 226. (Para 17)

B. Labour Law – Industrial Dispute Act, 1947 – Sections 6N, 6P & 6Q – Retrenchment – Award – ReinSt.ment with backwages – Forest department – Engagement of worker on daily wages – Principle for payment of backwages – Applicability – Held, in the department of forest, there is a practice of engaging people for the forest work on a daily wage basis – Where neither the department could dispute the working of the petitioner with it, nor could produce any witness to dispute the testimony of a fellow workman who had deposed in his favour, the approach of the department was rightly held to be unLawful in firing the workman suddenly on one fine morning – High Court held interest part of award upon backwages unsustainable. (Para 18, 22 and 25)

Writ petition partly allowed . (E-1)

List of Cases cited :-

1. St. of Uttarakhand & anr Vs Raj Kumar; 2019 (14) SCC 353

2. Chief Engineer, Ranjeet Sagar Dam & anr. Vs Sham Lal 2006 (9) SCC 124

3. St. of U. P.& ors. Vs Ram Swarup & anr. 2003 (99) FLR 665

4. Civil Misc. Writ Petition No. 28491 of 2006; St. of U. P. & ors. Vs Shri Prahalad & ors.

5. Deepali Gundu Surwase Vs Kranti Junior Adhyapak; 2013 (139) FLR 541

6. Standard Chartered Bank Vs Presiding Officer, Central Government Industrial Tribunal & ors.; 2014 LawSuit (All) 3872

7. Special Leave Petition No.32554 of 2018; Allahabad Bank & ors. Vs Avtar Bhushan Bhartiya decided on 22.04.2022

8. Special Leave Petition (Civil) Diary No. 5426 of 2020; Abhimanyu & ors. Vs The Principal Secretary St. of U.P. & anr.

9. Deepali Gundu Surwase Vs Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) & ors.; 2013 (10) SCC 324

10. Civil Appeal no. 6890 of 2022; Jeetubha Khansangji Jadeja Vs Kutchh District Panchayat decided by Supreme Court on 23.09.2022

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

1. Heard Sri Amit Manohar, learned Additional Chief Standing Counsel assisted by Sri R.M. Vishwakarma, learned Standing Counsel for the petitioners and Sri Sudhanshu Narain, learned Advocate appearing for the respondent No.1.

2. The petitioner no.1 is a Forest Department of the Government of Uttar Pradesh and petitioner no.2 is the Forest Range Officer of the Sohagibarwa Range (Shivpur), Maharajganj. The petitioners are aggrieved against the award passed by the Industrial Tribunal dated 04.11.2011 directing for reinstatement of respondent-workman namely Komal Yadav @ Ram Komal (herein after referred to as 'workman') with backwages alongwith interest at the rate of 9%.

3. Three-fold argument has been advanced before the Court:-

(A) The reference was highly barred by time as having been made after almost a decade of the alleged retrenchment dated 09.08.1991 of the workman;

(B) The department being a Forest Department and having no history of unfair labour practice, could not have been directed to reinstate the workman and the one time compensation should have been ordered instead; and

(C) The Tribunal was not justified in directing for payment of backwages alongwith interest at the rate of 9% without assigning any special reason so as to direct for payment of interest.

4. The petitioner department has argued that instead of reinstatement, it could have been directed for payment of compensation only. He has relied upon the judgment in the case of **State of Uttarakhand & anr vs. Raj Kumar; 2019 (14) SCC 353.**

5. *Per contra*, it is argued by the learned counsel appearing for the respondent-workman, Mr. Sudhanshu Narain that mere delay in making reference by the State Government would by itself not be a ground to reject the reference as barred by time, inasmuch as, the petitioner was pursuing the matter with the department that was already busy in absorption of certain daily rated workers

employed within a cut off date, inasmuch as, matter was already engaging attention of conciliation officer and even in the year 2000 he had reiterated his claim with the department. It is argued that if State has taken time in making a reference, the time taken was in his control so he should not be penalised for the same. He submits that neither the petitioner, nor the State Government can be said to be in any manner responsible for any delay and latches. In support of his argument, learned Advocate has relied upon a judgment of the Supreme Court in the case of ***Chief Engineer, Ranjeet Sagar Dam & another vs. Sham Lal 2006 (9) SCC 124.***

6. Counsel for the contesting respondent-workman has secondly argued that the department has a history of hiring labour and firing them at its sweet will and this is the reason why for many decades the department is faced with a large number of litigations before the High Court wherein ultimately directions were issued to consider the absorption of such daily wage workers/casual workers. He submits that still a number of petitions are pending where directions have been issued for payment of minimum wages to such daily rated workers who could not have been absorbed in the regular cadre. In support of his above argument, the respondent-workman has relied upon an order of High Court in the case of ***State of Uttar Pradesh & others vs. Ram Swarup & another 2003 (99) FLR 665 and State of Uttar Pradesh & others vs. Shri Prahalad & others passed in Civil Misc. Writ Petition No.28491 of 2006.*** Counsel for the respondent-workman has also argued that if the workman had worked for 240 days, he deserved to be reinstated but he had been fired. Such an act on the part of the department would certainly be in violation of Sections 6N, 6P and 6Q of the Industrial Disputes Act, 197 (in short 'the Act of 1947') and, therefore, such a workman would deserve reinstatement.

7. The third argument advanced by the learned counsel for the contesting respondent-workman is that once the termination of the workman was found to be an illegal retrenchment, the workman became entitle to not only reinstatement but also backwages. He submits that the Tribunal has been reasonable enough in giving only 50% of the backwages with interest and, therefore, the award passed by the Tribunal cannot be faulted with in the given facts and circumstances of the case of the department in particular. In support of his argument, learned Advocate has relied upon the judgement of the Supreme Court in the case of ***Deepali Gundu Surwase vs. Kranti Junior Adhyapak; 2013 (139) FLR 541***. He has also been relied upon by the judgment of a co-ordinate bench of this Court in the case of ***Standard Chartered Bank vs. Presiding Officer, Central Government Industrial Tribunal & others; 2014 LawSuit (All) 3872***. He has also relied upon a judgment of the Supreme Court in the case of ***Allahabad Bank & others vs. Avtar Bhushan Bhartiya*** rendered in Special Leave Petition No.32554 of 2018 on 22.04.2022 by which the 50% backwages order passed by the High Court was upheld.

8. Counsel for the respondent-workman has further placed a judgment in the case of ***Abhimanyu & others vs. The Principal Secretary State of UP & anr*** of the same forest department passed in where reinstatement with 50% of the backwages was upheld by the High Court being similarly circumstanced with such two other workers of the same department

decided on 28.02.2018. The special leave petition filed against the said judgment being Special Leave Petition (Civil) Diary No.5426 of 2020, was also dismissed.

9. Before dealing with the rival submissions made on behalf of the respective parties, it becomes imperative to refer to the facts of the case in a nutshell.

10. The respondent-workman claimed before the Tribunal to have been engaged as a gate-man in the month of February, 1987 initially, in the Nichlaul Range of the Forest Department of the then district of Gorakhpur (now District Maharajganj). Later on, he was transferred to Sohagibarwa Unit which was earlier part of the Nichlaul Range but later on became an independent range and the petitioner discharged his duties at the barrier in the capacity of a gate-man. It was claimed that certain officials were got annoyed with him as he demanded the prescribed payscale and upon his insistence, he was suddenly fired on 09.08.1991 orally by the officials of the department and, therefore, he was never permitted to work. So, the respondent-workman claimed to have worked with the department of forest as a gate-man upon a barrier in the forest range from February, 1987 to August, 1991 i.e. more than 4 years regularly without even a break of single day.

11. The department, on the contrary, denied the claim of the respondent that he was hired and then fired. There was no record traceable with the department, inasmuch as, the reference having been made after more than 12 years of his alleged retrenchment from employment, the industrial dispute deserved to be rejected. It was pleaded before the Tribunal that the department had its own selection committee and whenever the vacancy arose, its due publication was made and a person was employed through prescribed selection process. The department also took the plea before the Tribunal that the settled law was that there would be no back door entry in the employment as had been held by the Supreme Court in number of decisions and, thus, the department submitted that the respondent-workman did not deserve any relief.

12. The respondent-workman filed a number of documents like demand letter dated 06.04.2000 raised by him, the registry receipts signed by him, the certificate of working, the transfer order, the register containing entry of the vehicles that were checked at the barrier and the copies of the attendance register maintained since April, 1991. The workman deposed before the Tribunal that he was appointed on 02.02.1987 and that he worked at Nichlaul Range since April, 1987. When he was transferred to Sohagibarwa Range, he used to check the vehicle. He deposed that the work used to be done in three shifts and was permitted to work only till 08.08.1991 i.e. a day before he was orally fired by the officials of the department on 09.08.1991. He claimed that he was not given any employment letter and he was engaged for Rs.299/- per month and later on it was raised to Rs.750/- per month and that amount he was getting at the time he was fired from the department. One Jairam Yadav also entered into witness-box on behalf of the workman. This gentlemen was working as Nikasi Munshi (Niryat Muharrir) who later on retired. He deposed that Komal Yadav had worked with him and that Komal Yadav was engaged at Nichlaul Range in February, 1987. He also deposed that the duty of the gate-man at the barrier was to lift the barrier when the

vehicle came to carry out checking and then down the barrier after vehicle was given passage. He further deposed that later on he (workman) was transferred to Sohagibarwa Range where he worked till August, 1991 i.e. till the date when the workman was fired. He deposed that the duty used to be done in shifts and Komal Yadav used to perform 12 hours duty in a shift. He deposed that he was not taking any attendance of Komal Yadav and it was an official of the department who used to take attendance.

13. From the petitioner-department's side, One Vijaykant Pandey was produced before the Tribunal as a witness who was working in the Forest Department as Forest Ranger. He deposed that there was a World Bank Scheme to plant trees on the roadside, on the station of the railways in the Gram Samaj road and other public places and since there was more workload with the department, so in order to meet the requirement and utilise the fund given by the World Bank, that engagement used to be done for plantation work. With the end of the plantation work, the services of the labourer would come to an end and no labourer was employed on a permanent basis. They were engaged on daily wage basis and since the project of the world bank came to an end in 1991. He deposed that he was posted in Shivpur Range on the post of Forest Officer since the year 2005 and during the relevant period 1987 to 1991, he was working in Ballia range. He admitted documents of list of daily rated workers of the range to have been prepared by the department but refused to recognise the respondent-workman. He admitted that since he was not working in the range in question, he could say nothing about the respondent-workman.

14. The Tribunal having appreciated the documentary evidence brought on record and the depositions made by the witnesses of the parties, the register which showed subsequent engagement of two daily wage workers namely Rajaram and Gaffar etc., came to conclude that the depositions made by the workman and his witnesses could not be rebutted by the departmental witness, inasmuch as, the documents revealed that the respondent-workman worked as daily rated employee for 240 days with the department and the officials of the department fired him without giving him any notice in advance. The Tribunal concluded that the respondent having worked for more than 240 days, as was reflected from the depositions made and that could not be rebutted by the departmental witness, so the inevitable conclusion was that the respondent-workman was wholly illegally retrenched. The Tribunal concluded that if the workman was working in some project of the World Bank, he ought to have been posted on one place to do some plantation work but the evidence demonstrated otherwise as the workman worked at some barrier in one place and then transferred to some other place within the forest range. The Tribunal, therefore, held that the retrenchment of the workman was illegal in violation of Section 6-N, 6-P and 6-Q of the Act of 1947 and he having worked for more than 240 days definitely deserved notice before termination from service. Thus, the oral termination of the respondent-workman was held null and void and workman was directed to be reinstated in service. Since, the respondent-workman worked for 240 days and retrenchment was held illegal as null and void in compliance of the statutory provisions of the industrial laws, he was held entitled to backwages also to the

extent of 50%. The Tribunal also directed for payment of interest.

15. Having heard the learned counsel for the respective parties, their submissions raised across the bar and perusing the award of the Tribunal, two issues needed to be addressed:-

(i) Whether the reference was highly belated one and deserved rejection?; and

(ii) Whether payment of backwages with interest is justifiable.

16. The contention advanced by the learned counsel appearing for the petitioner-department that such a delayed reference ought to have been rejected. In my considered view, merely because there was delay in making reference would not by itself be a ground to reject the reference. In the case of ***Chief Engineer Ranjeet Sagar Dam*** *(supra),* the Supreme Court has held that no universal formula can be laid down to refuse the reference on the ground of delay as there was no time limit prescribed for the Government to exercise power of making reference. The Court was of the view that there must be some rational basis upon which the power should be exercised after lapse of such a period which otherwise could be said to be sufficient enough to hold the parties seeking for reference, guilty of delay and latches. While it is true that such a stale case cannot be opened taking recourse to the powers of the State Government to make a reference but this will all depend upon the facts of the case. Vide paragraphs 9 & 10, the Court held thus:

9. So far as delay in seeking the reference is concerned, no formula of universal application can be laid down. It would depend on facts of each individual case.

10. However, certain observations made by this Court need to be noted. In Nedungadi Bank Ltd. vs. K.P. Madhavankutty and Ors. (2000 (2) SCC 455) it was noted at paragraph 6 as follows:

"6. Law does not prescribe any time-limit for the appropriate Government to exercise its powers under Section 10 of the Act. It is not that this power can be exercised at any point of time and to revive matters which had since been settled. Power is to be exercised reasonably and in a rational manner. There appears to us to be no rational basis on which the Central Government has exercised powers in this case after a lapse of about seven years of the order dismissing the respondent from service. At the time reference was made no industrial dispute existed or could be even said to have been apprehended. A dispute which is stale could not be the subject-matter of reference under Section 10 of the Act. As to when a dispute can be said to be stale would depend on the facts and circumstances of each case. When the matter has become final, it appears to us to be rather incongruous that the reference be made under Section 10 of the Act in the circumstances like the present one. In fact it could be said that there was no dispute pending at the time when the reference in question was made. The only ground advanced by the respondent was that two other employees who were dismissed from service were reinstated. Under what circumstances they were dismissed and subsequently reinstated is nowhere mentioned. Demand raised by the respondent for raising an industrial dispute was ex-facie bad and incompetent."

17. A workman working in a government department if retiring from his services, he cannot be in a bargaining

position. A poor daily rated worker is fired suddenly in one fine morning can only lament for his sorry tale for the treatment given to him. Matter if remained pending with Conciliation Officer and State took its own time in making reference, the workman concerned should not be denied adjudication only for delay, more especially in the circumstances when no time limit is prescribed for making reference. In my equitable jurisdiction under Article 226, I do not intend to interfere with the award on this ground and hence argument raised by the petitioner is rejected.

18. Coming to the second aspect that the Tribunal ought not to have directed for reinstatement with backwages and interest and should have ordered for payment of one-time compensation as the department does not have any history of unfair labour practice, I find the present case is of the Forest Department and it is an open secret that in the department of forest, there is a practice of engaging people for the forest work on a daily wage basis. Thousands of daily wagers/casual labours have sought regularisation by moving to this Court through writ petitions under Article 226 of the Constitution and still number of writ petitions are pending for absorption. The case of ***State of Uttarakhand vs. Raj Kumar*** *(supra)* relates to department of Bharat Sanchar Nigam Ltd. whereas the petitioner's case is of the forest department where the history has been to hire casual labourers or daily rated workers on a regular basis and then illegally fire them. A series of reference has been made in respect of various such workers where reinstatement has been ordered with 50% backwages and, therefore, in my considered view, the judgment cited by the learned Additional Chief Standing Counsel, Mr. Amit Manohar is distinguishable on the facts of the case and is of no help to him. The case of ***Abhiumnayu and others (supra) , State of UP & ors vs. Ram Swarup & anr (supra) and State of UP & ors*** vs. Shri Prahalad & ors *(supra)* are all related to forest department. So, the history is otherwise what has been argued by the learned counsel appearing for the department. As a matter of fact, department failed to produce any officer as witness who might have worked either at Nichlaul Range or Sohagibarwa Unit now range. The departmental witness referred to some plantation scheme of World Bank in which daily rated workers used to be engaged but failed to even state that respondent-workman was engaged there. He admitted list of workers of the concerned range but said he did not know the workman so he would not say anything. It is quite obvious that if an officer had never worked in the concerned range during relevant period, he would not be knowing any thing about engagement of daily rated workers there. This officer admitted to be working at Ballia at relevant time and so he should not have been produced. The department virtually failed to rebut the claim set up and their claim led by the respondent-workman. On a pointed query being made, learned Additional Chief Sanding Counsel could neither dispute the documentary evidence led, nor could dispute that the workman's witness who supported the working of the workman at the barrier of the range, was not employee of the department. The learned Additional Chief Standing Counsel also could not dispute history of litigation by such workers with the forest department as cited by learned counsel for the respondent-workman. Thus, I do not find any such flaw like manifest error of law and flaw in the award of the Industrial Tribunal directing for reinstatement of the workman in the department.

19. As far as the payment of backwages is concerned, in all these cases, 50% of the backwages has been directed and the matter relates to the forest department. In the case of ***Abhiumnayu and others*** *(supra)* also, 50% of the backwages was ordered against which SLP was dismissed, may be on the ground of delay only but on the legal proposition relating to the backwages, I find that in the case of Allahabad Bank & ors *(supra)*, the this High Court had directed for payment of 50% of backwages upon reinstatement of officer/employee of the bank. The SLP was filed before the Supreme Court. The Supreme Court in the said case, referred to a number of judgements and then justified payment of 50% of the backwages as an act of striking balance between the department and its employee. In the said case, the officer-employee was found to be out of employment for an illegal and wrongful act of the department in terminating his services.

20. Elaborating the principle for payment of backwages in the case of ***Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and ors.; 2013 (10) SCC 324,*** vide paragraph 33, the Court has held thus:

"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).***

vii) The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal (supra) that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three Judge Benches referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman."

(emphasis added)

21. Relying upon the above judgment, the Supreme Court in the case of ***Jeetubha Khansangji Jadeja vs. Kutchh District Panchayat*** decided on 23.09.2022, vide paragraph 12 has held thus:

"12. In a more recent decision, Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya and Others,3 this court highlighted the need to adopt a restitutionary approach, when a court has to consider whether to reinstate an employee and if so, the extent to which backwages is to be ordered. The court observed:

"22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be

put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer-employee relationship, the latter's source of income gets dried up. Not only the employee concerned, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation.

These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi-judicial body or court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. The denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the employee concerned and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments.""

22. Applying the above principle where neither the department could dispute the working of the petitioner with it, nor could produce any witness to dispute the testimony of a fellow workman who had deposed in his favour, the approach of the department was rightly held to be unlawful in firing the workman suddenly on one fine morning. I, therefore, do not find any unreasonableness or perversity in the order of the Labour Court directly for payment of backwages.

23. So also I find here to be case where a poor Class-IV employee, say a daily wage worker/casual employee, working at a barrier in the forest range concerned nearly for about four years without any complaint regarding his work and conduct and yet he was fired for demanding regular pay. This approach of a government department cannot be approved of absolutely. Government is a model employer. I find that in a number of judgments not only the workmen have been directed to be reinstated in the department of forest with backwages but a number of petitions is before this Court where the daily rated workers, those who were to absorbed in service, have been directed to be paid for minimum of the pay scale.

24. The findings having been returned that the respondent-workman was out of employment ever since he was fired from the department and had no gainful employment and nothing shown in rebuttal, the labour Court could not be said to have faulted in issuing direction for backwages. Under the circumstances, direction for 50% of the backwages cannot be said to be totally irrational so as to warrant interference in exercise of power under Article 226 of the Constitution of India. However, I do not find any special reason to be assigned for payment of interest upon the backwages by the Tribunal under its award.

25. Therefore, the interest part of the award dated 04.11.2011 is held to be unsustainable.

26. In view of the above, while I decline to interfere with the award dated 04.11.2011 passed by the Industrial Tribunal directing for reinstatement of the respondent-workman with backwages, I set aside the award in so far as it directs for payment of interest upon the back wages.

27. The cost part of the award is also not interfered with.

28. Thus, writ petition stands partly allowed as above with no order as to cost.

(2023) 3 ILRA 440
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.02.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ C No. 1000609 of 2003

Hari Narain Shukla ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
G.M. Kamil

Counsel for the Respondents:
C.S.C., Pt. S. Chandra

A. Civil Law – Indian Stamp Act, 1899 – Section 33 (1), (4), and Proviso to Clause (5) – Proceeding initiated after four years – Maintainability – Instrument of Sale-deed was impounded u/s 33(1) – Applicability of limitation period – Distinction between proceeding of S. 33(1) and 33(4) – Effect – Held, in cases where an instrument is produced as evidence which is not duly stamped and is impounded u/s 33(1) of the Act of 1899, the provision required to be followed is only under Section 38 and not under Sections 33(4) & (5) of the Act of 1899. As such, the limitation period provided under Section 33(5) of the Act would not be applicable in case proceedings are drawn under Section 33(1) of the Act and would be available only if proceedings are drawn by Collector under Section 33(4) of the Act of 1899. (Para 16)

B. Civil Law – Indian Stamp Act, 1899 – Section 33 (1), (4), (5) and Proviso to Clause (5) – Limitation period of four years – Date of its applicability – Held, where an instrument of transfer is not produced before any designated court or authority as envisioned under Sections 33 or 47-A of the Act of 1899, the aforesaid period of limitation would run from the date when such an unregistered instrument of transfer is first produced before any such designated authority – Further held, limitation can only run from the date when a person becomes aware of any proceedings against such a person and not from the date of such proceedings or instrument. (Para 18 and 20)

C. Civil Law – Indian Stamp Act, 1899 – Ss. 33, 40 and 47A – Proceeding – Maintainability – No benefit was derived by petitioner from the unregistered instrument – Effect – Held, there is no provision under the Act of 1899 that proceedings under Section 33/40/47A can be initiated only in case a person derives benefit from an unstamped or under-valued instrument of transfer – Proceedings under Section 33/40/47A of the Act of 1899 are maintainable even if no benefit has been derived from the unregistered instrument of transfer. {Para 23 and 29(iii)}

D. Civil Law – Indian Stamp Act, 1899 – S. 33 – Calculation of deficiency – Appropriate date, on which calculation can be drawn – Held, valuation of under-valued or unstamped instrument and deficiency thereof is to be calculated as on

the date of execution of the deed and not from the date when it is impounded or presented. {Para 27 and 29(iv)}

Writ petition partly allowed . (E-1)

List of Cases cited :-

1. Saibabba Vs Bar Council of India & anr.; (2003) 6 SCC 186

2. Rajendra Prasad Garg Vs Chief Controlling Revenue Authority & ors.; (2002) 93 RD 198

(Delivered by Hon'ble Manish Mathur, J.)

1. Heard Mr. G.M. Kamil, learned counsel for petitioner and Mr. Devendra Mohan Shukla as well as Mr. Ajay Kumar Singh, learned State Counsel on behalf of opposite parties.

2. Petition has been filed challenging order dated 09.08.2002 impounding sale deed dated 12.08.1985 executed in favour of petitioner, under Section 33 of the Indian Stamp Act,1899 (hereinafter referred to as the Act of 1899). Also under challenge is order dated 17.02.2003 rejecting petitioner's preliminary objections regarding maintainability of proceedings under the Act of 1899. Further prayer for quashing entire proceedings initiated under Sections 33/40 of the Act of 1899 has also been sought.

3. Learned counsel for petitioner submits that a sale deed was executed in favour of petitioner by means of an unregistered instrument of transfer dated 12.08.1985. It is submitted that subsequently a suit for declaration under Section 229-B of U.P. Zamindari Abolition and Land Reforms Act, 1950 (herein after referred to as the Act of 1950) was filed by petitioner and registered as Case No.87. It is submitted that aforesaid suit was decreed vide judgment and order dated 17.05.2002 whereafter an application for recall was filed and by means of order dated 20.08.2002, the initial judgment and order dated 17.05.2002 was recalled. It is submitted that proceedings thereafter ensued in aforesaid declaration suit but he does not have any instructions with regard to its current status.

4. It has been submitted that in the meantime since judgment and decree dated 17.05.2002 was passed on the basis of an unregistered sale deed dated 12.08.1985, the same was impounded under Section 33 of the Act of 1899 and an authenticated copy of the same was forwarded to the authority concerned by means of reference order dated 09.08.2002 whereafter proceedings under Section 47-A read with Sections 33 and 40 of the Act were instituted against petitioner numbered as Case No.318/343/2002. It is submitted that a preliminary objection was filed by petitioner with regard to maintainability of aforesaid proceedings primarily on the ground that such proceedings cannot be initiated after a period of four years from the date of execution of the deed as provided in proviso to Section 33 (5) of Act of 1899. Second ground taken in the objections was that since the petitioner did not derive any benefit from aforesaid deed, stamp duty even otherwise was not payable. Third objection taken was that in referal order dated 09.08.2002, the deficiency of stamp duty has been wrongly indicated since valuation as per year 2002 was recorded instead of valuation as on the date of execution of the instrument.

5. It is submitted that aforesaid submissions as raised by petitioner has been rejected by means of impugned order dated 17.02.2003 primarily on the ground

that limitation of four years for initiation of proceedings from the date of execution of the instrument would not be applicable in the present case since the instrument after execution was never presented before any authority and was kept hidden by petitioner and as such limitation would be applicable only from the date of presentation of document. The order also states that since the document was produced only in year 2002, there is no error in the valuation recorded taking year 2002 as the year for indicating deficiency in stamp duty.

6. Learned counsel for petitioner submits that in passing impugned order, the authority concerned has come to an erroneous conclusion particularly with regard to applicability of limitation period since such a limitation has been clearly indicated in Section 33 of the Act under which the document itself was impounded and therefore no cogent reason has been indicated in impugned order for inapplicability of limitation period. It is also submitted that no reason at all has been indicated for taking the valuation of deed with effect from the year 2002 and not from the date of its execution in August, 1985. The authority has also not adverted to the fact that no benefit has been derived by petitioner from the aforesaid deed.

7. Mr. Devendra Mohan Shukla, learned State Counsel appearing on behalf of opposite parties while refuting submissions advanced by learned counsel for petitioner has submitted that limitation period of four years as provided in the proviso to Section 33(5) of the Act of 1899 would be inapplicable in the present case since impounding has taken place in terms of Section 33(1) of the Act of 1899 and therefore the procedure as indicated in Section 38 of the Act of 1899 would be applicable instead of the procedure indicated in Section 33(4) of the Act of 1899. Since Section 38 of the Act of 1899 does not provide for any limitation period, no error has been committed by authority concerned in rejecting the said submission of petitioner. It is submitted that even otherwise, once a document for transfer of immovable property has been executed and is not presented either for registration or before any public authority, no knowledge with regard to such execution can be obtained by revenue authorities and therefore in the alternative, the provision of limitation of four years should be made applicable from the date of knowledge of the document and not from the date of its execution.

8. It has been further submitted that once petitioner had filed a suit for declaration and the same was decreed on the basis of an unregistered sale deed dated 12.08.1985, clearly the petitioner has already derived benefit from aforesaid instrument and as such also submissions of learned counsel for petitioner on that account were rightly rejected. It is also submitted that petitioner has also admitted in paragraph-4 of writ petition that petitioner is deriving title and possession over the property in question on the basis of the said sale deed dated 12.08.1985. It has also been submitted that since the deed was kept hidden from authorities for seventeen years and was produced in declaratory proceedings only in year 2002, no error has been committed in taking valuation from year 2002 instead of year 1985.

9. For the proper adjudication of the present dispute, the following questions would require adjudication:-

(i) Whether the limitation period of four years as prescribed in the Proviso to

Section 33(5) of the Act of 1899 would be applicable in cases where document is impounded under Section 33(1) of the Act of 1899?

(ii) Whether in case limitation period as provided under Section 33(5) of the Act of 1899 would be applicable, it would be applicable from the date of execution of an instrument of transfer or from the date when it is produced in proceedings as indicated under Section 33(1) or 33(4) of the Act of 1899?

(iii) Whether proceedings against an assessee can be initiated in terms of Section 33/40/47A of the Act of 1899 when he has not derived any benefit from an unregistered instrument of transfer?

(iv) Whether valuation of instrument of transfer and deficiency of stamp duty thereon is to be assessed as on date of execution of instrument or when it is impounded?

10. Upon consideration of submissions advanced by learned counsel for the parties, it is evident and admitted that a sale deed was executed in favour of petitioner pertaining to immovable property on 12.08.1985. The aforesaid document was never produced for registration or even in any other proceedings before any public authority prior to its production in declaratory proceedings in year 2002 whereupon the court concerned finding it to be unstamped, impounded the same under Section 33(1) of the Act of 1899 and made a Reference vide order dated 09.08.2002 to the Prescribed Authority for proceedings under Sections 40 & 47A of the Act of 1899. A perusal of order dated 09.08.2002 indicates that valuation of the deed has been taken as on 17.05.2002 and deficiency of stamp duty has been indicated in the referal order whereafter an authenticated copy of instrument of transfer has been sent to the Prescribed Authority for initiating proceedings against petitioner under relevant provisions of the Act.

Question (i): Whether the limitation period of four years as prescribed in the Proviso to Section 33(5) of the Act of 1899 would be applicable in cases where document is impounded under Section 33(1) of the Act of 1899?.

11. For the aforesaid purpose, it is relevant to advert to Sections 33, 38 and 47A of the Act of 1899 which are as follows:-

"33. ***Examination and impounding of instruments*** *- (1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same.*

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in India when such instrument was executed or first executed :

Provided that--

(a) nothing herein contained shall be deemed to require any Magistrate or Judge of a criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Section 125 to 128 and sections 145 to 148 of the Code of Criminal Procedure, 1898 (5 of 1898)12;

(b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf.

(3) For the purposes of this section, the State Government may, in cases of doubt, determine what offices shall be deemed to be public offices and who shall be deemed to be persons-in-charge of public offices.

(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 authorised 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 year from the date of executionn 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. "

*"38. **Instruments impounded, how dealt with** -(1) When the person impounding an instrument under section 33 has by law or consent of parties, authority to receive evidence and admits such instrument in evidence upon payment of a penalty as provided by section 35 or of duty as provided by section 37, he shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and shall send such amount to the Collector, or to such person as he may appoint in this behalf.*

(2) In every other case, the person so impounding an instrument shall send it in original to the Collector."

***"47A. Under-valuation of the instrument** - (1) (a) If the market value of any property which is the subject of any instrument, on which duty is chargeable on the market value of the property as set forth in such instrument, is less than even the minimum value determined in accordance with the rules made under this Act, the registering officer appointed under the Registration Act, 1908 shall, notwithstanding anything contained in the said Act, immediately after presentation of such instrument and before accepting it for registration and taking any action under Section 52 of the said Act require the person liable to pay stamp duty under Section 29, to pay the deficit stamp duty as computed on the basis of the minimum value determined in accordance with the said rules and return the instrument for presenting again in accordance with Section 23 of the Registration Act, 1908.*

(b) When the deficit stamp duty required to be paid under clause (a), is paid in respect of any instrument and the instrument is presented again for registration, the registering officer shall

certify by endorsement thereon, that the deficit stamp duty has been paid in respect thereof and the name and the residence of the person paying them and register the same.

(c) Notwithstanding anything contained in any other provisions of this Act, the deficit stamp duty may be paid under clause (a) in the form of impressed stamps containing such declaration as may be prescribed.

(d) If any person does not make the payment of deficit stamp duty after receiving the order referred to in clause (a) and presents the instrument again for registration, the registering officer shall, before registering the instrument, refer the same to the Collector, for determination of the market value of the property and the proper duty payable thereon.

(2) On receipt of a reference under sub-section (1) the Collector shall, after giving the parties a reasonable opportunity of being heard and after holding an inquiry in such manner as many be prescribed by rules made under this Act, determine the market value of the property which is the subject of such instrument and the proper duty payable thereon.

(3) 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 State Government in that behalf, within four years from the date of registration of any instrument on which duty is chargeable on the market value of the property not already referred to him under sub-section (1) call for and examine the instrument for the purpose of satisfying himself as to the correctness of the market value of the property which is the subject for of such instrument, and the duty payable thereon and if after such examination he has reason to believe that market value of such property has not been truly set forth in such instrument, he may determine the market value of such property and the duty payable thereon :

Provided that, with the prior permission of the State Government, an action under this sub-section may be taken after a period of four years but before a period of eight years from the date of registration of the instrument on which duty is chargeable on the market value of the property.

Explanation : The payment of deficit stamp duty by any person under any order of registering officer under sub-section (1) shall not prevent the Collector from initiating proceedings on any instrument under sub-section (3).

(4) If on enquiry under sub-section (2) and examination under sub-section (3) the Collector finds the market value of the property :

(i) truly set forth and the instrument duly Stamped, he shall certify by endorsement that it is duly stamped and return it to the person who made the reference ;

(ii) not truly set forth and the instrument not duly stamped, he shall require the payment of proper duty or the amount required to make up the deficiency in the same, together with a penalty of an amount not exceeding four times the amount of the proper duty or the deficient portion thereof.

(4-A) The Collector shall also require along with the deficit stamp duty or penalty required to be paid under clause (ii) of sub-section (4), the payment of a simple interest at the rate of one and a half per cent per mensem on the amount of deficit stamp duty calculated from the date

of the execution of the instrument till the date of actual payment;

Provided that the amount of interest under this sub-Section shall be recalculated if the amount of deficit stamp duty is varied on appeal or revision or by any order of a competent court or authority.

(4-B) The amount of interest payable under sub section (4-A) shall be added to the amount due and be also deemed for all purposes to be part of the amount required to be paid.

(4-C) Where realization of the deficit stamp duty remained stayed by any order of any court or authority and such order of stay is subsequently vacated, the interest referred to in sub-section (4-A) shall be payable also for any period during which such order of stay remained in operation.

(4-D) Any amount paid or deposited by or recovered from, or refundable to, a person under the provision of this Act, shall first be adjusted towards the deficit stamp duty or penalty outstanding against him and the excess if any, shall then be adjusted towards the interest, if any, due from him."

(5) The instrument produced before the Collector under sub-section (2) or under sub-section (3) shall be deemed to have come before him in the performance of his functions.

(6) 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 on the copy of the instrument in accordance with the procedure laid down in sub-sections (2) and (4)."

12. A reading of Section 33(1) of the Act indicates certain authorities who have been granted the power to impound an instrument which is produced before them or comes in the performance of their functions and is not duly stamped. The procedure prior to its reference to Prescribed Authority is indicated in Section 33(2) of the Act while Sub-section (3) indicates the power of State Government to determine which offices would be deemed to be public offices.

13. A conjoint reading of Section 33(1) and Section 33(4) clearly brings out the distinction between aforesaid two provisions. While in Section 33(1), certain authorities have been granted the power to impound an instrument which is produced as evidence and is not duly stamped, sub-section (4) of Section 33 indicates the power of Collector where deficiency in stamp duty paid is noticed from a copy of instrument and where a Reference is made from court or authorities indicated therein. It is relevant that the provisions of Section 33(4) of the Ac of 1899 is only for the purpose of satisfaction of Collector with regard to adequacy of duty paid on instrument so produced and for that purpose only, the Collector has the power to call for original document. In case of applicability of Section 33(1) of the Act of 1899, the said satisfaction regarding adequacy of stamp duty is required to be seen by authorities indicated in the said sub-section itself and upon a conclusion that the instrument is not duly stamped, power to impound the same has been given. As such, the clear distinction between Subsections (1) and (4) of Section 33 of the Act of 1899 is that in sub-section (1), the authority before whom document is produced has been given the power to impound the same upon coming to satisfaction regarding inadequacy of stamp duty whereas under sub-section (4), the power to determine inadequacy of stamp

duty has been conferred only upon the Collector without any power to impound the document.

The distinction between Section 33(1) and 33(4) read with Section 47-A(3) of the Act of 1899 also brings out distinction between the said provisions where Section 33(1) primarily pertains to an unstamped or under-valued instrument being produced as evidence. Even the period of limitation for initiation of proceedings under Section 33 and Section 47A(3) is quite distinct with Section 33(5) initiating limitation from the date of execution of instrument while Section 47-A(3) initiates the limitation period with effect from the date of registration of instrument.

14. The aforesaid distinction would be clearer upon a perusal of Sections 38 which clearly indicates the provision regarding procedure to be followed once instruments not duly stamped are impounded. Section 38(1) clearly indicates that in case the inadequacy of stamp duty is found by authority concerned, the said inadequacy of stamp duty is to be indicated by the said authority whereafter an authenticated copy of instrument is to be sent to Collector. Under Section 38(2) of the Act of 1899, in every other case, the instrument is to be sent in original to Collector. The distinguishing feature under Sub-sections (1) and (2) of Section 38 appear to be that an authenticated copy of instrument is required to be sent in terms of sub-section (1) where the deficiency of stamp duty has been calculated and where it has not been so calculated, the original instrument is required to be sent to Collector for further proceedings.

15. The distinction between Section 33(1) and Section 33(4) & (5) is also evident from a reading of Section 47A of the Act of 1899 which does not make any reference whatsoever to documents which have been impounded by designated authorities and only indicates the procedure to be followed by Collector himself under Section 47-A(2) & (3) of the Act of 1899.

16. Even otherwise, if it is held that Section 33(4) and (5) follow Section 33(1) of the Act of 1899, the same will render the provisions of Section 38 of the Act of 1899 otiose, which cannot be the intention of Legislature while enacting the particular provisions of the Act. As such it is evident that in cases where an instrument is produced as evidence which is not duly stamped and is impounded under Section 33(1) of the Act of 1899, the provision required to be followed is only under Section 38 and not under Sections 33(4) & (5) of the Act of 1899. As such, the limitation period provided under Section 33(5) of the Act would not be applicable in case proceedings are drawn under Section 33(1) of the Act and would be available only if proceedings are drawn by Collector under Section 33(4) of the Act of 1899.

17. In view of discussions made herein above, it being evident that the limitation period was not available to petitioner since his document had been impounded under Section 33(1) of the Act of 1899, the Question no.(i) is answered negatively against petitioner.

Question no.(ii): Whether in case limitation period as provided under Section 33(5) of the Act of 1899 would be applicable, it would be applicable from the date of execution of an instrument of transfer or from the date when it is produced in proceedings as indicated under Section 33(1) or 33(4) of the Act of 1899?

18. With regard to aforesaid aspect, it is evident that the proviso to Section 33(5) of the Act makes a specific stipulation that no action under Sub-sections (4) or (5) of the Act can be taken after a period of four years from the date of execution of the instrument. However, although the aforesaid provision is couched in negative terms, there may be a scenario as envisioned in the present case where a document is executed between the parties and is kept with them for a period of more than four years without its production before any of the designated authorities either under Section 33 or even under Section 47-A of the Act of 1899. The proviso does not take any such scenario into account but in the present case, it is clearly evident and admitted that although the instrument of transfer was executed on 12.08.1985, it was produced in declaratory proceedings for the first time in year 2002. In such circumstances, it cannot be said that revenue authorities would have any knowledge with regard to execution of any such unregistered and therefore unstamped instrument of transfer. Naturally, authorities cannot derive any such information regarding execution of unregistered documents between private individuals particularly in case where such documents are kept in safe custody of the executor or the beneficiary of the instrument without its production before any designated authority. In such circumstances, it cannot be said that the limitation period of four years under Proviso to Section 33(5) of the Act would be applicable from the date of execution of the instrument. In the considered opinion of this Court, in such cases where an instrument of transfer is not produced before any designated court or authority as envisioned under Sections 33 or 47-A of the Act of 1899, the aforesaid period of limitation would run from the date when such an unregistered instrument of transfer is first produced before any such designated authority.

19. Hon?ble the Supreme Court in **Saibabba v. Bar Council of India and another** reported in (2003) 6 SCC 186 has read down such strict provisions in following manner:-

"9. So far as the commencement of the period of limitation for filing the review petition is concerned we are clearly of the opinion that the expression ?the date of that order? as occurring in Section 48-AA has to be construed as meaning the date of communication or knowledge of the order to the review petitioner. Where the law provides a remedy to a person, the provision has to be so construed in case of ambiguity as to make the availing of the remedy practical and the exercise of power conferred on the authority meaningful and effective. A construction which would render the provision nugatory ought to be avoided. True, the process of interpretation cannot be utilized for implanting a heart into a dead provision; however, the power to construe a provision of law can always be so exercised as to give throb to a sinking heart."

"10. An identical point came up for the consideration of this Court inRaja Harish Chandra Raj Singhv.Dy. Land Acquisition Officer[AIR 1961 SC 1500 : (1962) 1 SCR 676] . Section 18 of the Land Acquisition Act, 1894 contemplates an application seeking reference to the court being filed within six months from the date of the Collector's award. It was held that ?the date of the award? cannot be determined solely by reference to the time when the award is signed by the Collector or delivered by him in his office. It must involve the consideration of the question as

to when it was known to the party concerned either actually or constructively. If that be the true position, then placing a literal and mechanical construction on the words ?the date of the award? occurring in the relevant section would not be appropriate. It is fair and just that a decision is communicated to the party whose rights will ultimately be affected or who will be affected by the decision. The knowledge, either actual or constructive, of the party affected by such a decision, is an essential element which must be satisfied before the decision can be brought into force. Thus construed, the making of the award cannot consist merely of the physical act of writing an award or signing it or even filing it in the office of the Collector; it must involve the communication of the said award to the party concerned either actually or constructively. A literal or mechanical way of construing the words ?from the date of the Collector's award? was held to be unreasonable. The Court assigned a practical meaning to the expression by holding it as meaning the date when the award is either communicated to the party or is known by him either actually or constructively."

"14. How can a person concerned or a person aggrieved be expected to exercise the right of review conferred by the provision unless the order is communicated to or is known to him either actually or constructively? The words ?the date of that order?, therefore, mean and must be construed as meaning the date of communication or knowledge, actual or constructive, of the order sought to be reviewed."

20. Upon applicability of aforesaid judgment to the question framed, it is evident that limitation can only run from the date when a person becomes aware of any proceedings against such a person and not from the date of such proceedings or instrument as in the present one from its initiation or execution.

It is trite that revenue authorities cannot know about execution of any document which is not produced either as evidence in proceedings under Section 33 of the Act of 1899 or even for presentation under Section 47A of the Act of 1899 since they are not expected to know about execution of such document which after execution remain with either of the parties who may very well await passing of four years in order to avail themselves of the limitation period on a malafide basis.

21. In view of aforesaid discussion, no benefit can be derived by petitioner with regard to aforesaid limitation and Question no.(ii) as such is answered negatively against petitioner.

Question No.(iii): **Whether proceedings against an assessee can be initiated in terms of Section 33/40/47A of the Act of 1899 when he has not derived any benefit from an unregistered instrument of transfer?**

22. With regard to aforesaid question, learned counsel for petitioner has specifically submitted that although the sale deed was executed in favour of petitioner on 12.08.1985 but the suit for declaration under Section 229-B of the Act of 1950 initially decreed in favour of petitioner vide judgment and order dated 17.05.2002, did not bring any benefit to petitioner since aforesaid judgment and order was thereafter recalled vide order dated 20.08.2002. The submission as such is that when benefit of such an unregistered instrument was never provided to

petitioner, there was no occasion to have initiated such proceedings.

23. Considering submissions advanced, it is evident from material on record that suit for declaration under Section 229-B of the Act of 1950 was filed primarily on the basis of sale deed dated 12.08.1985. The said proceedings also culminated in passing of a decree in favour of petitioner on 17.05.2002. As such, it can not be said that no benefit was derived by petitioner from the sale deed dated 12.08.1985. Even otherwise, there is no provision under the Act of 1899 that proceedings under Section 33/40/47A can be initiated only in case a person derives benefit from an unstamped or under-valued instrument of transfer. As such, the submissions of learned counsel for petitioner are clearly misconceived and therefore rejected.

24. Question no.(iii) as such is answered negatively against petitioner.

Question no.(iv): **Whether valuation of instrument of transfer and deficiency of stamp duty thereon is to be assessed as on date of execution of instrument or when it is impounded?**

25. Petitioner in his preliminary objection has clearly taken a plea that since the document was executed in August, 1985, the referral authority has erred in taking valuation of the instrument as of 2002. Learned counsel for petitioner has submitted that in case of proceedings being initiated under Section 33 or under Section 47A of the Act, deficiency in stamp duty is to be seen as per valuation of the instrument as on the date of execution thereof and not on the date it is presented or impounded.

26. With regard to aforesaid submission, it is evident that Section 33(2) of the Act stipulates that in order to ascertain adequate stamp duty having been paid, it is the date when the said instrument was executed or first executed, which would be relevant. Similarly, Section 47A(1)(a) prescribes that duty chargeable on the market value of a property is to be set forth in accordance with the rules made under the Act with Section 47A(4-A) also stipulating simple interest imposeable upon deficiency from the date of execution of the instrument, which is also in consonance with Section 40 of the Act of 1899. There does not appear to be any provision under the Act of 1899 where valuation or deficiency of stamp duty thereupon is required to be calculated from the date of presentation or impounding of the document.

27. In view of specific provisions of Section 33 of the Act of 1899 as indicated herein above, it is the considered opinion of this court that valuation of such under-valued or unstamped instrument and deficiency thereof is to be calculated as on the date of execution of the deed and not from the date when it is impounded or presented.

The said aspect has already been considered by a coordinate Bench of this court in **Rajendra Prasad Garg v. Chief Controlling Revenue Authority and others** reported in (2002) 93 RD 198 in the following manner:-

"6. Section 3 of the Indian Stamp Act provides for instrument which are chargeable with duty. Section 3 of the Act came to be considered and interpreted in the case of Sri Kirti Ram reported in AIR 1954 HP 51. In the said case, after

perusing the relevant provisions of the Act, it was ruled as under:

"Now, the certificate of enrolment being an instrument falling under Article 30 of Schedule I, it is compulsorily chargeable with stamp duty under Section 3 of the Act. And since "chargeable" means, under Section 2(6) of the Act, chargeable when the instrument in question is executed, it is clear that the crucial date which determines the law in force is the date of the execution of instrument."

7. Sub-section (6) of Section 2 which defines the term chargeable, no amendment has been made by the State of Uttar Pradesh, therefore, the decision in the case of Sri Kirti Ram, (supra) is fully applicable to the facts of the present case. Similar view was taken by a Full Bench of Madras High Court in the case in ILR (5) Mad Series 394 (FB), wherein it was observed that duty should be calculated with reference to the requirement of law at the time of execution of the document."

28. Question no.(iv) as such is answered affirmatively in favour of petitioner.

29. In view of aforesaid, the answers to the questions are as follows:-

(i) limitation period of four years as prescribed in the Proviso to Section 33(5) of the Act, 1899 would be inapplicable where a document is impounded under Section 33(1) of the Act of 1899.

(ii) evidently, limitation as envisaged under Section 33(5) of the Act would be applicable only from the date when an instrument/document is produced in proceedings as indicated under Section 33(1) or 33(4) of the Act, 1899 and not from the date of its execution.

(iii) Proceedings under Section 33/40/47A of the Act of 1899 are maintainable even if no benefit has been derived from the unregistered instrument of transfer.

(iv) Valuation of the instrument of transfer/document and deficiency of stamp duty thereupon is to be assessed as on the date of execution of such instrument and not from the date when proceedings are initiated under the Act of 1899.

30. In view of the answers to aforesaid questions, particularly regarding question no.(iv), it is evident that the authorities have erred in determining valuation of the instrument of transfer and deficiency thereupon from the date when it was impounded while it should have actually been taken from the date of its execution on 12.08.1985.

31. Considering aforesaid, the petition succeeds to aforesaid extent. The case is remitted to the Prescribed Authority for determination of valuation and deficiency of stamp duty required to be paid as on 12.08.1985.

32. Accordingly, the petition is **partly allowed** and findings recorded by the authorities regarding valuation, deficiency of stamp duty and penalty stand set aside for re-determination in accordance with directions made herein above.

(2023) 3 ILRA 451
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.03.2023

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Writ C No. 1002728 of 1992

Baba Guru Saran Das Chela Baba Guru Charan Das ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Mohd. Arif Khan, Mohammad Aslam Khan

Counsel for the Respondents:
C.S.C.

A. Ceiling Law – Imposition of Ceiling on Land Holdings Act, 1960 – S. 10(2) – Declaration of land as surplus land – Land was recorded in the name of petitioner, not in the name of Math or Trust – Effect – Claim of land being used as Math and income thereof being used for religious purpose – Reliability – Benefit u/s 6(1)(f), how far can be claimed – Held, this could not be proved that the property in question was being utilized for charitable and religious purposes, being a 'Math' before 01-05-1959 –

Petitioner has also failed to show any document with respect to any 'Math' or 'Trust', recorded in the name of 'Baba Guru Sharan Das', which prima-facie, shows that it is a personal property and it is not being used for any religious or charitable purposes – Even if the part of the income of land is not utilized for the charitable purposes, then the benefit of the provisions of section 6(1)(f) of the 'Act 1960' cannot be given. (Para 25, 26 and 27)

Writ petition dismissed . (E-1)

List of Cases cited :-

1. Shri Radhaji Brijman Mandir & ors. Vs District Judge, Banda & ors.; 1979(5) ALR, 132

2. Matloob Ali Vs Ist Addl. Distt. & Sessions Judge & ors.; 1979 RD 32

3. Avinash Chandra Tewari Vs Additional District Judge, Court No. 3, Unnao & ors.; 2011 (86) ALR 662

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard Sri Mohd. Arif Khan, learned Senior Advocate, assisted by Sri Mohammad Aslam Khan, leaned counsel for the petitioner, Sri Shailendra Kumar Singh, learned Chief Standing Counseel-II assisted by Sri Sunil Kumar Khare, lerned counsel for the State.

2. By means of instant petition, the petitioner has assailed the order dated 13-04-1992 passsed by the Additional Commissioner, Faizabad Division, Faizabad and the order dated 29-06-1987 passed by the Prescribed Authority (Ceiling),District-Barabanki.

3. The factual matrix of the case is that a notice under section 10(2) of the Imposition of Ceiling on Land Holdings Act, 1960(hereinafter referred to as Act,1960) was issued to the petitioner on 11-09-1974. By the aforesaid notice, the petitioner was required to show cause as to why the statement under section (1) of Section 10 of the Act,1960 be not taken as correct. As per the version of the petitioner, the notice was not served upon him and therefore, he could not file objections as a result whereof, the Prescribed Authority(Ceiling) District-Barabanki passed an order on 25-11-1974, whereby the land in question was declared as surplus land.

4. As soon as, the aforesaid fact came into the knowledge of the petitioner, he submitted an application dated 02-01-1975 before the prescribed authority, under section 11(2) of Act,1960. Just thereafter, on 09-01-1975, the petitioner moved another appliation for spot inspection. He again moved an application on 20-01-1975 mentioning therein that "Baba Guru Charan Das' is "Mahant' of "Kuti-Manipur' and the

property in question belongs to a "Math' and this property belongs to a trust and there is possession of "Math' over there. He also submitted that income of "Math' is wholly utilised for realigous and charitable purposes and not for the petitioner or his decendants. The Prescribed Authority, on the aforesaid application passed an order and directed the Naib Tehsildar, Haidergarh to make an inspection and submit a report by 25-01-1975. In pursuance thereof, the Naib Tehsildar, enquired into the matter and submitted a report to the effect that the land in question is unirrigated as the same is not within the Command Area of the Canal or Tubewell. He also reported that plot no. 1024 is a "Jheel' and in most of the area, paddy crops are sown and the land belongs to a "Math' and the petitioiner is "Mahant'. On the aforesaid report, the Prescribed Authority vide order dated 10-03-1975, discharged the notices issued against the petitioner. Being aggrieved with the order dated 10-03-1975, the State of U.P. instituted an appeal under section 13 of the "Act 1960', which was allowed by the Additional Commissioner, Faizabad Division, Faizabad vide order dated 26-04-1976 and the matter was remanded back to the opposite party no. 3 i.e. the Prescribed Authority for deciding the matter afresh.

5. After the matter remitted back to the Prescribed Authority, the Prescribed Authority rejected the application of the petitioner, filed under section 11(2) of the "Act 1960', as the explanation with respect to the delay was not found sufficient. Being aggrieved with the aforesaid order, the present petitoner again filed an appeal which was allowed on 27-08-1977 and case was remanded back to opposite party no. 3 for decision afresh.

6. While deciding the matter, the Prescribed Authority vide order dated 26-03-1981 held that the property belongs to a "Math'of "Baba Shahab Kabir Panti Saint' and the income of the property is being utilized for religious and chartiable purposes. While passing the order aforesaid, the Prescribed Authority has considered the report of the Naib Tehsildar and entries of Khatauni of 1359 Fasli and Form 23 and Form 41 of Consolidation of Holdings Act.

7. Assailing the order dated 26-03-1981, the State of U.P. filed an appeal, which was allowed on 13-03-1984 and the case was again transmitted back to the opposite party no. 3 with direction to decide the case after framing the additional issues whether Math/Trust in question is a public chartiable or religious trust or not. After the aforesaid order, the opposite party no. 2 framed five issues in addition to three issues framed earlier. The Objector filed Khataunis of 1359,1380,1390 and 1392 Faslis and the witnesses also deposed that the property in suit belongs to a "Math' in the name of "Baba Guru Charan Das' as the trustee and this is not the personal property. The State of U.P. also got examined Prabhu Nath Tewri, Lekhpal and Durga Baksh Singh, Naib Tehsildar. On consideration of evidences and statements of the witnesses, the Prescribed Authority passed an order and denied the benefit of section 6(f) of the "Act 1960' and thereby declared the area of 10-15-3 Bighas as surplus land. Being aggrieved with the order aforesaid, an appeal was filed by the petitioner before the Commissioner, Faizabad Division, Faizabad on 01-08-1987 and that was dismissed vide order dated 13-04-1992, which is under challenge in this writ petition.

8. Contention of learned Senior Counsel appearing for the petitioner is that initially without serving a notice under section 10(2) of the "Act 1960', the order was passed and thereafter, the petitioner challenged the same and he was allowed to be heard. He added that it is a well settled law that a "trust' may be unregistered and further a property can be dedicated orally for charitable or religious purposes and the opposite party i.e. the State of U.P. has failed to contradict the same before the prescribed authority.

9. Learned Senior Counsel in support of the contentions aforesaid has placed reliance on a Judgment ***reported in 1979(5) ALR, 132, Shri Radhaji Brijman Mandir and Others Vs. District Judge, Banda and Others*** and has referred the extract of the Judgment aforesaid as under :-

"In the instant csae the endowment in question was for religious and charibtable purposes and there was no indication that any part of the income was for the benefit of the settler or any other person. The question is whether land covered by the endowment is exempt from consideration in the proceeding under the Act. Admittedly, the endowmewnt in question was created from before the 1st day of May,1959. Since then the land is held by the deities under a public religious and charitable endowment. That is clear from the terms of the document also. Under the endowment, no part of the income of the endowment was reserved for the benefit wholly or partly of the settler or members of his family or his descendants. The endowmenet in question fully satisifes the test laid down in calsue (f) and consequently land held under the endowment had to be exempted from considreartion for the purposes of detremining the ceiling area applicable to the surplus land of the tenure-holder, namely, Radha Krishna Ji Mahraj. Section 6(1)(f) is attracted where the land is held by the tenure holder. The law does not reuire that endowment should be created by the tenure-holder himself. Its only requirement is that the land must be held by the tenure-holder under a public religisous trust or endowmenet or institution. Land which was the subject-matter of the endowmenet in the present case, there is no dispute that the settler and his wife died issueless and, thereore, the question of income of the endowment being spent wholly or partly for the benefit of the settler or members of his family or his descendants does not arise. Even if the income of the property is not properly maintained by the present trustees that would not be ground for denying the tenure-holder the benefit of the provisions contained in clause (f) to sub-section (1) of Section 6."

10. Referring the aforesaid, he submits that it has been held by the court that if there is any discrepancies in the maintenance of the record of income of the "trust', that would not prevent the benefit of the provisions contained in clause (f) of sub. Section (1) of Section 6 of the "Act 1960'.

11. He has further placed reliance on a case reported in ***1979 RD 32(Allahabad High Court),Matloob Ali Vs. Ist Addl. Distt. & Sessions Judge and Others*** and submitted that it has been held that the first part of the requirement mentioned in Section 6(1)(f) of "Act 1960' is that the land be held before the first day of May, 1959, by or under a public religious or charitable Waqf, trust endowmenet or institution and so far as the present matter is concerned,

the "Math' was in existence on the first day of May,1959.

12. He further submitted that though certain plots have been declared as irrigated land, but, the evidence, which are on record, shows that the plots in question are not in Command Area of Canal or any Tubewell owned by the State. He submits that if the income of the property is not maintained by the trustee, even then that would not be a ground for denial of the benefit of section 6(f) of "Act 1960', to a tenure holder and in the instant matter, there is a report of the Naib Tehsildar and the statement of a village person, which say that the property in question belongs to a "Math', which has been established for religious and chartibale purposes and the income of the property was not utilizsed by the petitioner or his decedants and the State of U.P. could not succeed to prove before the prescribed authority or appellate authority that the property was not being used for charitable or religious purposes.

13. He further contended that the land in question was recorded in 1359 Fasli in the name of the "Baba Math' and the property was inherited by "Guru' of the present petitioner and the entries in the revenue record also denotes the word "Chela' and thus, this could not be said to be a personal property of the petitioner. He submits that the State government has not only been failed to contradict the evidences and the statements of the witnesses, but, also has failed to show any document that the land in question was not being utilised for charitable purposes. Thus, the submission of learned cousel for the petitioner is that the order passed by the Prescribed Authority as well as Appellate Authority are not sustainable and the same are liable to be set aside.

14. On the other hand, learned Chief Standing Counsel-II appearing for the State has vehemently opposed the contenions aforesaid and submitted that the land in question was not being utilised for charitable or religious purposes and it is not a property of "Math' or "Trust', but, it was being utilised for personal purposes and benefits. In support his contentions, he added that the report dated 13-02-1975, which was submitted by the Naib Tehsildar, was not examined while affording opportunity of cross-examination to the State.

15. He also added that though the petitioner is claiming the benefit of the provisions of Section 6 (1) (f) of the Act, 1960, but,he has failed to establish that he is Manager of a religious and chartiable Trust/Math and it is prima-facie, evident that the land in questioin is recorded in the name of an individual and this is not recorded in the name of any "Trust' or "Math'. He added that the petitioner has also failed to prove that the whole income of the land in question is being utilised for religious and charitable purposes,which is one of the conditions precedent for getting the benefit of Section 6 (1) (f) of the "Act,1960'.

16. Adding his arugments, he submits that the petitioner could not substantiate that the "Trust/Math' was registered at any point of time and if it is been claimed as "Trust', the same should be registered as per the provisions of Section 5 of the Indian Trusts Act, 1882.

17. He further added and has drawn attention of this court towards the case reported in ***[2011 (86) ALR 662], Avinash Chandra Tewari Vs. Additional District Judge, Court No. 3, Unnao and Others*** and has referred paragraph no. 27 and added that the Hon'ble court has held that mere on the fact that the members of the public are allowed to worship or visit the place, would not be the proof of a public' Trust'.

18. Further contention is that it is evident from the order dated 29-06-1987 that the Prescribed Authority has properly framed five questions in compliance of the direction of the appellate order dated 20-03-1984 and there was no direction with respect to framing of question on the issue of the land being irrigated or non-irrigated. He submits that the property is not of a "Math' or "Trust',but, it is the property recorded in the name of a person and the same is being used for individual and not for religious or charitable purposes and therefore, there is no merit in the case of the petitioner and the instant petition is liable to be dismissed.

19. Having heard learned counsels for the parties and after perusal of material placed on record, it emerges that a dispute arose with respect to declaration of the land in question as a surplus land. Initially, a notice was issued to the petitioner on 11-09-1974, which as per the averment of the petitioner, was never served upon him and therefore, a set of litigation was instituted and ultimately, the petitioner succeeded and his objections were entertained under section 11(2) of the Act,1960. Thereafter, the matter goes upto the appellate court and the same was remanded back to the Prescribed Authority vide order dated 30-03-1984 with a direction to formulate additional issues and thereafter, the issues were formulated by the Prescribed Authority and the order was passed on 29-06-1987, whereby the claim of the petitioiner with respect to according benefit of Section 6(f) of the Act,1960 was rejected. An appeal was also instituted that too was decided vide order dated 13-04-1992 upholding the order passsed by the Prescribed Authority as the appellate authority found no illegality or infirmity in the order passed by the Prescribed Authority.

20. When this court examined the order passed by the Prescribed Authority dated 29-06-1987, it reveals that five additional questions were framed including the question as to whether the property in question belongs to a religious "Math' and whether the same was recorded as a "Math' prior to 01-05-1959 and whether the income arising out of the aforesaid property is being utilised for religious and charitable purposes coupled with the issue that whether the decendants are also beneficiaries of the alleged "Trust' or "Math'.

21. On the perusal of the discussions of court below while deciding the aforesaid issue is clear that the land in question is recorded in the name of the present petitioner and not in the name of any "Math' or "Trust' and there is no written terms or conditions thereof. The Prescribed Authority while examining the evidences and the statements of the witnesses, has come to the conclusion that no evidence could be placed by the petitioner that the income of the property in question was being utilised for religious or charitable purposes or

the family members/descendants of the petitioner are not the beneficiaries of the land in question. He has also considered the statements of the Naib Tehsildar and the Lekhpal of the area concerned that the property in quesion is the private property of Guru Sharan Das.

22. This court has also noticed that there is a contradiction in the Nakal Khatauni of 1359 Fasli with the present Khataunis and the origin of the alleged "Math' could not be proved prior to 01-05-1959, which is the cut of date mentioned in section 6(1)(f) of "Act 1960'. While examining the report of the Naib Tehsildar dated 13-04-1975, it is answered that the Naib Tehsildar did not mention the fact that what is the basis of his satisfaction that the land in question is land of a "Math' and when it was constituted and the land was recorded in the name of the "Math'.

23. The appellante authority has recorded findings that the Naib Tehsildar has also not mentioned any fact in its report that whether the income of the property in question was not being utilized for "Mahant' as well as his family members and though much emphasis has been placed upon the report of the Naib Tehsildar by the petitioner on every stage.

24. In fact, substantially, there were two questions, which were to be dealt with by the Prescribed Authority and the Appellate Authority. The first issue is that whether the property in question is a property of "Math' or "Trust' and the income of which was being utilised for religious or charitable purposes and the second issue is that whether for according the benefits of Section 6 (1) (f) of the "Act 1960', a "Trust' or "Math' is essentially to be registered or not.

25. The first issue, which has been answered by the Prescribed Authority is that the report of the Naib Tehsildar dated 13-02-1975, was vehemently relied upon by the petitioner though, it is apparent that except apart from a line report of the Naib Tehsildar that the property in question is the property of a "Math', there is no other details that what was the evidence and record, on the basis of which, the Naib Tehsildar reported that the property belongs to a "Math'. It has also not been disclosed by the Naib Tehsildar in his report dated 13-04-1975 that the income of the property in question was being utilized for charitable or religious purposes, except the fact that usually the saints of "Kabir Panti' were kept on visiting and the expenditure incurred upon the religious ceremonies were fulfilled by the income of the property in question, but, this does not disclose that whether all the income of the property in question was being utilised for the charitable and religious purposes as it is sellted law that even if the part of the income of land is not utilised for the charitable purposes, then the benefit of the provisions of section 6(1)(f) of the "Act 1960' cannot be given.

26. Further the petitioner also could not prove by any of the documents that the income of the property in question was utilized for charitable and religious purposes and he has also failed to prove that he or his family members are not the beneficiaries of the income of the property in question. Further, there is a material contradiction in the Nakal Khatauni of 1359 Fasli as well as well as the Nakal Khatauni of the present year and therefore, this could not be proved that the property in question was being utilized for charitable and religious purposes, being a "Math' before 01-05-1959.

27. This court has also noticed the fact that the petitioner has also failed to show any document wih respect to any "Math' or "Trust', recorded in the name of "Baba Guru Sharan Das', which prima-facie, shows that it is a personal property and it is not being used for any religious or charitable purposes and all these issues have very exhaustively been dealt with by the Prescribed Authoriy as well as by the Appellate Authority. Therefore, there is no merit in the instant matter.

28. Resultantly, the writ petition is hereby ***dismissed.***

29. Consinged to record.

(2023) 3 ILRA 458
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.03.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Writ C No. 1007259 of 2013

C/M Pratibha Shikshan Samiti & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Girish Chandra Verma

Counsel for the Respondents:
C.S.C., Adit Mishra, G.M. Kamil, Manish Vaish, Rakesh Chandra Tewari

A. Society – Societies Registration Act, 1860 – Sections 25(2) & (3) – Election – Term of Committee expired – No order u/s 25(2) was passed by Assistant Registrar – Effect – Committee's power to hold election – Legality challenged – Held, the committee of management even after expiry of its term can convene a meeting for the purpose of holding election unless it is specifically barred under the rules of the society. This right continues till such time the Registrar passes an order under section 25(2) of the Act after which no other meeting can be convened by the committee of management in view of sub section (3) of Section 25 of the Act. (Para 7)

Writ petition allowed . (E-1)

List of Cases cited :-

1. C/M Vidyawati Higher Secondary School Vs Assistant Registrar & ors.; 2005(3)UPLBEC 2410

2. Vinod Kumar Varsnay Vs St. of U.P. & ors.; (D.B.) 2017 (3) E.S.C. 1529

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

1. Heard learned counsel for the petitioner and learned Additional Chief Standing Counsel for opposite parties 1 and 2 as also Mr. Anil Tewari, learned Senior Advocate, assisted by Mr. R.C. Tewari, learned counsel for respondent No.3.

2. By means of this writ petition, the petitioner has prayed for a writ in the nature of certiorari quashing order dated 23.9.2013, passed by Deputy Registrar, Firms, societies & Chits, Faizabad Region, Faizabad, respondent No.2.

A further writ of mandamus has been prayed directing respondent No.2 not to give effect to the impugned order dated 23.9.2013 and not to disturb the functioning of the petitioner.

3. The petitioner No.1 is registered society, petitioner No.2 is the founder Manager and respondent No.3 was the

founder President along with other office bearers. In the meeting held on 28.7.2008, a decision was taken for getting registered list of executive committee of management under section 4 of the Societies Registration Act, 1860 (in short, Act) for the year 2008-09. List of 39 members of the general body was approved in the resolution dated 15.6.2008. The Deputy Registrar vide order dated 22.10.2008 passed order for registration of the list for the year 2008-09. On 30.11.2008, a resolution was passed for getting renewal of the registration as well as membership of 35 new members of general body. The resolution was accepted and sanctioned strength of general body became 74.

On 9.12.2008, a letter was submitted before the respondent No.2 along with documents for renewal of society. Vide order dated 20.12.2008, the society was renewed and the renewal certificate was issued by respondent No.2 for further five years. On 21.12.2008, the resolution was passed of the society for holding election. Programme of the election was notified and separate agenda was issued for the election dated 18.1.2009. List of 74 members of general body was also published. The meeting was presided by respondent No.3 as President. On 18.1.2009, election of the committee of management was held in which the petitioner No.2 was again elected as Manager and respondent No.3 was elected as President. This meeting dated 18.1.2009 was confirmed in the meeting dated 8.9.2009. On 10.2.2009, the resolution dated 21.12.2008, 18.1.2009, 3.2.2009 and list of the office bearers along with the list of the members of the general body was submitted before the respondent No.2 along with other documents duly signed by respondent No.3 and the petitioner.

A letter dated 6.11.2012 was sent for registration of the office bearers as per election dated 18.1.2009. The same was duly registered by the respondent No.2. The respondent No.3 after enjoying the status of president of the society for more than four years of election moved an application for declaration of the society time barred by concocting story, to which a detailed reply dated 16.5.2013 was filed by the petitioner against notice sent by respondent No.2. On 6.1.2012, a first information report was lodged against respondent No.3 under sections 467, 468, 471, 419, 420 I.P.C. at police station Dewan. The respondent No.2 by the impugned order dated 23.9.2013, has declared the society time barred holding that the election of the society ought to have been concluded by 20.12.2008 which has not been conducted and on this ground has declared the committee of management of the society time barred w.e.f. 20.12.2008, with a further direction to hold election of the time barred committee of management from 12 members of the general body.

4. Learned counsel for the petitioner submits that it is not disputed that the election of the committee of management of the society was held from the list of 74 members which was recognised by the respondent No.2 himself by registering list of office bearers of the society by passing order dated 6.11.2012, contained in Annexure no.17 to the writ petition. Hence the election dated 18.1.2009 was recognised and was in knowledge of respondent No.2.

It is submitted that from a joint reading of the provisions of section 25(2) and (3) of the Act, it is evident that till the Deputy Registrar does not pass order under section 25(2) of the Act, the society will not

be defunct and the outgoing committee of management has all the powers and authority to hold the election accordingly. He has relied on judgment of this Court in **Committee of Management, Vidyawati Higher Secondary School, Shahpur, Sarain, Azamgarh and another** versus **Asstt. Registrar, Firms, Societies and Chits, Azamgarh Region, Azamgarh and others** 2005(3)UPLBEC 2410 (relevant paras 6, 7 and 8). He has also relied on judgment of the Division Bench of this Court in **Vinod Kumar Varsna**y versus **State of U.P. and others** (D.B.) 2017 (3) E.S.C. 1529 (relevant paras 17, 18 and 19).

5. Learned Addl. Chief Standing Tiwari and Mr. Rakesh Tewari, learned Senior Advocate appearing for respondent No.3 have opposed the petition.

6. It is not disputed that the election of the society was held in the year 2008. List of office bearers of the society was registered for the year 2008-09 by the Deputy Registrar vide order dated 22.10.2008. The term of the committee of management came to an end on 20.12.2008. It is also not disputed that no orders were passed after expiry of the term of the committee of management by the Deputy Registrar under section 25(2) of the Act. The law in this regard has been settled by this Court in the aforesaid referred cases. For convenience paras 6, 7 and 8 of **Committee of Management and another versus Asstt. Registrar, Firm Societies and others** (supra) are reproduced below :

"6. For appreciating the controversy raised in the present writ petition it would be relevant to refer to Sections 25(2) and (3) of the Societies Registration Act, 1960, which are quoted below:

"25. Disputes regarding election of office bearers-(1) ??????..

(2) Where an order made under sub-section (1), an election is set aside or an office-bearer is held no longer entitled to continue in office or where the Registrar is satisfied that any election of office bearers of a society has not been held within the time specified in the rules of that society/ he may call meeting of the general body of such society for electing such office-bearer or office-bearers, and such meeting shall be presided over and be conducted by the Registrar or by any officer authorized by him in this behalf, and the provisions in the rules of the society relating to meetings and elections shall apply to such meeting and election with necessary modifications.

(3) Where a meeting is called by the Registrar under sub-section (2), no other meeting shall be called for the purpose of election by any other authority or by any person claiming to be an office-bearer of the society.

Explanation For the purposes of this section, the expression 'prescribed authority' means an office or Court authorized in this behalf by the State Government by notification published in the Official Gazette." 7. A bare reading of the aforesaid section would establish that the right to convene a meeting for the purposes of holding elections of the office-bearers of the society.

Explanation For the purposes of this section, the expression 'prescribed authority' means an office or Court authorized in this behalf by the State Government by notification published in the Official Gazette."

7. A bare reading of the aforesaid section would establish that the right to convene a meeting for the purposes of holding elections of the office-bearers of

the outgoing Committee of Management and after expiry of the term of the office bearers the society is lost only when the Registrar passes order under Section 25(2) of the Act for convening a meeting of the general body of the society for the purposes of holding fresh election of the Committee of Management. It is at t stage only that outgoing office bearers are debarred from convening any meeting for the said purpose.

8. In the facts of the present case it is admitted position that no such order was passed by the Registrar under Section 25(2). Thus the power to convene a meeting of General Body for holding fresh elections was not lost and there is no bar either in the byelaws of the society or under the Societies Registration Act in holding of fresh elections by the outgoing office-bearers. In such circumstances the clections which have been held on 2.3.2003, even after expiry of the term of the office- bearers of the society, cannot be said to be illegal or invalid in any manner and the objections raised in that regard canot be legally sustained.?

Paras 17, 18, and 19 of Vinod Kumar Varshney?s case (supra) is reproduced below :

17. Having given our thoughtful consideration in the matter and upon considering the language of Section 25(2) and 25(3) of the Act and upon a conjoint reading of Section 25(2) and 25(3) of the Act, it is apparently clear that the Registrar has the power and jurisdiction to call a meeting for the purpose of holding an election if he is satisfied that the election has not been held within the time specified in the rules of the society. However, Section 25(3) of the Act recognises that a meeting for the purpose of holding an election can be convened by any other authority or by any other person claiming to be an office bearer of the society, meaning thereby that if the term of the Committee of Management expires, the Committee of Management can still convene a meeting and hold an election unless an order is passed by the Registrar under Section 25(2) of the Act for holding an election.

18. We are of the view that upon a conjoint reading of Section 25(2) and Section 25(3) of the Act, the power of the Committee of Management to convene a meeting for the purpose of holding an election gets eclipsed only when the Registrar has assumed jurisdiction and has taken steps to convene a meeting under Section 25(2) of the Act. We make it further clear that so long as an order for convening a meeting and for holding an election is not passed by the Registrar under Section 25(2) of the Act, the power to convene a meeting for the purpose of holding an election continues with the Committee of Management, even after the expiry of its terms unless it is specifically prohibited in the Rules of that society. In this regard, our view is fortified by a decision of a Full Bench of this Court in Committee of Management, Dadar Ashram Trust Society and others Vs. Mahatma Gandhi Kashi Vidyapeeth, Varanasi and others, 2017 (1) ADJ 1, wherein the Full Bench held:-

"As would be evident from a reading of sub-section (3), the power and jurisdiction of any other authority or person to call a meeting for the purpose of elections stands eclipsed only in a situation where a meeting has already been called by the Registrar under sub-section (2). In fact sub-section (3) recognises that a meeting for the purposes of elections may in fact be convened by any other authority or by any other person. The power of that other authority or person to convene such a meeting stands taken away only if the

Registrar has assumed jurisdiction and steps under sub-section (2) to convene a meeting." 19. In the light of the aforesaid, the answer to question no.1 is, that the Committee of Management even after the expiry of its term can convene a meeting for the purpose of holding an election unless it is specifically barred under the Rules of its society. Such right continues till such time the Registrar passes an order under Section 25(2) of the Act after which no further meeting could be convened thereafter by the Committee of Management in view of sub-Section (3) of Section 25 of the Act. ?

7. A perusal of the aforesaid judgments passed by this Court makes it evident that the committee of management even after expiry of its term can convene a meeting for the purpose of holding election unless it is specifically barred under the rules of the society. This right continues till such time the Registrar passes an order under section 25(2) of the Act after which no other meeting can be convened by the committee of management in view of sub section (3) of Section 25 of the Act.

8. In the case in hand, admittedly, no order was passed after expiry of the term of the committee of management in the year 2008, hence election convened by the outgoing committee of management on 18.1.2009 was perfectly legal. The committee of management for this reason does not become time barred also as no order under section 25(2) of the Act was passed by the Registrar. Hence, for this reason, the impugned order is unsustainable.

9. The writ petition is accordingly allowed and the impugned order dated 23.9.2013 (supra) is set aside.

(2023) 3 ILRA 462
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 21.02.2023

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application U/S 378 No. 17 of 2023

State of U.P. ...Applicant
Versus
Arif Anwar Hashmi & Ors.
...Opposite Party

Counsel for the Applicant:
G.A., Sulkhan Singh, Sushil Kumar Singh

Counsel for the Opposite Party:
Manoj Kumar Misra, Anand Mani Tripathi, Roshan Babu Gupta

(A) - Criminal Law – Criminal Procedure Code, 1973 - Sections 378, 462 & 465 - U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 - Sections 3(1) & 18 - Application for Leave to Appeal – impugned order passed beyond jurisdiction of the court - appeal opposed by the respondents on the ground of Section 462 & 465 of Cr.P.C. - court finds that, if there is any specific designated court is exists to deal and adjudicate such issue, the jurisdiction vests with that court only to deal & adjudicate that issue and if such issue in question has been adjudicated by another court, it would be an error on the face of record, which may be considered as failure of justice, in the light of judgment of the Apex Court in case of *Ashwinin Kumar Upadhyay* - the Apex Court's judgment is the law of the land and if any guidelines have been formulated and circulated and being followed in the entire St., deviation thereof would be a disobedience of the order of the Apex Court - hence, the provision of section 462 & 465(2) Cr.P.C. would not be applicable and the impugned order may not be liable to be sustained in the eyes of law - consequently, instant Leave to Appeal, allowed and the matter remanded back to the designated court to

adjudicate the issue on its merits, promptly - directions issued accordingly.
(Para – 6, 7, 8, 11)

Appeal Allowed. (E-11)

List of Cases cited: -

Ashwani Kumar Upadhyay Vs U.O.I. & ors. (WP No. 699/2016 - interim order dated 04.12.20218 & finally Decided on 09.11.2023)

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

1. Heard Sri Vimal Srivastava, learned Government Advocate, assisted by Sri Alok Saran, Sri Rajesh Kumar Singh, learned AGA, Sri Manoj Kumar Misra, learned counsel for respondents no.1 & 3, Sri A.M. Tripathi, learned counsel for respondents no.2 & 6 and Sri Roshan Babu Gupta as well as Ms. Purnima Mishra, learned counsel for respondents no.4 & 5.

2. Learned AGA has filed supplementary affidavit, the same is taken on record. Sri Manoj Kumar Misra has filed objection against the appeal and objection against the interim relief application, both the objections are also taken on record.

3. This appeal has been filed under Section 18 of the Uttar Pradesh Gansters and Anti-Social Activities (Prevention) Act, 1986 (hereinafter referred to as "the Gangsters Act") against the order dated 23.12.2022 passed by the Special Judge (Gangster Act)/ Special Judge (POCSO Act), Balrampur in Criminal Misc. Reference Case No.984 of 2022, State Vs. Arif Anwar Hashmi and Others, arising out of Case Crime No.156 of 2020, under Section 3 (1) of U.P. Gansters and Anti-Social Activities (Prevention) Act, 1986, Police Station- Sadullanagar, District-Balrampur.

4. The first and foremost submission of the learned Government Advocate Sri Vimal Srivastava is that the issue in question relating to the party, who has been MLA of Utraula and being pensioned from the State Government, which is admissible for the Ex-MLA. The aforesaid fact has been considered vide para-35 of the aforesaid impugned order. It has been further submitted that the impugned order dated 23.12.2022 has been passed by the Special Judge (Gangster Act)/ Special Judge (POCSO Act), Balrampur. As per learned Government Advocate, the aforesaid court may not adjudicate any issue or may not pass such order in the light of the dicutm of the Apex Court in re; **Ashwini Kumar Upadhyay Vs. Union of India & Anr., Writ Petition (Civil) No.699 of 2016.** Relevant paragraphs 5 & 9 of the aforesaid judgment are being reproduced herein below:-

"5. On 4.12.2018 this Court issued the following directions :-

"1. Instead of designating one Sessions Court and one Magisterial Court in each District we request each High Court to assign/allocate criminal cases involving former and sitting legislators to as many Sessions Courts and Magisterial Courts as the each High Court may consider proper, fit and expedient. This, according to us, would be a more effective step instead of concentrating all the cases involving former and sitting legislators in a Special Court(s) in the district.

2. The procedural steps indicated by the learned Amicus Curiae, narrated above, will be followed by each of the designated Court allocated in terms of the directions above except that to whom work

would be offences punishable with imprisonment for life/death against sitting M.Ps./M.L.As. M.Ps./M.L.As. would be taken as well as former up on first priority followed by sequential order indicated above without creating any distinction between cases involving sitting legislators and former legislators.

3. At this stage, we are of the view that the above directions should be made applicable to cases involving former and sitting legislators in the States of Bihar and Kerala.

The National Capital Territory of Delhi where the position is somewhat different and the difficulties of distance and territories do not come in the way the trial of cases by the Special Courts (both Sessions Court and Magisterial Court) will continue.

4. So far us the cases involving States of Kerala and Bihar are concerned, such of the case records which have been transmitted to the Special Courts in the two states will be re-transmitted to the jurisdictional courts wherefrom the records have been sent for being dealt with in the manner indicated above. This will be done forthwith.

5. The registry of the High Courts of Kerala (State of Kerala) and Patna (State of Bihar) will initiate necessary action in this matter without any delay.

6. Rest of the Special Courts already set up shall continue to work and try cases assigned to it until further orders are passed in this regard by this Court.

7. The designated Courts in the districts in the aforesaid two States of Kerala and Bihar will submit monthly report to the High Court with regard to the cases where charge-sheets have not yet been filed; cases where charges have not yet been framed giving reasons therefor; and the progress of the trial where the cases are ready. The High Courts, in turn, will forward the said reports to the registry of this Court with a copy to Shri Vijay Hansaria, learned Amicus Curiae who is requested to go through the said reports and assist the Court by placing the information conveyed before this Court in an appropriate manner on the next date/dates of hearing."

9. The above directions do not mandate the High Courts to transfer cases which are triable by Magistrates to Sessions Courts. The directions contained in the Order dated 4 December 2018 do not supplant the jurisdictional provisions contained either in the Code of Criminal Procedure, 1973 or in other special enactments governing the trial of offences governed by those enactments. The directions of this Court mandate the assigning and allocation of criminal cases involving former and sitting legislators to Sessions Courts or, as the case may be, Magisterial Courts. This has to be in accordance with the governing provisions of the law as applicable. Consequently, where a case is triable by a Magistrate under the Penal Code, the case would have to be assigned/allocated to a Court of a Magistrate vested with jurisdiction and the Order of this Court dated 4 December 2018 cannot be construed as a direction requiring the trial of the case by a Sessions Court. In the State of Uttar Pradesh, no Magisterial Courts have been designated as Special Courts for the trial of cases triable by Magistrates in terms of the directions of this Court dated 4 December 2018. The Notification issued by the High Court of Judicature at Allahabad on 16 August 2019 is based on

an evident misconstruction of the directions contained in the Order of this Court."

5. Learned Government Advocate, who is counsel for the appellant, has stated that in the light of the aforesaid dictum of the Apex Court, the impugned order is without jurisdiction, therefore, the same is liable to be set aside/ quashed. Learned counsel for the appellant has also raised some objections challenging the impugned order to the effect that the relevant provisions of the Gangsters Act have not been followed but I am not considering those objections at this stage since the order impugned has been passed by the court, which was not having jurisdiction to pass such order, therefore, such order is liable to be set aside/ quashed.

6. However, learned counsel for the respondents, more particularly Sri Manoj Kumar Misra, has drawn attention of this Court towards Sections 462 & 465 Cr.P.C. by submitting that only for the reason that the impugned proceedings have been concluded by the wrong court, the impugned order may not be set aside for that reason alone. He has also submitted that if the proceedings were running before the wrong court, the Public Prosecutor should have taken specific objection before the court concerned but no such objection has been raised by the Public Prosecutor till passing of the impugned order. He has, therefore, submitted that lapse on the part of the Public Prosecutor/ State, the respondents should not suffer. Sri Manoj Kumar Misra has also raised objection that in this appeal, this ground has not been taken specifically that the order impugned has been passed by the court, which was not having jurisdiction to pass such order, therefore, the present appeal may be dismissed.

7. Be that as it may, after the judgment of the Apex Court in re; **Ashwini Kumar Upadhyay** (supra), the courts have been designated to deal with the issue relating to the MPs/MLAs and if the matter pertains to the issue relating to any MP/MLA, the designated court would have jurisdiction to adjudicate such issue strictly in accordance with law. Notably, it has not been disputed by the parties that the impugned order has been passed by the court, which was not having such jurisdiction, therefore, even if this ground has not been raised in this appeal, after noticing the aforesaid fact which discloses that this is an error apparent on the face of record, the order impugned may not be liable to be sustained in the eyes of law.

8. So far as Section 462 Cr.P.C. is concerned, it has been made clear in the aforesaid section that the proceedings, if concluded by the wrong court, may not be set aside only for the reason that it has been concluded by the wrong court unless it appears that such error has, in fact, occasioned failure of justice. In the judgment of the Apex Court in re; **Ashwini Kumar Upadhyay** (supra), the purpose has been interpreted as to why for dealing cases relating to MP/MLA should be adjudicated by the designated court only. Therefore, if there is any specific designated court to deal and adjudicate such issue, the jurisdiction vests with that court only to deal and adjudicate that issue and if the issue in question has been adjudicated by another court, to me, it would be an error, which may be considered as failure of justice. Besides, the judgment being passed by the Apex Court is the law of the land

and if in compliance of the order of the Apex Court, any guidelines have been formulated and circulated and being followed in the entire State, deviation thereof would be a disobedience of the order of the Apex Court and would frustrate the purpose of formulating the guidelines issued by the High Court at Allahabad to deal with and to adjudicate the issue relating to the MPs/MLAs. Therefore, the provisions of Section 465 (2) Cr.P.C. would not be applicable, which provides that if specific objection has not been taken by the either side at the appropriate stage and order is passed by the court not having jurisdiction may not be set aside. In the present cases, the District/ Sessions Judge was duty bound to transfer the case to the designated court dealing with the issues relating to the MP/MLA. Likewise, if the court where the matter has been transferred by the District/ Sessions Judge concerned is having no locus or jurisdiction to deal with or to adjudicate the issue relating to the MP/MLA should have not proceeded further. Notably, the Court concerned has considered the fact in para 35 of the impugned order that one of the parties has been MLA and getting pension admissible for the MLA. In the present case, the order impugned has been passed by the court, which is not having jurisdiction to pass such order, therefore, the aforesaid order may not sustain in the eyes of law. At the same time, it is also observed that there is no fault on the part of the respondents inasmuch as they have participated in the proceedings and they did not try to linger on the issue.

9. Considering the submissions of learned counsel for the parties and perusing the material available on record, I find that there is an error apparent on the face of the order dated 23.12.2022 as the same has been passed by the court, which was not having jurisdiction to pass such order in the light of the dictum of the Apex Court in re; **Ashwini Kumar Upadhyay** (supra) and the subsequent guidelines so issued by the High Court at Allahabad.

10. Therefore, the instant application for leave to appeal is **allowed**.

11. The impugned order dated 23.12.2022 passed by the Special Judge (Gangster Act)/ Special Judge (POCSO Act), Balrampur in Criminal Misc. Reference Case No.984 of 2022 is hereby set aside/ quashed only on the ground of jurisdictional error as I have not entered into the merit of the issue. The matter is remanded back to the designated court concerned at Balrampur to adjudicate the issue on merits promptly, strictly in accordance with law, by affording opportunity of hearing to the parties concerned, with expedition, preferably, within a period of three months from the date of production of certified copy of this order.

12. Accordingly, the appeal is also **allowed**.

(2023) 3 ILRA 466
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 27.02.2023

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application U/S 482. No. 1974 of 2023

Purushottam Chaudhary ...Applicant
Versus
C.B.I., Lucknow ...Opposite Party

Counsel for the Applicant:

Pranshu Agrawal

Counsel for the Opposite Party:
Anurag Kumar Singh

Criminal Law - Code of Criminal Procedure, 1973 - Section 64, 82 & 83-Trial Court issued bailable warrant against the Applicant presuming that despite summons been served-Applicant did not appear-summons not served in terms of section 64 Cr.P.C.-summons neither served upon Applicant nor on any male family member-at least one more summon to be served-proclamation u/s 82 and 83 Cr.P.C.-to be issued only on the Application of the prosecution supported with an affidavit that despite all reasonable efforts accused is avoiding summon-impugned order set aside.

Application allowed. (E-9)

List of Cases cited:

1. Inder Mohan Goswami & anr. Vs St. of Uttaranchal & ors. ,2007 AIR SCW 6679

2. Vinod Kumar Singh @ Vinod Singh Vs St. of U.P., Application U/s 482/378/407 No. 5195 of 2021

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

1. Heard Sri P. Chakravarty and Sri Pranshu Agarwal, learned counsel for the applicant and Sri Anurag Kumar Singh, learned counsel for the C.B.I.

2. By means of this application the applicant has prayed for quashing of the impugned order dated 24.1.2023 by means of which Non-Bailable Warrant was ordered to be issued and also for quashing the order dated 08.02.2023 by means of which Non-Bailable Warrant as well as the process u/s 82 Cr.P.C. was ordered to be issued by the Court of Special Judge, CBI, Court No. 2, Lucknow in Criminal Case No. 01/2023, C.B.I. vs. Bhagwati Prasad Verma and others, arising out of R.C. No. 8(A)/2014, u/s 120B/409, 420, 511 IPC and section 13(2) r/w 13(1)(d) of the Prevention of Corruption Act, 1988, P.S. CBI / ACB, Lucknow.

3. At the very outset learned counsel for the applicant has drawn attention of this Court towards the order dated 10.1.2023 whereby the learned trial court has issued bailable warrant against the applicant presuming that despite the summons having been served upon him he did not appear. Learned counsel for the applicant has submitted that summon has not been served on the petitioner in terms of section 64 Cr.P.C. which provides that if the person whose presence is required in the Court is not present in the house such summon should be served upon any male member of the family but the same has been served upon one female member of the family. If it is presumed for the argument sake that such summon has been served on the family member (Bhabhi) of the applicant and the petitioner did not appear on that summon the learned trial court may issue summons against him but on the basis of presumption that same has been served on the applicant through his relative the bailable warrant should not have been issued against him as this exercise is in derogation of section 64 Cr.P.C.

4. Further, attention has been drawn towards the next date fixed i.e. 24.1.2023. On that date a straightaway Non-Bailable Warrant has been issued without verifying the fact as to whether the applicant has been informed about the date fixed i.e. 24.1.2023 and about the bailable warrant being issued against him on 10.1.2023. Sri Chakravarty has further drawn attention of this Court towards the third order dated 8.2.2023 whereby the learned trial court

straightaway issued N.B.W. and proclamation of section 82 Cr.P.C. again without verifying the fact as to whether the applicant is aware about the N.B.W. being issued on 24.1.2023.

5. Sri Chakravarty has placed reliance of the dictum of Apex Court in re: ***Inder Mohan Goswami and Anr. vs. State of Uttaranchal and Ors., 2007 AIR SCW 6679*** whereby the Hon'ble Apex Court has deprecated such exercise being adopted by the learned trial court. The Hon'ble Apex Court in re: **Inder Mohan Goswami (supra)** has observed that if the appearance of any person / accused person is required before the court concerned, he should have been first issued summons and the court should remain careful on the aspect that if the person concerned has not appeared before the court concerned on the summons when such summons have not been served upon him, however, upon his family member, again summons should have been issued and if the learned trial court is convinced that despite the service of the summons upon the person concerned he is deliberately trying to avoid the process of law, bailable warrant may be issued but before issuing N.B.W. against such person the Court should remain very careful inasmuch as issuing N.B.W. against any accused person directly affects his fundamental right to life and liberty. The Apex Court in **Inder Mohan Goswami (supra)** has issued guidelines to the effect that under what circumstances the strict process should be issued as under :

"....Personal liberty and the interest of the State Civilized countries have recognized that liberty is the most precious of all the human Personal liberty and the interest of the e State Civilized countries nights The American Declaration of Independence 1776, French Declaration of the Rights of Men and the Citizen 1789, Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights 1966 all speak with one voice - liberty is the natural and inalienable right of every human being Similarly, Article 21 of our Constitution proclaims that no one shall be deprived of his liberty except in accordance with the procedure prescribed by law...

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.

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...."

[Emphasis Supplied]

6. Sri Chakravarty has submitted that if the facts and circumstances of the present case are tested on the touchstone of the guidelines of the Hon'ble Apex Court in re: **Inder Mohan Goswami (supra)** the impugned orders whereby the Non-Bailable Warrant and proclamation u/s 82 Cr.P.c. has been issued, those orders would be liable to be set aside. Sri Chakravarty has also placed reliance on the judgment and order dated 10.12.2021 passed in ***Case :- U/s 482/378/407 No. 5195 of 2021 (Vinod Kumar Singh @ Vinod Singh vs. State of U.P.)*** whereby this Court placing reliance of the order of co-ordinate Bench of this Court has directed that before issuing proclamation u/s 82 Cr.P.C. there must be an application supported with an affidavit

of the prosecution to show and convince the learned court below that despite all possible efforts being taken by the prosecution serving summons, bailable warrants and non-bailable warrants upon him or her such person is not appearing before the Court concerned, therefore, the proclamation u/s 82 Cr.P.C. may be issued and the learned trial court after being satisfied on the contents of such application which is supported by an affidavit may issue proclamation u/s 82 Cr.P.C. but such proclamation may not be issued in a cursory manner infringing the fundamental right of any person enshrined under Article 21 of the Constitution of India.

7. Therefore, Sri Chakravarty has stated that the impugned orders dated 10.1.2023, 24.1.2023 and 8.2.2023 are patently illegal and unwarranted, the same may be set aside. The applicant undertakes that he shall appear before the learned trial court concerned on the next date fixed i.e. 13.3.2023 and shall participate in the proceedings. Sri Chakravarty has also apprised the Court that since the marriage of the daughter of the applicant was fixed on 25.1.2023, therefore, he could not appear before the learned trial court concerned on 10.1.2023 and 24.1.2023 and this fact has been apprised by the family members of the applicant to the Process Server as such report has been enclosed with the petition as Annexure no. 5. However, in such report the subsequent part thereof which indicates that the applicant has given undertaking that he shall appear on the date fixed before the court is not correct rather the applicant has not given any undertaking to the Process Server through his family member that he shall be appearing before the court concerned on 10.1.2023. In any case he shall be appearing on the next date and shall participate in the proceedings properly.

8. Sri Anurag Kumar Singh, learned counsel for the C.B.I. has tried to defend the impugned orders dated 10.1.2023, 24.1.2023 and 8.2.2023 by submitting that when the Process Server approached the family members of the present applicant on 8.1.2023 and apprised that the next date has been fixed as 10.1.2023, such process has been served upon the sister-in-law (Bhabhi of the present applicant) and the Process Server talked with the applicant, who assured that he shall appear on the next date fixed, therefore, avoiding the process of law despite knowing the fact that next date is fixed before the trial court is already uncalled for, for the applicant itself, therefore, the learned trial court has rightly issued bailable warrant on 10.1.2023, however, on being further confronted as to whether the present applicant was informed about the bailable warrant being issued against him on 10.1.2023 fixing next date for 24.1.2023, Sri Singh has stated that he has no specific instructions on that point.

9. On being confronted as to whether the summon has been served in the light of section 64 Cr.P.C., Sri Singh has fairly stated that such summon has not been served on any male family member of the applicant. On being further confronted as to whether the present applicant was informed the dates fixed in the court and the subsequent date 8.2.2023 has been fixed and on 24.1.2023 N.B.W. has been issued against him, Sri Singh has again stated that he has no specific instructions to the effect that as to whether the earlier date and orders have been intimated to the applicant or not. Lastly, Sri Singh has been asked as to whether any application supported by an affidavit has been filed before the learned

trial court seeking proclamation against the applicant u/s 82 Cr.P.C., Sri Singh has stated that on that point too he has no specific instructions.

10. Having heard learned counsel for the parties and having perused the material available on record, I am of the considered opinion that if the appearance of any person / accused person is required before the learned trial court firstly summons should have been issued and if the person concerned does not appear before the court concerned on the date fixed the court concerned should first verify as to whether such summon has been served upon the applicant or not and if such summon has not been served on him personally at least one more summon should have been issued to him and on the next date this fact must be verified as to whether such summon has been served o the person concerned or not and if the court is convinced that despite the summons being served upon the person concerned he is avoiding the process of law, the bailable warrant can be issued but at the stage of non-bailable warrant the court should take proper care and precaution convincing itself that despite the service of bailable warrant on couple of dates the process of law is being avoided only in that extreme circumstance the Non-Bailable Warrant should be issued as such process of law directly relates with the liberty of a person which is guaranteed under Article 21 of the Constitution of India. In other words before issuing N.B.W. due care and precaution is warranted for the learned trial court and N.B.W. should not be issued in a cursory manner. Further, if the learned trial court is willing to issue proclamation u/s 82 and 83 Cr.P.C. against such accused persons, the degree of carefulness and precaution would be increased and such orders relating to the proclamation may be issued only on the application of the prosecution supported with an affidavit that despite all reasonable efforts being taken against the accused person to serve upon the summon the bailable warrant and N.B.W. he / she is avoiding the process, the court by assigning specific and cogent reasons to the effect that now there is no other way out except to initiate proceedings u/s 82 Cr.P.C. and 83 Cr.P.C. such proclamation can be issued but that proclamation cannot be issued in a cursory manner in view of the dictum of Apex Court in re: **Inder Mohan Goswami (supra).**

In the present case the summon has not been served upon the applicant in terms of section 64 Cr.P.C. which provides that if the person whose presence is required in the Court is not present in the house such summon should be served upon any male member of the family but the same has been served upon one female member of the family.

11. If the facts and circumstances of the present case are tested on the touchstone of dictum of Apex Court in re: **Inder Mohan Goswami (supra)** I find that the impugned order dated 10.1.2023, 24.1.2023 and 8.2.2023 suffers from illegality, therefore, those orders are liable to be **set aside.**

12. Accordingly, the order dated 10.1.2023, 24.1.2023 and 8.2.2023 are hereby set aside.

13. Since the next date has been fixed on 13.3.2023, therefore, the present petitioner is directed to appear before the learned court concerned on 13.3.2023 to face the further proceedings and the learned trial court may proceed further strictly in

accordance with law ignoring the impugned orders dated 10.1.2023, 24.1.2023 and 8.2.2023. However, it is made clear that if the petitioner does not appear before the learned trial court on 13.3.2023, the benefit of this order shall not be available to him and the learned trial court may take any appropriate step against him which is permissible under the law.

14. It is made clear that the petitioner may take other appropriate remedy before the appropriate court of law for that no liberty is required.

15. In view of aforesaid terms, the petition is **allowed**.

(2023) 3 ILRA 471
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.02.2023

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Application U/S 482. No. 4227 of 2023

Parvez Parwaz & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Manauvar Husain, Ms. Fatma Anjum, S.F.A. Naqvi (Sr. Advocate)

Counsel for the Opposite Parties:
G.A.

Criminal Law - Criminal Procedure Code, 1973–Section 482–Inherent powers of High Court–Not to be exercised to reopen issues already decided by Supreme Court–Principle of res judicata applicable to criminal proceedings.
Criminal Law - Code of Criminal Procedure- Section 196-Sanction for prosecution under Section 196 Cr.P.C.–Once sanction refused and issue attains finality up to Supreme Court, trial court cannot reopen and decide the issue again in subsequent proceedings–Investigation under Section 156(3) Cr.P.C.–Not permissible against a public servant once sanctioned for prosecution has been refused.

Application dismissed. (E-9)

List of Cases cited:

1. Bhagat Ram Vs St. of Raj., 1972 (2) SCC 466

2. Anil Kumar & ors. Vs M.K. Aiyappa & anr., (2013) 10 SCC 705

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

1. The present petition under Section 482 CrPC has been filed, impugning the order dated 11.10.2022 passed by the Additional District & Sessions Judge (Rape and POCSO)-3, Gorakhpur in Final Report No.1230 of 2017 (Parvez Parwaz Vs. Yogi Adityanath and others), arising out of Case Crime No.2776 of 2008, under Sections 153, 153-A, 153-B, 295, 295-B, 147, 148, 395, 436, 435, 302, 427 and 452 IPC read with Section 7 Criminal Law Amendment lodged at Police Station Cantt., District Gorakhpur.

2. The learned trial Court has rejected the protest petition filed by the petitioner by holding that as the sanction for prosecuting the accused was already refused under Section 196 CrPC and the said order was challenged by the petitioner/complainant up-to the Supreme Court and the Supreme Court had dismissed the appeal, therefore, the protest petition could not be accepted and the trial Court could not interfere with the order, refusing the sanction for prosecution of the alleged accused. There is a checkered

history of litigation and a brief survey is required to be mentioned. The petitioner had initially approached this Court by filing Criminal Writ Petition No.16095 of 2007. The Division Bench of this Court by means of order dated 24.10.2007 dismissed the writ petition by observing that the the petitioner, if so advised, may file an application under Section 156(3) CrPC for a direction to lodge the FIR against Sri Yogi Adityanath and others. The petitioner, thereafter, filed an application under Section 156(3) CrPC for lodging of the FIR against the accused under Sections under Sections 120-B, 153-A, 153-B, 295-A, 295-B, 143, 147, 435, 436, 452, 427, 395, 302 and 307 IPC and 3/4 Prevention of Damage to Public Property Act and Railways Act.

3. The said application was rejected by the learned Chief Judicial Magistrate vide order dated 29.07.2008. The petitioner, thereafter, filed Criminal Revision No.2346 of 2008 before this Court. This Court vide order dated 26.09.2008 set-aside the order dated 29.07.2008 passed by the learned Chief Judicial Magistrate, Gorakhpur and remitted back the matter to the learned Chief Judicial Magistrate to pass a fresh order in accordance with law. It was also directed that after registration of the FIR, on the basis of the application filed by the petitioner under Section 156(3) CrPC, proper investigation should be ensured.

4. On remand, the FIR was registered on 02.11.2008 at Police Station Cantt., District Gorakhpur against five accused persons, including Sri Yogi Adityanath, the then Member of Parliament from Gorakhpur Parliamentary Constituency.

5. The accused approached the Supreme Court by filing Criminal Appeal No. 2039 of 2012 against the order dated 26.09.2008 passed by this Court in Criminal Revision No. 2346 of 2008. The Supreme Court vide order dated 13.12.2012 dismissed the said appeal.

6. The petitioner, perceived that the investigation was not being properly conducted by the investigating agency in the FIR, therefore, approached this Court by filing Criminal Misc. Writ Petition No.21733 of 2008 for following prayers:-

"i. issue a writ, order or direction in the nature of Mandamus directing and commanding the investigate case crime respondents to No.2776 of 2008 (Annexure No.1) in fair and impartial manner by an independent investigating agency and not by Crime Branch of Criminal Investigation Department as per order dt. 3.11.2008 (Annexure No. 9).

ii. issue a writ, order or direction in the nature of Mandamus directing and commanding the respondents to include appropriate section of Indian Penal Code i.e. 120-B, 121, 121-A, 122 IPC section 3/4 Prevention of Damages to Public Property Act, 1984 and provision of Religious Institution (Prevention of Misuse) Act, 1988 in crime No.2776 of 2008 and to investigate the issue of conspiracy also;

iii. issue a writ, order or direction in the nature of Mandamus directing and commanding the respondents to take disciplinary action against the officers who at the relevant point of time failed to act in accordance with law and had not taken any action to initiate criminal action against the culprits;

iv. issue a writ, order or direction in the nature of Mandamus directing and commanding the respondent No. 1 to provide adequate security to the petitioners;

v. issue a writ, order or direction, which this Hon'ble Court may deem fit and propert in the circumstances of the case;

vi. award the cost of the petition in favour of the petitioners;

vii. issue a writ, order or direction in the nature of certiorari quashing the impugned letter dt. 3.5.2017 (Annexure No. 16 to this writ petition) issued under the signature of Joint Secretary (Home), Government of U.P. to the S.P. CBCID Lucknow whereby state prosecution sanction of the accused persons has been refused; and

viii. issue a writ, order or direction in the nature of certiorari quashing the letter dt. 9.5.2017 (Annexure No. 17) issued by the respondent No. 2 addressed to the respondent No. 1 whereby it is mentioned that vide final report dt. 6.5.2017 case has been closed."

7. Prayer nos. 7 and 8 were added during the pendency of the writ petition as on 03.05.2017 prosecution sanction under Section 196 CrPC was refused by the State Government and final report was submitted. The Division Bench of this Court vide judgment and order dated 22.02.2008 decided the said writ petition. The Division Bench framed following three issues for determination:

"(1) When the State fails to perform its statutory and constitutional duty to investigate a crime in a fair and impartial manner, whether the High Court in exercise of its jurisdiction conferred by Article 226 of the Constitution is vested with the power to transfer the investigation to be conducted by any other investigating agency.

(2) Whether in the facts and circumstances of the instant case, the State has failed to perform its statutory duty to conduct a fair investigation in the matter and the same is liable to be transferred to some other independent agency to ensure fair investigation.

(3) Whether the State can pass an order under Section 196 Cr.P.C. in respect of a proposed accused in a criminal case who in the meantime gets elected as the Chief Minister and is the Executive Head as per the scheme provided under Article 163 of the Constitution of India."

8. Issue no. 3 was answered as under:-

"In view of above discussions and the authoritative judicial pronouncements, whenever it is established that investigation has not been fair, proper and impartial there is power vested with the High Court to transfer the investigation to be conducted by any other investigating agency and the same can be invoked by the informant/victim or an aggrieved person. Issue no. 1 stands answered accordingly."

9. While answering the issue no. 2, the Division Bench has held that direction for transferring investigation by any other investigating agency should not be given in absence of sufficient material on record to arrive at a conclusion that such material would disclose prima facie case for transferring the investigation from the agency which had been entrusted by the State to investigate the offence to another agency, but such power should not be exercised casually, as a routine manner or merely on some allegations made by the complainant. The Division Bench noted that there was no averment much less any other material placed on record of the

petition on the basis of which a conclusion could be drawn that the investigation was not proceeding fairly, independently and impartially calling for transferring of the same to any other agency.

10. The Division Bench took pains to extract the averments made in the writ petition and factual foundation laid, seeking relief for transfer of the investigation to some other agency. The Division Bench had called for the original record of the case, including the case diary to satisfy conscience of the Court as to whether proper investigation had been carried out or not and had discussed the evidence brought on record in detail. The Division Bench noted that statements of 21 witnesses were recorded, including the petitioner no. 1 and certain other witnesses named by him. Statements of four accused, including, Sri Yogi Adityanath were also recorded. The investigating agency also recorded statements of two police officers, Shyam Narain Singh, Station Officer and Brijendra Singh, who were allegedly present at the time of the incident and were on duty. The case diary would further go to show that another compact disk (DVD) containing alleged speech of Sri Yogi Adityanath was provided as evidence by the petitioner on 14.03.2013 to the CBCID at the time of recording his statement under Section 161 CrPC. The investigating agency obtained second a compact disk on 25.05.2014, containing the admitted voice of Sri Yogi Adityanath from Circle Officer, Pipraich for comparison with voice recorded in the compact disc handed over by the petitioner. Both the compact discs (DVD) were sent by the investigating agency for forensic examination on 02.07.2014 to Forensic Science Laboratory, Lucknow. However, the Laboratory returned back the compact discs to the investigating agency, stating that the lab was not equipped to carry out the required forensic analysis. Subsequently, the investigating agency again sent the two compact discs to Forensic Science Laboratory, Madhuvan Chowk, New Delhi. The said lab returned back the compact discs to investigating agency on the ground that it was only authorized to carry out analysis of incident(s) within the territorial jurisdiction of Delhi. Thereafter, the investigating agency, after obtaining order from the Additional Chief Judicial Magistrate on 14.08.2014, sent the compact discs to the Laboratory of Central Bureau of Investigation, CGO Complex, New Delhi along with case diary containing the admitted sample voice of Sri Yogi Adityanath. The CBI Lab, after carrying out examination of compact discs, submitted reports dated 13.10.2014 and 14.10.2014 respectively. After receiving the report as well as other evidence which came on record, including the statements of witnesses, the investigating agency prepared and sent draft final report on 09.04.2015, charging the accused for offence under Sections 143, 153, 153-A, 295-A read with Section 505 IPC, and the said report was forwarded to the superior officers for its approval by the competent authority. In the draft final report prepared under Section 173 (2) CrPC for offence under Sections 143, 153, 153-A, 295-A read with Section 505 IPC there was no evidence found in support of allegations for other offences for which the FIR was registered.

11. The allegation of the petitioner that the compact disc (DVD) filed by the petitioner in the Court of Additional Chief Judicial Magistrate along with affidavit on 05.05.2008 in proceeding under Section 156(3) CrPC was not sent for forensic

examination, but a fake compact disc was sent, as such, the report submitted by the Laboratory was of no consequence and, thus, the investigating agency failed to perform its statutory duty to carry out fair, impartial and judicious investigation, the Division Bench had held that it was the petitioner who had supplied another compact disc to the CBCID at the time of recording his statement under Section 161 CrPC, and the said disc was sent for forensic examination. After analysis, the CBI Laboratory submitted two reports dated 13.10.2014, in respect of video contents, and the other dated 14.10.2014 in respect of voice examination. The forensic examination of the compact discs would reveal that the DVD containing videos were not original and they were edited and tampered. The forensic examination report has been extracted in the judgment delivered by the Division Bench. The Division Bench had held that from perusal of the case diary and in depth analysis of the investigation carried out, as depicted from the case diary, there was no failure on behalf of the investigating agency to perform its statutory duty for carrying out investigation in a fair, impartial and independent manner and, therefore, found no ground to transfer the investigation to some other agency. In respect of issue no. 3, the Division Bench did not find any procedural error, either in the conduct of the investigation or in the decision making process regarding refusal to grant sanction for prosecution or any other illegality in the order which required an interference by this Court in exercise of its extra-ordinary jurisdiction under Article 226 of the Constitution of India.

12. The Division Bench noted that the record revealed that all the material collected by the investigating agency during the course of investigation, was placed before the sanctioning authority, and its subjective satisfaction was arrived upon perusal of the entire material. Therefore, it could not be said that no objective assessment was made to arrive at subjective satisfaction recorded by the sanctioning authority. The order, refusing the sanction, had been passed by the competent authority after due application of mind. Section 196 CrPC is a shield for public servants against vexatious and malicious prosecution.

13. The Division Bench of this Court did not find any procedural error, either, in the conduct of the investigation or in the decision making process, refusing prosecution sanction or any other illegality in the order which could have been interfered with by this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. Resultantly, the writ petition was dismissed.

14. The petitioner did not stop and, being dissatisfied with the judgment and order dated 22.02.2018 passed by the Division Bench of this Court, he approached the Supreme Court by filing Criminal Appeal No.1343 of 2022, arising out of SLP (Crl.) No.6190 of 2018.

15. During the hearing of the appeal, learned counsel for the petitioner did not press issue nos. 1 and 2, as framed by the Division Bench in its judgment and order dated 22.02.2018. The arguments were advanced only on issue no. 3 relating to denial of sanction for prosecution under Section 196 CrPC. The Supreme Court noted the fact that the investigation was over and closure report (F.R. No.01 of 2017) dated 06.05.2017 was filed in the Court by the investigating agency. Against

the final/closure report, a protest petition was filed. The same was pending for consideration before the trial Court.

16. In view of the aforesaid facts and circumstances, the Supreme Court did not think it necessary to go into the contentions raised by both sides on issue of denial of sanction for prosecution and the legal submissions made in relation to the said issue. However, the legal question, on the issue of sanction for prosecution, was left open to be considered in an appropriate case. The Supreme Court had dismissed the appeal, observing as under:-

"12. In the instant case, a short affidavit was filed on behalf of the second respondent wherein it is stated that the investigation was closed vide FR No.1/17 dated 06.05.2017. This position is not disputed by the appellants. Thus, as of now, the position that emerges is that the investigation has culminated in a closure/refer report. Learned counsel for the appellants has informed us that a protest petition has been filed which is pending considering before the trial Court.

13. In the aforesaid circumstances, we do not think it necessary to go into the contentions raised by both sides on the issue of denial of sanction for prosecution and the legal pleas sought to be raised in relation to the said issue. However, we think it appropriate that the legal questions on the issue of sanction be left open to be considered in an appropriate case."

17. As noted above, the challenge in this petition under Section 482 CrPC is to the decision of the learned trial Court dated 11.10.2022 wherein the learned trial Court has rejected the protest petition against the final/closure report no. 1 of 2017 dated 06.05.2017. The impugned order would disclose that the petitioner had again raised the same issue i. e. legality / validity of the order, refusing sanction for prosecution and the issue of compact disc which had attained finality upto the Supreme Court. The learned trial Court, in its well considered impugned judgment, has held that once the issue of legality/validity of sanction for prosecution had attained finality upto the Supreme Court, the same issue could not be re-opened. The issue of improper investigation was also decided by the High Court in its judgment and order dated 22.02.2018 passed in Criminal Misc. Writ Petition No.21733 of 2008, and before the Supreme Court, the petitioner did not raise the said issue before the Supreme Court and the only issue, which was raised before the Supreme Court, was of validity of order of refusal for prosecution sanction. In view thereof, the trial Court has held that there is no ground to interfere with the final/closure report no.01 of 2017 and dismissed the protest petition.

18. Mr. S.F.A. Naqvi, learned Senior Advocate, assisted by Ms. Fatma Anjum and Mr. Manauvar Husain, Advocates has submitted that the question of legality of order, refusing sanction for prosecution, was left open by the Supreme Court and, therefore, it cannot be said that the issue had attained finality. It has been further submitted that while deciding the protest petition filed by the petitioner against the closure/final report no.01 of 2017, the trial Court could/ought to have decided the issue of legality of the order, refusing prosecution sanction. The learned Senior Advocate has again raised the issue of alleged improper investigation by the investigating agency and submitted that considering the aforesaid, the impugned order is to be set-aside and the trial Court

should be directed to decide the issue of final/closure report afresh.

19. On the other hand, Mr. Manish Goyal, learned Additional Advocate General, assisted by A.K. Sand, learned Additional Government Advocate, representing the respondent - State, has submitted that the issues raised in the protest petition and in this petition had attained finality upto the Supreme Court. The petitioner cannot be permitted to raise the same issues time & again. The Supreme Court had left open the question of sanction and legal submissions to be decided in an appropriate case, but not in this case again. The learned Additional Advocate General has further submitted that the contention raised by the learned Senior Advocate for the petitioner that the trial Court should have decided the question of validity of order, refusing sanction is completely incorrect. Once the Supreme Court has not entertained the plea of validity of order, refusing prosecution sanction, the trial Court has rightly refused to go into the said issue. It has been further submitted that it does not lie in mouth of the petitioner to raise the question of improper investigation inasmuch as out of three issues, two issues were not pressed by the petitioner before the Supreme Court. It has been further submitted that the petitioner has been indulging in vexatious prosecution of the elected and popular Chief Minister of this State, who has changed the face of the State since he assumed the charge of the State in the year 2017. It has been further submitted that some forces are working against the popular Chief Minister to derail the progress of the State. Such a vexatious prosecution should be dealt with sternly. It has been further submitted that the petitioner has a long criminal history of 14 cases, which would read as under:-

"1.FIR/Crime No. 0430 of 1992, U/S 10/13 (1) The Unlawful Activities (Prevention) Act, 1967 read with Section 153A/188 IPC, Police Station Rajghat, District Gorakhpur;

2. FIR/Crime No.0226 of 2003, U/S 143, 336 and 427 IPC read with Section 7 Criminal Law Amendment Act, Police Station Rajghat, District Gorakhpur;

3. FIR/Crime No. 0255 of 2003, U/S 143, 195A/253A/505 Kha IPC read with Section 7 Criminal Law Amendment Act, Rajghat, District Gorakhpur;

4. FIR/Crime No. 0260 of 2003, U/S 3 (II) National Security Act, Police Station Rajghat, District Gorakhpur;

5. FIR/Crime No.01079 of 2010, U/S 147, 148, 149, 307 and 354 IPC read with Sections 3(II)(v) SC/ST Act, Police Station Rajghat, District Gorakhpur;

6. FIR/Crime No.0112 of 1992, U/S 452, 323, 504 and 506 IPC, Police Station Rajghat, District Gorakhpur;

7. FIR/Crime No.0175 of 2018, U/S 376D IPC, Police Station Rajghat, District Gorakhpur;

8. 0817 of 2010, U/S 147, 352, 323, 504, 506 and 307 IPC read with Section 7 Criminal Law Amendment Act, Police Station Kotwali, District Gorakhpur;

9. FIR/Crime No.0402A of 1991, U/S 448/506 IPC, Police Station Kotwali, District Gorakhpur;

10. FIR/Crime No.0303 of 1983, U/S 2 Prevention of Nation Insult Act, Police Station Kotwali, District Gorakhpur;

11. FIR/Crime No.0101 of 2001, U/S 279/304 IPC, Police Station Kotwali, District Gorakhpur;

12. FIR/Crime No.0479A of 2004, U/S 395, 147, 148, 149, 307 and 504 IPC read with Sections 3(II)(v) SC/ST Act,

Police Station Rajghat, District Gorakhpur;

13. FIR/Crime No.01063 of 2018, under Sections 120-B, 193, 195, 196, 419, 420, 467, 468, 469, 474 and 481 IPC, Police Station Cantt., District Gorakhpur; and

14. FIR/Crime No.0679 of 2019, U/S 120-B, 347, 365, 392, 452 and 506 IPC, Police Station Cantt., District Gorakhpur."

20. It is submitted on behalf of the State that the petitioner claims to be a social worker as per his application under Section 156(3) CrPC. Such a person having criminal history of serious offences, as mentioned, cannot be said to be a social worker. It appears that the petitioner is an impostor who has been set up by the forces, who are adverse to Sri Yogi Adityanath, State and India. When they could not succeed to contain his rise in politics they had set up an impostor, the petitioner to be indulged in vexatious prosecution. The petitioner's resources, to fight such a litigation, should be investigated. It is, therefore, submitted that the present petition is nothing but an abuse of process of the Court, and it is required to be dismissed with an exemplary cost.

21. I have considered the submissions advanced by the learned Senior Advocate for the petitioner as well as learned Additional Advocate General for the respondent - State.

22. The facts and issues have been extracted in detail herein above which are not in dispute. The question, which would require to be answered, is that whether it could have been opened to the learned trial Court to decide the issue of validity of the order, refusing prosecution sanction of the respondent when the Supreme Court had dismissed the criminal appeal and left the question of sanction to be answered in an appropriate case. As mentioned above, the only question which was raised by the learned counsel for the petitioner before the Supreme Court was regarding the validity of order, refusing sanction for prosecution under Section 196 CrPC. The Supreme Court, however, taking note of the facts & circumstances, did not answer the issue and dismissed the appeal and, thus, the judgment of the Division Bench had attained finality. The said issue could not have been decided by the learned trial Court again. I find that the trial Court has rightly refused to go into the said question once it got decided by the Supreme Court. Once the question of sanction got finally settled, the trial Court could not have taken cognizance on the police report or on the protest petition as the accused, being a public servant, no cognizance could be taken without there being sanction by the competent authority for prosecution.

23. The Supreme Court in the case reported in ***1972 (2) SCC 466 (Bhagat Ram Vs. State of Rajasthan)*** has held that the principle of res judicata is also applicable to criminal proceedings, and it is not permissible in the subsequent stage of the same proceedings to convict a person for an offence in respect of which an order for his acquittal has already been passed. The provisions of Section 403 CrPC is based upon the same principle of res judicata. Paragraphs 12, 13 and 14 of the said judgment would read as under:-

"12. It would appear from the resume of facts given above that both Bhagat Ram and Ram Swaroop were acquitted by the special judge. On appeal filed by the State of Rajasthan against the

acquittal of the two accused, Tyagi and Lodha, JJ. maintained the order relating to the acquittal of Ram Swaroop. As regards Bhagat Ram, though there was a difference between the two judges regarding the correctness of his acquittal for offenses under Section 5(1) (a) of Prevention of Corruption Act and Section 161 of Indian Penal Code, they concurred with regard to the acquittal of Bhagat Ram in respect of the charges under Sections 120-B, 218, 347 and 389 I.P.C. The State appeal against the acquittal of Bhagat Ram was dismissed to that extent. The order which was made by the learned judges of the Division Bench reads as under :

"By the Court. The result is that the appeal of the State against the order of acquittal of respondent Ram Swaroop is dismissed. The appeal of the State so far as it relates to the acquittal of respondent Bhagat Ram under Sections 347, 218, 389 and 120-B Indian Penal Code is also dismissed. In view of the difference of opinion about the acquittal of Bhagat Ram under Section 161 Indian Penal Code and Section 5(1)(a) of the Prevention of Corruption Act, the matter may be laid before Hon'ble the Chief Justice for referring it to the third Judge."

13. In view of the fact that the State appeal against the acquittal of Bhagat Ram for offenses under Sections 120B, 218, 347 and 389 I.P.C. had been dismissed by the Division Bench, it was, in our opinion, not permissible for the third judge to reopen the matter and convict Bhagat Ram for offenses under Sections 347, 389 and 120B I.P.C. The matter had been referred under Section 429 of the Code of Criminal Procedure to Jagat Narayan, J. because there was a difference of opinion between Tyagi, J. and Lodha, J. regarding the correctness of the acquittal of Bhagat Ram for offenses under Section 161 I.P.C. And Section 5(1)(a) of Prevention of Corruption Act. Jagat Narayan, J. could go only into this aspect of the matter and arrive at his conclusion. The present was not a case wherein the entire matter relating to the acquittal or conviction of Bhagat Ram had been left open because of a difference of opinion between the two judges. Had that been the position the whole case relating to Bhagat Ram could legitimately be considered by Jagat Narayan, J. and he could have formed his own view of the matter regarding the correctness of the order of acquittal made by the trial judge in respect of Bhagat Ram. On the contrary, as mentioned earlier, an express order had been made by the Division Bench upholding the acquittal of Bhagat Ram for offenses under Sections 120-B, 218,347 and 389 I.P.C. and the State appeal in that respect had been dismissed. The above decision of the Division Bench was binding upon Jagat Narayan, J. and he was in error in convicting Bhagat Ram for offenses under Sections 120-B, 218 and 347 I.P.C. despite the order of the Division Bench. It was, in our opinion, not within the competence of the learned judge to reopen the matter and pass the above order of conviction in the face of the earlier order of the Division Bench whereby the order of acquittal of Bhagat Ram made by the trial judge in respect of the said three charges had been affirmed. The order of the Division Bench unless set aside in appeal to this Court, was binding and conclusive in all subsequent proceedings between the parties. The principle of res judicata is also applicable to criminal proceedings and it is not permissible in the subsequent stage of the same proceedings or in some other subsequent proceedings to convict a person for an offence in respect of which an order for his acquittal has already been recorded.

The plea of autrefois acquit as a bar to prosecution embodied in Section 403 of the Code of Criminal Procedure is based upon the above wholesome principle.

14. In the case of Sambasivam v. Public Prosecutor, Federal of Malaya, Lord MacDermott observed:

"The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication.

The maxim 'res judicata proveritate ascipitur' is no less applicable, to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any steps to challenge it at the second trial."

The above observations were quoted with approval by this Court in the case of Pritam Singh v. State of Punjab. We are, therefore, of the opinion that the judgment of Jagat Narayan, J., in so far as he has convicted Bhagat Ram for offenses under Sections 120-B, 218 and 347 I.P.C. cannot be sustained."

24. In the present case, the question of validity of sanction got decided by the Division Bench of this Court against which the Supreme Court had dismissed the appeal and, therefore, the question of validity of order, refusing sanction for prosecution under Section 196 CrPC of the accused got finally settled, and the said issue is barred by principle of res judicata in subsequent proceedings of the same case. The trial Court has, therefore, correctly held that the said issue could not be re-opened while deciding the protest petition.

25. The Supreme Court in the case reported in ***(2013) 10 SCC 705 (Anil Kumar and others Vs. M.K. Aiyappa and another)*** has held that on the plea of proper sanction the Magistrate cannot order investigation against the public servant while invoking the power under Section 156 CrPC. Paragraphs 21 and 22 of the said judgment would read as under:-

"21. The learned Senior Counsel appearing for the appellants raised the contention that the requirement of sanction is only procedural in nature and hence, directory or else Section 19(3) would be rendered otiose. We find it difficult to accept that contention. Sub-section (3) of Section 19 has an object to achieve, which applies in circumstances where a Special Judge has already rendered a finding, sentence or order. In such an event, it shall not be reversed or altered by a court in appeal, confirmation or revision on the ground of absence of sanction. That does not mean that the requirement to obtain sanction is not a mandatory requirement. Once it is noticed that there was no previous sanction, as already indicated in various judgments referred to hereinabove, the Magistrate cannot order investigation against a public servant while invoking powers under Section 156(3) Cr.P.C. The above legal position, as already indicated, has been clearly spelt out in Paras Nath Singh and Subramanium Swamy cases..

22. Further, this Court in Army Headquarters v. CBI opined as follows: (SCC p. 261, paras 82-83)

"82. Thus, in view of the above, the law on the issue of sanction can be

summarized to the effect that the question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duty. In order that the public servant may not be unnecessarily harassed on a complaint of an unscrupulous person, it is obligatory on the part of the executive authority to protect him.....

83. If the law requires sanction, and the court proceeds against a public servant without sanction, the public servant has a right to raise the issue of jurisdiction as the entire action may be rendered void ab-initio."

26. Once the sanction for prosecution was refused, the investigation, even otherwise could not have been carried out by an order under Section 156(3) CrPC as in the present case. The petitioner appears to be a busy body who himself is facing several criminal cases, and he has been fighting this case since 2007. The petitioner must have been incurring huge expenses in engaging counsels to contest this case before the trial Court, this Court and the Supreme Court. His resources to fight/contest the litigation should be a matter of investigation. There may be some force in the submission raised by Mr. Manish Goyal, learned Additional Advocate General that the petitioner is an impostor who has been set up by the forces, which are opposing Sri Yogi Adityanath, the present Chief Minister of the State of Uttar Pradesh, and the forces, which do not want progress of the State of Uttar Pradesh and India. It is for the State to investigate the said aspect, however, this Court does not want to say anything further or give any direction in this regard.

27. With the aforesaid observations, this petition stands **dismissed *with an exemplary cost of Rs. 1,00,000/- (Rupees (One Lakh)*** to be deposited in the ***"Army Welfare Fund Battle Casualties" within four weeks from today,*** failing which the same shall be recovered as arrears of land revenue from estates/assets of the petitioner.

(2023) 3 ILRA 481
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.09.2022

BEFORE

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

Application U/S 482. No. 4392 of 2016

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

Counsel for the Applicant:
Sri Ashok Kumar, Sri Sachin Kanaujiya

Counsel for the Opposite Parties:
G.A., Sri Chandra Bhan Dubey

Criminal Law - Code of Criminal Procedure, 1973 - Section 482- Victim married the applicant out of her own free will, leading the court to quash the proceedings–the parties had already settled their dispute–inherent powers under Section 482 CrPC to quash criminal proceedings- even in certain cognizable and non-compoundable offences–in cases with a predominantly civil flavour, such as those arising from commercial, financial, matrimonial, or family disputes- if the possibility of conviction is remote and continuation would cause oppression and injustice.

Application allowed. (E-9)

List of Cases cited:

1. Mafat Lal & anr. Vs St. of Raj. report on 2022 LawSuit(SC) 463

2. Gufran Shaikh @ Gani Munawwar Vs St. of U.P. & anr., Application U/s 482 No.10258 of 2021 decided on 28.07.2022

3. Gian Singh Vs St. of Pun., (2012) 10 SCC 303

4. Parbatbhai Aahir @ Parbhathbhai Bhimsinghbhai Karmur & ors. Vs St. of Gujarat & anr., (2017) 9 SCC 641

5. Narinder Singh & ors. Vs St. of Pun. & ors. (2014)6 SCC 466

6. St. of Madhya Pradesh Vs Laxmi Narayan & ors. (2019) 5 SCC 688

7. Madan Mohan Abbot Vs St. of Pun., (2008) 4 SCC 582

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

1. Mr. Chandra Bhan Dubey, learned for the opposite party no.2 has not appeared even in the revised call.

2. Heard Mr. Sachin Kanaujiya, learned counsel for the applicant, Mr. Amit Singh Chauhan, learned AGA for the State and perused the records.

3. This application under Section 482 Cr.P.C. has been filed to quash the charge sheet dated 25.06.2015 and the cognizance order dated 30.07.2015 as well as the entire proceedings of Criminal Case No. 36 of 2015 (State Vs. Rajiv Kumar), arising out of Case Crime No.118 of 2015, under Sections 363, 366 and 376 I.P.C. and Section 3/4 of POCSO Act, P.S. Doghat, District-Baghpat, Additional District and Sessions Judge, Baghpat.

4. On 13.09.2022, the following order was passed:-

"As per office report dated 13.09.2022, notice has been personally served upon opposite party no.2.

Learned counsel for the applicant submits that the applicant has married opposite party no.3 and they are living a happy married life.

An FIR has been lodged by opposite party no.2 (maternal uncle of opposite party no.3) who is trying to ruin the married life of the parties by not appearing before the Court. In such a situation and in view of various judgments of the Hon'ble Apex Court, continuance of proceedings in the present case would amount to abuse of process of law.

In view of the above, let the applicant as well as opposite party no.3 be present before the Court on the next date.

List on 21.09.2022.

Interim order is extended till the next date of listing."

5. In compliance of the order of the Court dated 13.09.2022, the applicant, namely, Rajiv Kumar and the opposite party no.3, namely, Upasana are present alongwith her son, who is four and half years old, in the Court today, who have been identified and signatures have also been attested by learned counsel for the applicant.

6. The rejoinder affidavit has been filed by Mr. Sachin Kanaujia, learned counsel for the applicant, in which, deponent is Upasana, who is wife of applicant.

7. On query being raised, the opposite party no.3, namely, Upasana has stated that she has married the applicant out of her own sweet will and is living happy married life. Out of their wedlock, they are blessed with a male child, who is presently four and half years old. As per her date of birth, she was nearly 17 and half years old at the time of marriage. She has also stated that her in-

laws have accepted their marriage and she is staying happily with them. She has also stated that FIR has been lodged by her maternal uncle, i.e. opposite party no.2, who is trying to ruin the married life of Upasana. She has further stated that she has entered into compromise and deposed before this Court, out of her free will, consent and without any external pressure, coercion or threat of any kind.

8. Learned counsel for the applicants submits that on account of compromise entered into between the parties concerned, all disputes between them have come to an end, and therefore, further proceedings against the applicant in the aforesaid case is liable to be quashed by this Court. In support of his contention, learned counsel for the applicant has relied upon the judgment of this Apex Court in the case of ***Mafat Lal and another vs. State of Rajasthan report on 2022 LawSuit(SC) 463*** and also relied upon the judgment of this Court in the case of ***Gufran Shaikh @ Gani Munawwar vs. State of U.P. and another*** decided on 28.07.2022 passed in Application U/s 482 No.10258 of 2021.

9. Learned A.G.A. does not dispute the aforesaid fact and submitted at the Bar that since the parties concerned have settled their dispute as mentioned above, therefore, he has no objection in quashing the impugned criminal proceedings against the applicants.

10. Before proceeding any further it shall be apt to make a brief reference to the case of ***Gian Singh Vs. State of Punjab reported in (2012) 10 SCC 303,*** wherein the Apex Court has categorically held that the compromise can be made between the parties even in respect of certain cognizable and non compoundable offences. The relevant portion of the said judgment of the Apex Court reads as follows:-

"57. 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 F.I.R may be exercised where the offender and 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 serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like 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 pre-dominatingly civil flavour stand on 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, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put 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 wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

11. The Apex Court in ***Parbatbhai Aahir alias Parbhathbhai Bhimsinghbhai Karmur and others vs. State of Gujarat and another, (2017) 9 SCC 641,*** summarizing the broad principles regarding inherent powers of the High Court under Section 482 Cr.P.C. has recognized that these powers are not inhibited by provisions of Section 320 Cr.P.C.

12. The Apex Court in the case of ***Narinder Singh and others vs. State of Punjab and others*** reported in ***(2014)6 SCC 466*** and also in ***State of Madhya Pradesh vs. Laxmi Narayan and others*** reported in ***(2019) 5 SCC 688,*** has summed up and laid down principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercise its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with criminal proceedings.

13. In the present case, no doubt offence under the relevant sections 363, 366 and 376 of IPC and Sections 3/4 of POCSO Act are not compoundable under Section 320 Cr.P.C. However, as explained by Hon'ble Apex Court in ***Gian Singh's, Narinder Singh's, Parbatbhai Aahir's and Laxmi Narayan's cases (supra),*** power of High Court under Section 482 Cr.P.C is not inhibited by the provisions of Section 320 Cr.P.C and FIR as well as criminal proceedings can be quashed by exercising inherent powers under Section 482 Cr.P.C, if warranted in given facts and circumstances of the case for ends of justice or to prevent abuse of the process of any Court, even in those cases which are not compoundable where parties have settled the matter between themselves.

14. In the case of ***Madan Mohan Abbot vs. State of Punjab, reported in (2008) 4 SCC 582,*** the Apex Court emphasized and advised that in the matter of compromise in criminal proceedings, keeping in view of nature of this case, to save the time of the Court for utilizing to decide more effective and meaningful litigation, a commonsense approach, based on ground realities and bereft of the technicalities of law, should be applied.

15. In the aforesaid judgments, the Apex Court has categorically held that compromise can be made between the parties even in respect of certain cognizable and non compoundable offences. The present case is also a case where two societal interests are in clash. To punish the offenders for a crime, involved in present case, is in the interest of society, but, at the same time, husband is taking care of his wife and in case, husband is convicted and sentenced for societal interest, then, wife will be in great trouble and their future would be ruined. It is also in the interest of society to settle and resettle the family for their welfare.

16. Considering the facts and circumstances of the case, as noted herein above, and also the submissions made by the counsel for the parties, the court is of the considered opinion that the victim/opposite party no.3, herself, has stated before this Court that she has married the applicant out of her own sweet will and is living happy married life. Out of their wedlock, they are blessed with a male child, who is presently four and half years old. Therefore, no useful purpose shall be served by prolonging the proceedings of the above mentioned criminal case as the parties have already settled their dispute.

17. Accordingly, the charge sheet dated 25.06.2015 and the cognizance order dated 30.07.2015 as well as the entire proceedings of Criminal Case No. 36 of 2015 (State Vs. Rajiv Kumar), arising out of Case Crime No.118 of 2015, under Sections 363, 366 and 376 I.P.C. and Section 3/4 of POCSO Act, P.S. Doghat, District-Baghpat, Additional District and Sessions Judge, Baghpat are hereby **quashed**.

18. The application is, accordingly, **allowed**. There shall be no order as to costs.

19. A copy of this order be certified to the lower court forthwith.

(2023) 3 ILRA 485
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.02.2023

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Application U/S 482. No. 5106 of 2022
Along With
Other Connected Cases

Subesh Kumar Singh ...Applicant
Versus
State of U.P. & Ors. ...Opposite Party

Counsel for the Applicant:
S.M. Singh Royekwar, Sumeet Tahilramani

Counsel for the Opposite Party:
G.A., Anurag Kumar Singh, Narendra Kumar Sharma, Romil Sagar

Criminal Law - Code of Criminal Procedure - Sections 173 & 197-Allegations against retired/serving public /police officers-who were acting in discharge of their official duty when investigation carried out-CBI filed closure reprt after reaching to conclusion that it was suicide-protest petition-supplementary closure report—again protest filed-Magistrate rejected second final report-treated protest petition as complaint case-no prior sanction u/s 197 Cr.P.C.-Magistrate should not have acted on guess of the complainant- existence of overwhelming material and compelling reasons is must before summoning-complaint not disclose commission of offence u/s302 and 120-B IPC-impugned order set-aside.

Applications allowed. (E-9)

List of Cases cited:

1. D. Devaraja Vs Owais Sabeer Hussain, (2020) 7 SCC 695

2. Pepsi Foods Ltd. & anr. Vs Special Judicial Magistrate & ors., (1998) 5 SCC 749

3. Mehmood Ul Rehman Vs Khazir Mohammad Tunda & ors., (2015) 12 SCC 420

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

1. These seven petitioners under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the "CrPC") have been filed, impugning the summoning order dated 07.07.2022 passed by the learned Special Judicial Magistrate, C.B.I., Lucknow in Complaint Case No. 3845 of 2019.

2. The facts, giving rise to these petitioners briefly stated are that the Government of India launched a scheme, named and styled as 'National Rural Health Mission' (hereinafter referred to as the "NRHM") on 12.04.2003 with a view to provide accessible, adequate and affordable health service to all persons, particularly, to vulnerable section of the society, residing in remote areas. The separate Memorandum of Understandings were entered into between the Central Government and the State Governments for decentralizing the implementation of the scheme and mobilizing the resources for implementing the said scheme. Such a Memorandum of Understanding with the Government of Uttar Pradesh was entered into on 12.11.2006. As per the said Memorandum, 85% funds were to be provided by the Central Government whereas the State Government was to contribute 15% of the total funds for the Mission.

3. The State Health Society (hereinafter referred to as the "SHS") was established under the Chairmanship of Chief Secretary, Government of Uttar Pradesh and the existing State Agencies involved in implementation of tuberculous, blindness and leprosy eradication as well as other State Empowered Committee for RCH etc. were merged with he SHS.

4. On the allegation of large scale bungling, misappropriation and cheating of public funds, while implementing the NRHM by the government officials, in active connivance and conspiracy with private persons, Public Interest Litigation Petition Nos. 3611 (M/B) of 2011, 3301 (M/B) of 2011 and 2647 (M/B) of 2011 came to be filed. This Court vide order 15th November, 2011 directed as under:-

".....We are prima facie convinced that gross irregularities financial and administrative appear to have been committed in the execution and implementation of NRHM including the matter of award of contracts, procurement of goods, article and etc. at various levels.

.....The facts and circumstances, aforesaid make out a case for reference to CBI for making a preliminary enquiry in the affairs of NRHM in the entire State of U.P. right from the very inception of the NRHM.

We, therefore, direct the Director, CBI to conduct a preliminary enquiry in the matter of execution and implementation of the NRHM and utilization of funds at various levels during such implementation in the entire State of U.P. and register regular case in respect of persons against whom prima facie

cognizable offence is made out and proceed in accordance with law. The preliminary enquiry shall be conducted from the period commencing year 2005-06 till date....."

5. In compliance of the directions issued by this Court, the CBI, after making preliminary inquiries, registered FIR bearing RC No.01(A)/2012 dated 02.01.2012 in the matter of irregularities in utilization of funds allocated to the UP Small Scale Industries Corporation for supply/procurement of various items under the NRHM during the year 2009-2010.

6. In May, 2010, the State Government of U.P. vide Government Order No.1570/Sec-2-5-10-7(109) dated 05.05.2010 bifurcated the post of Chief Medical Officer (hereinafter referred to as the "CMO") into District Project Officer (Family Welfare) and CMO (Health). Considerable funds under NRHM Scheme were placed at the disposal of the CMO (Family Welfare) of various districts of U.P. for procurement of medicines and equipments, hiring contractual manpower and ambulances, expenditure on information, education and communication which included publicity through wall-writings, banners, posters and advertisements etc.

7. Dr. Y.S. Sachan had remained posted as Deputy Chief Medical Officer in the office of CMO, Lucknow from 26.07.2007 to 08.09.2010 when Dr. Anil Kumar Shukla was working as CMO, Lucknow. After bifurcation, Dr. A.K. Shukla was posted as CMO (Health), Lucknow, whereas on 15.05.2010 Dr. Rajendra Prasad Kushwaha was posted as District Project Officer (Family Welfare), Lucknow. On 24.07.2010, Dr. Vinod Kumar Arya (hereinafter referred to as "V.K. Arya") was posted as successor of Dr. Rajendra Prasad Kushwaha. Dr. Y.S. Sachan was transferred from office of the CMO (Health), Lucknow to the office of District Project Officer (Family Welfare), Lucknow vide Order No.1529/5-9-2010-09(221/10) dated 09.09.2010. In the month of October, 2010, the post of District Project Officer (Family Welfare) was re-designated as CMO (Family Welfare).

8. Dr. V.K. Arya was shot dead in the morning of 27.10.2010, while he was taking morning walk near his house at Vikas Nagar, Lucknow by some unidentified motorcycle borne assailants. First Information Report (hereinafter referred to as the "FIR") vide Case Crime No.0322 of 2010 was registered at Police Station Vikas Nagar, Lucknow under Section 302 IPC on the complaint of Dr. (Smt) Shashi Kumari, wife of Dr. V.K. Arya. In this case, local police initially arrested Vijay Dubey, Abhay Singh, Anshu Dixit, Amit Kumar Dixit and Ajay Mishra. After murder, the charge of CMO (Family Welfare), Lucknow was given to Dr. Y.S. Sachan on 22.11.2010, who worked as In-charge CMO (Family Welfare), Lucknow till 25.02.2011 in the absence of regular CMO. During the Financial Year 2010-2011, a total amount of Rs. 32.49 Crores were received by the Lucknow District under different heads of NRHM Schemes from State Health Society, out of which a total amount of Rs.19.35 Crores were spent. Dr. Y.S. Sachan, during his tenure as In-charge CMO (Family Welfare), Lucknow, spent an amount of Rs. 8 Crores 21 Lac under different heads.

9. After murder of Dr. V.K. Arya, Dr. B.P. Singh was posted as CMO (Family Welfare), Lucknow on 25.02.2011 and Dr. Y.S. Sachan continued to work as his

Deputy CMO. In the morning of 02.04.2011, Dr. B.P. Singh was also shot dead by motorcycle borne unidentified assailants near his house, while he was taking morning walk in similar fashion as was the case in committing murder of Dr. V.K. Arya. In this regard, FIR vide Case Crime No.0269 of 2011 dated 02.04.2011, under Section 302 IPC was registered at Police Station Gomti Nagar, Lucknow. Investigation was taken up by Sub-Inspector, Mr. Abhimanyu Dhar Dwivedi, Sation Officer. On 04.04.2011, Mr. Abhimanyu Dhar Dwivedi, Station Officer of Police Station Gomti Nagar and I.O of the case examined Dr. Y.S. Sachan and recorded his statement in order to get some clue in murder case of Dr. B.P. Singh, but without any success.

10. After murder of Dr. B.P. Singh on 02.04.2011, an FIR vide Case Crime No.0112 of 2011 was registered at Police Station Wazirganj, Lucknow on 05.04.2011, under Sections 409, 419, 420, 467, 468 and 471 IPC against Dr. Y.S. Sachan and two others for bungling, misappropriation, cheating and forgery etc of NRHM funds during the Financial Year 2010-2011. On 05.04.2011, Dr. Y.S. Sachan was summoned in Crime Branch, Hazratganj, Lucknow. Dr. Y.S. Sachan was arrested on the same day in relation to Case Crime No.0112 of 2011 and sent to District Jail, Lucknow on 06.04.2011.

11. In view of murders of the two CMOs, both the Ministers for Health and Family Welfare resigned on 07.04.2011 and Mr. Pradeep Shukla, Principal Secretary (Health) was also transferred on the same day. Another FIR vide Case Crime No.0115 of 2011 was also registered at Police Station Wazirganj, Lucknow under Sections 409, 419, 420, 467, 468 and 471 IPC on 07.04.2011 against Dr. Y.S. Sachan and Dr. A.K. Shukla for misappropriation, bungling, cheating of NRHM funds in CMO Office, Lucknow during the Financial Year 2009-2010. Dr. Y.S. Sachan remained in judicial custody from 05.04.2011 to 06.04.2011. On account of high blood pressure and diabetes, Dr. Y.S. Sachan was admitted in District Jail Hospital, Lucknow on 06.04.2011. On 08.04.2011, Dr. Y.S. Sachan was taken on police custody remand for 48 hours in Case Crime No.0112 of 2011 lodged at Police Station Wajirganj, Lucknow, but again he got hospitalized in Balrampur District Hospital at 5.30 p.m. Dr. Y.S. Sachan was discharged from Balrampur District Hospital on 10.04.2011 and sent to District Jail, Lucknow where he was admitted in District Jail Hospital and discharged on 11.04.2011. Dr. Y.S. Sachan was again taken on police custody remand for one day on 13.04.2011 in Case Crime No.0112 of 2011. The Jail Doctor, however, opined that his police custody was subject to clearance from the expert of Balrampur District Hospital. Dr. Y.S. Sachan was admitted in Balrampur District Hospital and discharged on the next day i.e. 14.04.2011 and again sent back to District Jail, Lucknow. Dr. Y.S. Sachan remained hospitalized in District Jail Hospital, Lucknow from 10.04.2011 to 11.04.2011, from 16.04.2011 to 07.06.2011 and from 11.06.2011 to 22.06.2011 (till his death).

12. It would be relevant to take note that after two months from initial arrest on 05.04.2011, when Dr. Y.S. Sachan was again taken in police custody remand for 24 hours on 10.06.2011 in relation to Case Crime No.0115 of 2011 lodged at Police Station Wazirganj his statement was recorded for the second time by the Investigating Officer, Mr. Abhimanyu Dhar

Dwivedi on 15.06.2011 in relation to Case Crime No.0269 of 2011 lodged at Police Station Gomti Nagar (Dr. B.P. Singh murder case) after taking permission from the Court. On 17.06.2011, Special Task Force (hereinafter referred to as the "STF"), Lucknow of U.P. Police arrested Anand Prakash Tiwari, Ram Krishan Verma and Vinod Sharma for murder of Dr. B.P. Singh and during interrogation, they had disclosed complicity of Dr. Y.S. Sachan in the said case. On the same day i.e. 17.06.2011, in the evening, the then Cabinet Secretary of Government of U.P. convened a press conference and claimed that the two CMOs were murdered at the instance of Dr. Y.S. Sachan. On 18.06.2011, Sub-Inspector, Mr. Abhimanyu Dhar Dwivedi filed an application in the Court of Chief Judicial Magistrate, Lucknow for production of Dr. Y.S. Sachan before the Court so that he might be remanded in judicial custody in relation to Case Crime No.0269 of 2011. Accordingly, Dr. Y.S. Sachan was produced in the Court of Chief Judicial Magistrate, Lucknow on 20.06.2011. Sub-Inspector, Mr. Abhimanyu Dhar Dwivedi recorded further statement of Dr. Y.S. Sachan on 21.06.2011 in District Jail, Lucknow after permission from the Court. On 22.06.2011, dead-body of Dr. Y.S. Sachan was found on 1st Floor of unused toilet of Jail Hospital, Lucknow. On 23.06.2011, Dr. Malti Sachan, wife of Dr. Y.S. Sachan, sent a complaint to the Station Officer, Police Station Gosainganj, Lucknow, alleging therein murder of her husband on 22.06.2011 in Jail Hospital, Lucknow. On the basis of the complaint sent by Dr. Malti Sachan, wife of Dr. Y.S. Sachan, FIR vide Case Crime No.0276 of 2011 dated 26.06.2011 was lodged against unknown person(s) under Sections 120-B and 302 IPC.

13. Dr. Malti Sachan, in her complaint, alleged that on 05.04.2011 her husband was summoned by the Wazirganj Police, Lucknow for interrogation in the case relating to large scale financial irregularities in Family Welfare Department and that there appeared to be involvement of high ranking officers. Earlier two CMOs were also murdered. Her husband was sent to prison pursuant to a well-designed criminal conspiracy hatched by the responsible officers of the State Government on the allegations of bungling of Crores of rupees in Family Welfare Department. Initially, there were allegations of financial irregularities against him but later on, he was also linked to the murders of Dr. V.K. Arya and Dr. B.P. Singh, both were the then CMOs (Family Welfare), Lucknow. On 23.06.2011, her husband was to appear in the Court and he could have disclosed involvement of high influential persons in the Government. Her husband was done to death in a planned manner by inflicting grievous injuries in order to shield the high influential persons.

14. This Court vide order dated 14.07.2011 passed in Writ Petition No.6601 (M/B) of 2011 (PIL) filed by (Sachchidanand Sachchay Vs. State of U.P. and others) directed the CBI to investigate reasons, circumstances and cause of death of Dr. Y.S. Sachan. FIR vide Case Crime No.0276 of 2011, lodged at Police Station Gosaiganj, was re-registered as FIR No.RC0532011S0004 of 2011, under Sections 302 and 120-B IPC, Police Station CBI/SCB/Lucknow on 15.07.2011.

15. The CBI took cognizance pursuant to the said order passed by this Court in respect of death of Dr. Y.S. Sachan.

16. As per statement recorded on 15.06.2011 by the Investigating Officer (hereinafter referred to as the "IO"), Abhimanyu Dhar Dwivedi, Dr. Y.S. Sachan admitted his complicity in the murder case of both the CMOs. In case of Dr.V.K. Arya, he admitted that after issuance of Government Orders dated 14.10.2010 and 18.10.2010 he was not made second signatory to sign cheques by Dr. V.K. Arya due to which he was not getting any monetary benefit. In case of Dr. B.P. Singh, he (Dr. Y.S. Sachan) admitted that Dr. B.P. Singh had humiliated him for various payments made during his tenure as CMO (Family Welfare), Lucknow towards hiring of vehicles, maintenance of official buildings and hiring security guards etc. He was also accused of making fraudulent payment of Rs. 1.05 Lac to his associate, Ram Krishna Verma. Dr. B.P. Singh was bent upon fixing him for the financial irregularities. He also visited house of Dr. B.P. Singh to sort out the matter but in vain. He confined ill-treatment meted out to him at the hands of Dr. B.P. Singh to his associate, Mr. Ram Krishna Verma, who assured him that he would get rid of Dr. B.P. Singh as was done in the case of Dr. V.K. Arya.

17. The STF, Lucknow of UP Police was working in tandem with Lucknow Police to solve the murder cases of the two CMOs. On 17.06.2011, the STF, Lucknow arrested three accused persons, namely, Ram Krishna Verma, Anand Prakash Tiwari and Vinod Sharma for their involvement in the murder of Dr. B.P. Singh. During interrogation, the trio admitted before the STF that both the CMOs were murdered at the instance of Dr. Y.S. Sachan and thereafter the Cabinet Secretary, Government of U.P., in the evening of 17.06.2011, held a press conference and said that as per the police investigation both the CMOs (Dr. V. K. Arya and Dr. B. P. Singh) were murdered at the instance Dr. Y.S. Sachan. The said conference was given wide coverage by both Electronic and Print Media.

18. It is said that as per police statement of Dr. Y.S. Sachan recorded on 21.06.2011, Ram Krishna Verma, friend of Dr. Y.S. Sachan, introduced him to Anand Prakash Tiwari. Anand Prakash Tiwari was offered Rs. 7 Lac for committing murder of Dr.B.P. Singh. Anand Prakash Tiwari was given Rs.50,000/- as an advance for the job. Dr. Y.S. Sachan took Anand Prakash Tiwari to his office and showed him the target i.e. Dr. B.P. Singh. He also provided residential address to Dr. B.P. Singh to Anand Prakash Tiwari and showed his house to him. Dr. Y.S. Sachan was not talking to his accomplices over phone to chalk out the strategy but would convey the modalities through Ram Krishna Verma or in person. In the morning of 02.04.2011, Anand Prakash Tiwari came to him to collect the remaining amount after committing the murder of Dr. B.P. Singh. Anand Prakash Tiwari handed over him the pistol used in commission of the crime, which Dr. Y.S. Sachan concealed in his office and was ready to get it recovered to the police.

19. The CBI, in its investigation, in respect of death of Dr. Y.S. Sachan, found that on 22.06.2011, while locking the jail in the evening, Dr. Y.S. Sachan was found missing. On being searched, his dead-body was found at about 20.15 hours under mysterious circumstances on 1st floor in an unused toilet of minor operation theater of the jail hospital which was under construction. There were cut-marks on his body, and a leather belt was found tied

around his neck. Buckle end of the belt was found entangled in the ventilator of toilet. The dead-body was taken out from the toilet and kept in the corridor at 1st floor for examination by doctor of jail hospital. On examination, Dr. V.V. Tripathi declared him dead at about 20.30 hours. The information was given to the Station Officer, Police Station Gosaiganj, Lucknow about death of Dr. Y.S. Sachan and the inquest proceedings were conducted by Mr. Jitendra Srivastava, Tehsildar, Mohanlalganj on the same day. The inquest proceedings were conducted from 23:15 hours of 22.06.2011 to 01:30 hours of 23.06.2011. After inquest proceedings got concluded FSL Team, comprising of the experts from biology, serology, physics, ballistics, photography and their supporting staff reached at the spot and sniffer dogs were also pressed into service. The place of occurrence and dead-body were photographed and video recorded by the experts of the FSL, Lucknow in the night of 22/23.06.2011.

20. A panel of doctors was constitute for conducting autopsy. As per postmortem report, there were 8 antemortem incised wounds and one postmortem ligature mark on neck of body of Dr. Y.S. Sachan. Cause of death was opined to be shock and hemorrhage.

21. The FSL submitted its report dated 18.07.2011 regarding inspection of scene of occurrence on 22.06.2011 and 23.06.2011 and as per the FSL report a leather belt was found tied around the neck of the deceased with a slipping knot, blood was spread all over the floor of the toilet and clotted. One plastic bottle, half filled with water like liquid, was also fond on the door of the toilet, blood was detected on the iron rod of the ventilator and also recovered one half shaving blade under questionable circumstances.

22. Dr. B.S. Arora, Additional Director and Dr. S.C. Mittal, Joint Director, State Forensic Medicine Experts, Government of U.P. vide their report dated 22.07.2011 opined that the death of Dr. Y.S. Sachan did not appear to be a case of suicide.

23. The CBI, during the course of investigation, requisitioned the services of experts of CFSL, CBI, New Delhi, along with Dr. T.D. Dogra, Professor & Head, Department of Forensic Medicine and Toxicology, AIIMS, New-Delhi. The experts collected certain samples from the scene of occurrence and the place was also photographed. During inspection, jail hospital premises was also searched to trace any physical clue/chance, however, nothing incriminating was found. Dr. M.S. Dahiya, Deputy Director, FSL, Gandhinagar, Gujarat also inspected the place of occurrence. CCTV footage of cameras installed in District Jail, Lucknow were scanned/scrutinized for movement of any person and vehicle.

24. The CBI sought constitution of a medical board of experts at AIIMS, New-Delhi for opinion on the nature of injuries and cause of death. Expert opinion of the hand-writing experts of documents seized/recovered during investigation was also sought. Polygraph examination of suspected persons was conducted.

25. The Medical Board of AIIMS, New-Delhi was of the opinion that the deceased could have first attempted to kill himself by inflicting incised wounds on the known suicidal sites where arteries and veins were situated i.e. writs, elbow, neck

and inguinal region. The injuries inflicted did not cut any artery or vein instead of superficial veins were cut from which there was bleeding, but it was very slow. Hence, after sometime, when the deceased realized that the injuries were not killing him fast, he could have attempted to hang himself with the help of belt in which he had succeeded and, therefore, the immediate cause of death in this case was asphyxia as a result of hanging associated with the bleeding from the injuries inflicted. This observation was made by the Board of Doctors of AIIMS, New-Delhi after perusing/examining postmortem report, video recording of postmortem examination and photographs of dead-body and place of occurrence taken on 22/23.06.2011-. The Board answered the questions framed by the CBI in detail which is part of the investigation report of the CBI.

26. As many as seven jail officials and one Ajmat Ullah Beg, convict, who was working in Jail Hospital, were subjected to polygraph examination and they denied their involvement in any foul play relating to murder of Dr. Y.S. Sachan, and the CBI did not find their involvement on any of the material issues. The CBI, after analyzing its evidence and opinion of the experts, was of the view that the deceased had committed suicide.

27. The final/closure report submitted under Section 173(2) CrPC by the CBI had included the detailed scientific investigation with the help of experts carried bout by the CBI which runs into several pages and on the basis of the said detailed scientific investigation, the CBI had concluded that Dr. Y.S. Sachan had committed suicide, and it was not a case of homicidal death. The closure report would also disclose that the experts, who conducted serological autopsy in respect of death of Dr. Y.S. Sachan had found that Dr. Y.S. Sachan was under tremendous pressure/stress after seeing newspaper reports dated 18.06.2011 wherein his involvement in murder of two CMOs was widely reported. He was highly disturbed and shown less interest in eating food after 18.06.2011. His blood pressure was very high. He had written typical suicide note, which was recovered among his belongings on the date of incident, suggests that it was in his hand-writing. The injuries would suggest self-inflicted one, specially in absence of definite wounds.

28. The CBI also investigated the procedure/practice for locking and unlocking jail and counting of inmates and jail staff in District Jail, Lucknow and actual events in this regard on 22.06.2011.

29. It is mentioned in the report that Dr. Y.S. Sachan was present in Ward No. 2 at the time of unlocking of jail at 6 hours on 22.06.2011. He used to wake up early in morning for morning walk. On the date of incident, he was seen in the ward in the morning by co-inmates, namely, Furkan, Ramkpal Verma and Kailash. Inmate Shripal Verma had seen Dr. Y.S. Sachan going out of Ward No. 2 with water bottle in his hand. Inmate, Ram Pal Verma who was allotted Bed No. 14 in Ward No. 2 had seen Dr. Y.S. Sachan washing/cleaning his face. He collected water in the bottle at about 7.30 hours in morning of 22.06.2011. Dr. Y.S. Sachan was wearing pant and shirt.

30. During evening counting and locking of the jail hospital, when strength of inmates was communicated by the Head Warder, Mr. Babu Ram Dubey to the

Control Room, Chief Head Warder on duty detected discrepancy of shortage of one inmate of Jail Hospital. Control Room informed the same to Mr. Babu Ram Dubey and called him in Control Room. When Mr. Babu Ram Dubey pointed out about Dr. Y.S. Sachan went on remand, he was asked about the slip issued by the office of Deputy Jailer, Under Trial Section, for sending Dr. Y.S. Sachan on remand. On search, the said slip was not found available. When this fact was cross-checked from office of Deputy Jailer (Under Trial) and main gate, it was confirmed that Dr. Y.S. Sachan was not sent on remand on 22.06.2011. Thereafter, search was started for tracing Dr. Y.S. Sachan out.

31. While searching Dr. Y.S. Sachan in this jail hospital premises, the Head Warder, Mr. Babu Ram Dubey went to 1st floor of jail hospital and he found door of the unused toilet attached with the operation theater partly opened. He pushed the door and found a person in sitting posture above the commode of the toilet. The 1st floor of the jail hospital had no electricity supply, but there was visibility due to percolation of lights through glass window panes of the operation theater and toilet ventilator. Head Warder Babu Ram Dubey shouted from 1st floor that Dr. Y.S. Sachan had been found in toilet. On hearing shouts of Mr. Dubey, Mr. Bhimsen Mukund along with Warder Dan Singh and others rushed to 1st floor of the jail hospital.

32. On reaching 1st floor, Mr. Bhimsen Mukund checked inside the toilet. Dr. Y.S. Sachan was taken out from toilet and his body was kept in corridor. Dr. V.V. Tripathi, after examination, declared him dead. The information was given over phone to Mr. V.K. Gupta, IGP (Jail Administration & Reform Services); Mr. Anil Sagar, District Magistrate, Lucknow; Mr. D.K. Thakur, DIG, Lucknow; FSL, Lucknow and to the Station Officer of Police Station Gosaiganj by Mr. S.H.M. Rizvi, Senior Jail Superintendent. Sniffer dogs reached to the spot.

33. On receiving information, Mr. V.K. Gupta, IGP (Jail Administration & Reform Services); Mr. Anil Sagar, District Magistrate, Lucknow; Mr. D.K. Thakur, DIG, Lucknow; experts of FSL and others reached to the spot and inspected the site. Inquest proceedings were conducted by Mr. Jitendra Srivastava, Tehsildar, Mohanlalganj. Mr. V.K. Gupta made inquiries from inmates of Ward No. 2. Thereafter, he searched personal belongings of Dr. Y.S. Sachan lying on the side steel rack of his bed. He took out a note/paper from the belongings of Dr. Y.S. Sachan and after perusing it kept the same in his pocket. Thereafter, Mr. V.K. Gupta again went to 1st floor and read out contents of the said note to someone over phone. Some contents of the note were also overheard by Mr. J.P. Srivastava. During examination, Mr. J.P. Srivastava stated that he overheard *that "mujhe apne parivar se koi shikayat nahi hai, na hi karagar ke adhikariyo se"*

34. Mr. V.K. Gupta, in the intervening night of 22/23.06.2011 gave a brief interview to electronic media regarding death of Dr. Y.S. Sachan, and he told that note/paper which could be said to be suicide note was found. Something written by hand had been found but till hand-writing was examined and other things were not verified, nothing definite could be said about it.

35. The Lucknow Police was under tremendous pressure to solve the murder

case of Dr. B.P. Singh, therefore, various teams were formed and assigned the task of working out the cases. One team, comprising of Inspectors, Mr. Anil Singh and D.K. Shahi and Sub-Inspector, K.N. Singh was also formed under supervision of the then IGP, Lucknow Zone, Lucknow for the said purpose. Dr. Y.S. Sachan was taken on remand for 24 hours by Sub-Inspector, Mr. Shajaur Rahim in 2nd NRHM Scam (Case Crime No.115 of 2011, lodged at Police Station Wazirganj) in the morning of 10.06.2011. In the intervening night of 10/11/06/2011, he was taken to Police Station Chinhat where he was interrogated by team of Inspector, Mr. Anil Singh and others. In the morning of 11.06.2011, he was lodged back at District Jail, Lucknow where he was again interrogated by Inspector, Mr. Anil Singh and Sub-Inspector, Mr. K.N. Singh.

36. During interrogation, Dr. Y.S. Sachan gave a hand-written note/letter meant to be given to Dr. A.K. Shukla, to Inspector, Mr. Anil Singh, who in turn handed over the said letter to Mr. Subeh Kumar Singh, the then IGP, Lucknow Zone, Lucknow. During investigation, the said letter was produced by Mr. Subesh Kumar Singh before the CBI. The letter dated 11.06.2011 written by Dr. Y.S. Sachan addressed to Dr. A.K. Shukla would read as *"CMO Dr. A.K. Shukla mai jail me bahut pareshan go gaya hon. Mere pariwar ki halat kharab hai. Ap ne meri kuchh madad nihi kiya. Agar aap ne madad nahi ki to agli remand ki tarikh par police va midia to bata donga ki dono CMO ki hatya apne karwaya hai. Mere parivar ki suraksha ka dhyan rakhiyega. Apka".*

37. The said note would indicate that both Dr. Y.S. Sachan and Dr. A.K. Shukla were privy to murder of both the CMOs.

38. The CBI concluded after thorough, detailed and scientific investigation from all angles, including the opinion of the experts, that no evidence had come on record indicating death of Dr. Y.S. Sachan in jail hospital on 22.06.2011 to be a homicide and no evidence could come, pointing out presence of second person on 1st floor of the toilet of jail hospital. The evidence collected during investigation, included statements of witnesses, expert opinion of Board of Directors of AIIMS, New-Delhi, the reports of CFSL experts including biological reports, physics, fingerprint, hand-writing experts, chemical examiner & forensic psychologist all of which indicated that Dr. Y.S. Sachan had committed suicide.

39. The evidence included circumstantial evidence which emerged during investigation revealed that Dr. Y.S. Sachan was extremely disturbed and stressed after disclosure of his complicity in the murder cases of CMOs and he even stopped taking meals. The opinion of the Board of Doctors of AIIMS, New-Delhi that the cause of death in case of Dr. Y.S. Sachan was antemortem hanging associated with multiple suicidal wounds was also fully got corroborated by the oral as well as documentary evidence which came on record during investigation. There was some omissions and commissions on the part of Pahender Singh the then warder and Babu Ram Dubey the then head warder for failing to do actual head count of inmates and maintain correct entries as well as failure on the part of Mr. V.K. Gupta then then IGP (Jail Administration and Reform Services) for bringing on record the note written by Dr. Y.S. Sachan and causing disappearance of the same in view of which matter was taken up by the CBI with the Government of Uttar Pradesh for taking an

appropriate departmental action against them.

40. The closure report dated 27.09.2012 was filed by CBI under Section 173 (2) CrPC after reaching to the conclusion that death of Dr. Y.S. Sachan was not homicide, but suicide. The complainant filed a protest petition alleging therein various gaps in the investigation and prayed for further investigation.

41. The CBI filed reply to the protest petition, however, the learned Magistrate vide order dated 22.02.2013 directed the CBI for further investigation of the offence.

42. The CBI undertook the further investigation and filed a supplementary closure report after investigating all the aspects highlighted in the order of learned Magistrate as well as on each of the allegations made by the complainant in the said protest petition; viz. (i) the injuries were not self-inflicted (ii) recovery of blade doubtful (iii) difference of opinion between panel of Board of Forensic Medicine Experts, AIIMS and panel of Doctors who conducted postmortem examination (iv) no proper investigation on belt (v) no report on the surgical knife taken by the police from the pharmacist (vi) statements under Section 161 CrPC of Anil Kumar Singh and petitioner, Subesh Kumar Singh, which were recorded for the note in question (vii) CBI's approach had been abinitio towards the conclusion as a case of suicide (viii) CJM inquiry report; and (ix) second opinion from Board of Experts (AIIMS).

43. The complainant was not satisfied even with the supplementary closure report and again filed a protest petition for summoning of seven accused persons (the petitioners) for trial of murder of Dr. Y.S. Sachan and for causing disappearance of evidence.

44. The CBI filed reply to the protest petition.

45. The learned Magistrate vide order dated 19.11.2019 had rejected the second final report, treating the protest petition as a complaint case. The statement of complainant, Malti Sachan got recorded under Section 200 CrPC and statement of six witnesses got recorded under Section 202 CrPC. Thereafter, the impugned order was passed, summoning the petitioners to face trial under Section 302 read with Section 120-B IPC.

46. The petitioners are Ex-serving government servants. There is no prior sanction under Section 197 CrPC. Absence of sanction, as mandated under Section 197 CrPC, would otherwise vitiate the impugned order. In sum & substance, the allegation is for disappearance of evidence.

47. In the case reported in ***(2020) 7 SCC 695 (D. Devaraja Vs. Owais Sabeer Hussain),*** in respect of police officer (accused of offence), while discharging duties, has held in paragraphs 65 to 75, which read as under:-

"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 to protect 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 policeman 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 the 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.

72. On the question of the stage at which the trial court has to examine whether sanction has been obtained and if not whether the criminal proceedings should be nipped in the bud, there are diverse decisions of this Court.

73. While this Court has, in D.T. Virupakshappa [D.T. Virupakshappa v. C. Subash, (2015) 12 SCC 231 : (2016) 1 SCC

(Cri) 82] held that the High Court had erred [D.T. Virupakshappa v. C. Subash, 2013 SCC OnLine Kar 10774] in not setting aside an order of the trial court taking cognizance of a complaint, in exercise of the power under Section 482 of the Criminal Procedure Code, in Matajog Dobey [Matajog Dobey v. H.C. Bhari, AIR 1956 SC 44 : 1956 Cri LJ 140] this Court held that it is not always necessary that the need for sanction under Section 197 is to be considered as soon as the complaint is lodged and on the allegations contained therein. The complainant may not disclose that the act constituting the offence was done or purported to be done in the discharge of official duty and/or under colour of duty. However, the facts subsequently coming to light in course of the trial or upon police or judicial enquiry may establish the necessity for sanction. Thus, whether sanction is necessary or not may have to be determined at any stage of the proceedings.

74. It is well settled that an application under Section 482 of the Criminal Procedure Code is maintainable to quash proceedings which are ex facie bad for want of sanction, frivolous or in abuse of process of court. If, on the face of the complaint, the act alleged appears to have a reasonable relationship with official duty, where the criminal proceeding is apparently prompted by mala fides and instituted with ulterior motive, power under Section 482 of the Criminal Procedure Code would have to be exercised to quash the proceedings, to prevent abuse of process of court.

75. There is also no reason to suppose that sanction will be withheld in case of prosecution, where there is substance in a complaint and in any case if, in such a case, sanction is refused, the aggrieved complainant can take recourse to law. At the cost of repetition, it is reiterated that the records of the instant case clearly reveal that the complainant alleged of police excesses while the respondent was in custody, in the course of investigation in connection with Crime No. 12/2012. Patently, the complaint pertains to an act under colour of duty."

48. The learned Magistrate, while issuing summoning order, has failed to record reasons for summoning the petitioners under Sections 302 read with Section 120-B IPC. The impugned order neither reflects an application of mind nor it deals with the investigation reports submitted by the CBI on every aspects and allegations.

49. As mentioned above, the CBI had filed the first closure report, and thereafter, under the direction of learned Magistrate carried out further investigation other than the points highlighted and had again filed the closure report. However, the learned Magistrate has rejected both the closure reports and treated the protest petition as a 'complaint case'.

50. The learned Magistrate, while taking cognizance on the basis of the complaint, has to be more cautious and careful than taking cognizance on police report as in the latter scenario, the Magistrate had an advantage of police report, which would be filed after collecting evidence and material by the investigating agency. In the case in hand, the Magistrate did not have the benefit of police reports, which are against the theory of the complainant. It was the duty of the learned Magistrate to be more careful inasmuch as he would summon the persons on the allegations of the complaint to face trial for an offence under Section 302 IPC.

There must be compelling reasons and overwhelming material to discard conclusion of the investigation reports submitted by the CBI. However, the statement of the complainant and witnesses recorded under Section 200 and 202 CrPC respectively would suggest that those are in respect of same allegations which got investigated thoroughly, impartially, fairly and scientifically by the CBI and found no substance in the theory of the complaint. No new evidence and material has been brought on record. There was nothing new before the learned Magistrate to take cognizance for an offence under Section 302 IPC.

51. The allegations are against the retired/serving public/police officers, who were acting in discharge of their official duty when the police was carrying out investigation. The Magistrate should not have acted on guess of the complainant. The complainant is obsesses with new theory of gaps in the investigation by the CBI. Existence of overwhelming material and compelling reasons is a must before summoning a person. Summoning of a person to face trial for a criminal case is a serious matter. The complaint in the present case would not disclose commission of offence under Sections 302 and 120-B IPC.

52. In the case reported in ***(1998) 5 SCC 749 (Pepsi Foods Ltd. and another Vs. Special Judicial Magistrate and others)*** in paragraph-28 it has been held as under:-

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

53. In the case report in ***(2015) 12 SCC 420 (Mehmood Ul Rehman Vs. Khazir Mohammad Tunda and others)*** in paragraphs 21, 22 and 23 it has been held as under:-

"21. Under Section 190(1)(b) CrPC, the Magistrate has the advantage of a police report and under Section 190(1)(c) CrPC, he has the information or knowledge of commission of an offence. But under Section 190(1)(a) CrPC, he has only a complaint before him. The Code hence specifies that "a complaint of facts which constitute such offence". Therefore, if the complaint, on the face of it, does not disclose the commission of any offence, the Magistrate shall not take cognizance under Section 190(1)(a) CrPC. The complaint is simply to be rejected.

22. The steps taken by the Magistrate under Section 190(1)(a) CrPC followed by Section 204 CrPC should

reflect that the Magistrate has applied his mind to the facts and the statements and he is satisfied that there is ground for proceeding further in the matter by asking the person against whom the violation of law is alleged, to appear before the court. The satisfaction on the ground for proceeding would mean that the facts alleged in the complaint would constitute an offence, and when considered along with the statements recorded, would, prima facie, make the accused answerable before the court. No doubt, no formal order or a speaking order is required to be passed at that stage. The Code of Criminal Procedure requires speaking order to be passed under Section 203 CrPC when the complaint is dismissed and that too the reasons need to be stated only briefly. In other words, the Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 CrPC, if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused under Section 204 CrPC, by issuing process for appearance. The application of mind is best demonstrated by disclosure of mind on the satisfaction. If there is no such indication in a case where the Magistrate proceeds under Sections 190/204 CrPC, the High Court under Section 482 CrPC is bound to invoke its inherent power in order to prevent abuse of the power of the criminal court. To be called to appear before the criminal court as an accused is serious matter affecting one's dignity, self-respect and image in society. Hence, the process of criminal court shall not be made a weapon of harassment.

23. Having gone through the order passed by the Magistrate, we are satisfied that there is no indication on the application of mind by the learned Magistrate in taking cognizance and issuing process to the appellants. The contention that the application of mind has to be inferred cannot be appreciated. The further contention that without application of mind, the process will not be issued cannot also be appreciated. Though no formal or speaking or reasoned orders are required at the stage of Sections 190/204 CrPC, there must be sufficient indication on the application of mind by the Magistrate to the facts constituting commission of an offence and the statements recorded under Section 200 CrPC so as to proceed against the offender. No doubt, the High Court is right in holding that the veracity of the allegations is a question of evidence. The question is not about veracity of the allegations, but whether the respondents are answerable at all before the criminal court. There is no indication in that regard in the order passed by the learned Magistrate."

54. The findings of the CBI have been mentioned-herein above in detail to highlight that how detail scientific, meticulous and fair investigation was carried out by the CBI for reaching to the conclusion that it was not a case of homicide, but suicide. There should have been overwhelming material and evidence to discard/ignore such a report before the learned Magistrate. At the cost of repetition, it is mentioned here that there

has been nothing before the learned Magistrate to discard the reports submitted by the CBI.

55. In view of the aforesaid discussion, in absence of order of sanction for prosecution of the petitioners for the offence in question, the order of cognizance is bad in law and is liable to be set-aside. Even otherwise, the impugned order, which would disclose non-application of mind by the learned Magistrate and without there being any overwhelming evidence and material to discard the closure reports filed by the CBI under Section 173 (2) CrPC, summoning the petitioners, who are retired/serving government officers to face trial for such a serious offence under Section 302 read with Section 120-B IPC, is preposterous and to some extent outrageous. The impugned order is, therefore, set-aside.

56. Accordingly, all the petitions are **allowed**.

(2023) 3 ILRA 500
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.01.2023

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Application U/S 482. No. 12297 of 2021

Nand Kishore Gupta ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Preet Pal Singh Rathore, Sri Anil Tiwari (Sr. Advocate)

Counsel for the Opposite Parties:
G.A., Sri Ashok Kumar Dwivedi

Criminal Law - Code of Criminal Procedure, 1973 - Section 227-The trial court must apply its judicial mind to determine if a prima facie case exists under Section 227 CrPC- must go through evidence to see if sufficient grounds exist to proceed, considering broad probabilities and evidence effects–can discharge the accused if the evidence raises mere suspicion rather than grave suspicion–impugned order bad**.**

Application allowed. (E-9)

List of Cases cited:

1. Yogesh @ Sachin Jagdish Joshi Vs St. of Mah. (2008) 10 SCC 394

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

3. Smt. Shiv Kumari Vs St. of U.P. 2012 (78) ACC 605,

4. Ajay Singh & anr. Vs St. of Chhattishgarh & anr. (2017) 3 SCC 330

5. P. Vijayan Vs St. of Kerala & anr. (2010) 2 SCC 398

6. Yogesh @ Sachin Jagdish Joshi Vs St. of Mah. (2008) 10 SCC 394

7. Pancho Vs St. of Har. (2012) (77) ACC 269

8. Sharat Babu Digumarti Vs Government (NCT of Delhi (2017) 2 SCC 18

9. CBI Vs Akhilesh (2005) 1 SCC 478

10. Pradeep Kumar @ Pradeep Kumar Verma Vs St. of Bihar & anr. (2007) 7 SCC 413

11. Siyaram alias Shiva Ram Vs St. of U.P. 2022 (118) ACC 877

12. Smt. Shila Devi Vs St. of U.P. & anr. 2022 (119) ACC 482.

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

1. Heard Sri Preet Pal Singh Rathore, learned counsel for the applicant and learned A.G.A. for the State of U.P.- opposite party no.1.

2. This application under Section 482 Cr.P.C. is filed to quash the order dated 8.02.2021 passed by Additional Session Judge, Court No.04/Gangsters Act, Gorakhpur in G. T. No.148 of 2011 arising out of Case Crime No.406 of 2010 under Sections 419, 420 I.P.C. and 3(1) of U.P. Gangster and Anti Social Activities (Prevention) Act, 1986, Police Station Khorabar, Disrict Gorakhpur as well as entire proceedings of aforesaid case.

3. First Information Report dated 25.03.2010 was lodged by opposite party no.2 bearing Case Crime No.406 of 2010 under Sections 419, 420, 272, 273 I.P.C. and 7/16 of Food Adulteration Act, 1954 at Police Station Khorabar, District Gorakhpur. As per the allegations of the F.I.R. a police party led by Inspector, Rajendra Prasad Pandey on information received from informer that spurious *Khoya* obnoxious to health is being prepared in *Ahata* of Ram Dulare Paswan by Nand Kishor Gupta for making sweets and supplying it to Gorakhpur city and other cities, conducted a raid at about 2 p.m., Pramod Kumar, Ramesh Kumar Kewat, Ranjeet Verma, Rameshwar Giri and Zaiki Verma were arrested. One vehicle U.P. 53 AT 0995 Tata Magic was also found on the spot on which 11 bundles milk cake, 30 bundles of *barfi* and packing box on which Shiv Shanker Sweets Special P.G. Group was scribed and on the cartons *Barfi*, Muskan Ka Deshi Ghee, Dry Fruit Kaju and Pistawala Donda *Barfi* is printed was recovered. The arrested persons told that they are workers. They also informed that in process of sweet making *Suji* mixed with sugar and refined is used for making spurious *Khoya* from which milk cake and *Doda barfi* is prepared and packed for supplying by Nand Kishor Gupta. Utensils and gas cylinder used for preparation of spurious *Mawa* along with *Suji*, sugar, refined, milk powder, empty cartons and empty sweetmeat packets were also recovered, no date of manufacturing was printed on the packets. Arrested persons could not show the license. The arrested persons also informed that Nand Kishor Gupa is involved in business of manufacturing spurious *Khoya* and milk cake and Doda *barfi* prepared from it, which he used to supply as pure sweetmeat of Desh Ghee and it is harmful for health. The sample was collected and recovery memo was prepared on the spot. A report dated 31.03.2010 was forwarded to the District Magistrate for initiation of proceeding under Section 3(1) of U.P. Gangsters and Anti Social Activities (Prevention) Act. After its approval by District Magistrate vide order dated 06.04.2010, Section 3(1) of U.P. Act No. 7 of 1986 was also added. The sample collected was sent for chemical examination. In chemical examination report it was noted that sample is not adulterated. The Investigating Officer recorded statements of witnesses and after investigation submitted charge sheet under Sections 419, 420 I.P.C. and 3(1) of U.P. Gangsters and Anti Social Activities (Prevention) Act only. Before the trial court a discharge application 12-Kha under Section 227 of Cr.P.C. was filed by accused Nand Kishor Gupta. It is alleged in the application that the applicant-accused is innocent, there is no evidence on record that accused was arrested on the spot or anything incriminating was recovered from his possession, the offence of U.P. Gangsters and Anti Social Activities

(Prevention) Act has been added without any evidence, there is no evidence to frame charge against the accused for the offence under Sections 419 and 420 I.P.C., in the gang chart no other case is mentioned, at the time of approval of gang charge only single case under Sections 419, 420, 272, 273 I.P.C. and 7/16 of Food Adulteration Act, 1954 is mentioned and approval is granted without obtaining chemical examiner's report, there is no evidence against the applicant for offence under Sections 16, 17 and 22 of Food Adulteration Act, no sanction has been obtained from District Magistrate for filing the charge-sheet, the name of the applicant-accused has been added on the basis of confessional statement of arrested accused, while proceeding under Gangsters Act has been initiated only against two accused persons without any satisfactory and sufficient explanation. On the aforesaid grounds the discharge was claimed. Learned trial court vide order dated 08.02.2021 has rejected the discharge application.

4. Learned counsel for the applicant submitted that the applicant is doing business of sweetmeat/*mawa* which is registered in accordance with law and he has valid license. The applicant has been falsely implicated by the opposite party no.2 and his associates misusing their power and position. Just after lodging the F.I.R. opposite party no.2 submitted a report to the District Magistrate for seeking recommendation for initiation of proceeding against the applicant under Section 3(1) of U.P. Gangsters and Anti Social Activities (Prevention) Act which was recommended by him on 06.04.2010 and Section 3(1) of U.P. Act No.7 of 1986 was added. The sample collected by the Investigating Officer was sent for chemical examination. The report of Public Analyst submitted on 27.04.2010 confirms that no adulteration was reported. Thereafter the Investigating Officer interrogated prosecution witnesses. He examined first informant on 08.05.2010, Sub Inspector Suraj Nath Singh on 24.05.2010 and other police personnel and Food Inspector Ajit Kumar Mishra, Shiv Kumar Gupta on 05.06.2010 and Food Inspector Chandra Bhan, Amardeo Maheshwari, Constable Amaresh Yadav on 05.12.2010, but their statement does not corroborate the prosecution case and there is considerable contradiction amongst them. After 05.06.2010 no further investigation was conducted and on the basis of material available the Investigating Officer filed charge-sheet. It is further contended that no recovery memo was prepared on the spot and it has no signature of independent witness. There is no independent witness in the entire charge-sheet. Learned counsel further submitted that initially F.I.R. was lodged under Sections 7/16 of Food Adulteration Act also while this Act was repealed by the new Act i.e. Food Safety and Standards Act, 2006. Once Food Adulteration Act was replaced by Food Safety and Standards Act, no F.I.R. ought to have been lodged under Sections 7/16 of Food Adulteration Act. Further in chemical examination no adulteration was found by the Public Analyst and the Investigating Officer removed Sections 272, 273 I.P.C. and 7/16 of Food Adulteration Act and filed charge-sheet only under Sections 419, 420 I.P.C. and 3(1) of U.P. Gangsters and Anti Social Activities (Prevention) Act. When in recovered articles no adulteration was found, then there was no reason to file charge-sheet against the applicant. It is further contended that no offence under Sections 419 and 420 I.P.C. against the applicant is made out. In chemical

examination report it is mentioned that sample in question is only plain cake and not of milk cake. The applicant never forged and claimed so called cake to be a milk cake but at the most it may be a case of misbranding which is covered by Section 52 of Food Safety and Standards Act and can be adjudicated under Section 68 of Food Safety and Standards Act and is compoundable under Section 69 of the Act. An order passed under Section 52 is appealable under Section 70 of the Act before Food Safety Appellate Tribunal and second appeal lies to the High Court. Learned counsel submitted that the Food Safety and Standards Act, 2006 is complete Code for that very purpose. This is special law while Indian Penal Code is general law. Sections 419 and 420 I.P.C. cannot be attracted for misbranding. Only a complaint can be filed in accordance with law and the provisions provided in Food Safety and Standards Act. It is also contended that except confessional statement of co-accused, there is no evidence against the applicant and confessional statement of co-accused is not admissible in evidence. It is next contended that there is no cogent, credible and concrete evidence in support of prosecution case, even then learned court below without properly considering facts and circumstances of the case and without carefully scrutinizing the material on case diary has rejected the discharge application. The impugned order is illegal and has been passed without application of judicial mind. While rejecting the discharge application, learned court below has completely relied on prosecution case and has completely ignored and discarded the plea taken by the applicant without recording any reason of doing so. Learned court below has failed to consider that no proper investigation has been conducted and without collecting sufficient material, charge-sheet has been submitted. Learned trial court has also not considered legal aspect of the matter and has not recorded any finding on it. Throughout the case diary there is no material against the applicant with regard to his connection with any gang or his indulgence in gangster activities. The Investigating Officer has misused his power and invoked the provisions of Gangsters Act against the applicant on the basis of a solitary case which was under investigation. The whole prosecution case is false and baseless. The story set up is cooked one and motivated. The entire proceedings of the case are illegal, arbitrary, unjust and manifestly discriminatory and erroneous. Learned counsel has placed reliance on following case laws:

(1) . Smt. Shiv Kumari Versus State of U.P. 2012 (78) ACC 605,

(2) . Ajay Singh and another Versus State of Chhattishgarh and another (2017) 3 SCC 330,

(3) . P. Vijayan Versus State of Kerala and another (2010) 2 SCC 398,

(4) . Yogesh alias Sachin Jagdish Joshi Versus State of Maharashtra (2008) 10 SCC 394,

(5) . Pancho Versus State of Haryana (2012) (77) ACC 269,

(6) . Sharat Babu Digumarti Versus Government (NCT of Delhi (2017) 2 SCC 18,

(7) . CBI Versus Akhilesh (2005) 1 SCC 478,

(8) . Pradeep Kumar alias Pradeep Kumar Verma Versus State of Bihar and another (2007) 7 SCC 413,

(9) . Siyaram alias Shiva Ram Versus State of U.P. 2022 (118) ACC 877,

(10). Smt. Shila Devi Versus State of U.P. and another 2022 (119) ACC 482.

5. Learned A.G.A. contended that F.I.R. has been lodged against six named accused including the applicant accused and substance of prosecution story is that they were preparing spurious *Mawa* and adulterated sweets dangerous for human life. Various articles have been recovered and co-accused has been arrested on the spot. The first informant and his companions have supported the prosecution case in their statements under Section 161 Cr.P.C. The Investigating Officer has also recorded the statements of various Food Inspectors. After thorough investigation credible and cogent evidence has been collected showing the complicity of the accused-applicant and charge-sheet has been submitted in the relevant sections. It is further contended that chemical examiner's report corroborates the prosecution case that the applicant was involved in business of sweetmeats which were not of prescribed standards as printed on its packaging. So, the offence under Sections 419, 420 I.P.C. and under Section 3(1) of U.P. Gangsters and Anti Social Activities (Prevention) Act is made out against the applicant. Considering the evidence and material available on record cognizance has been taken on charge-sheet. The discharge application has rightly been rejected by the trial court after recording specific finding that there is sufficient evidence against the accused-applicant for framing of charge. The impugned the order dated 8.02.2021 passed by Additional Sessions Judge, Court No.02 (Gangsters Act), Gorakhpur is just, legal and proper and it does not suffer from any illegality or infirmity.

6. The allegations of F.I.R. are that police party took action on information that spurious *mawa* is being prepared for supplying and preparation of adulterated and obnoxious sweetmeats. Initially F.I.R. was lodged under Sections 419, 420, 272, 273 I.P.C. and 7/16 of Food Adulteration Act, 1954. This fact is uncontroverted that after lodging of the F.I.R. on 25.03.2021 the Investigating Officer submitted a report to District Magistrate on 31.03.2021 seeking his approval for implication of the accused for the offence under Section 3(1) of U.P. Gangster and Anti Social Activities (Prevention) Act. Approval was granted on 06.04.2010 and aforesaid section was added. It is also not disputed that the sample sent for chemical examination has not been found to be adulterated. It only indicates that the sample was not milk cake but only simple cake. The Investigating Officer has omitted Sections 272, 273 I.P.C. and 7/16 of Food Adulteration Act, 1954 and has submitted charge-sheet under Sections 419, 420 I.P.C. and under Section 3(1) of U.P. Gangster and Anti Social Activities (Prevention) Act. It is also not disputed that at the time of lodging of the F.I.R. provisions of Food Adulteration Act was not in force and it was replaced by Food Safety and Standards Act, 2006. Misbranding of food articles has been dealt with under the provisions of Food Safety and Standards Act and it is punishable under Section 52 of the Act. The Act is a complete Code itself and it being special law will override provisions of Indian Penal Code. The proceeding under Section 3(1) of U.P. Gangster and Anti Social Activities (Prevention) Act has been initiated on the allegations of the F.I.R. that the applicant is involved in preparation and sale of spurious *mawa* and sweetmeats obnoxious to human health. Except present case no other case is shown in the gang-chart. The chemical examiner's report has not corroborated the prosecution case of adulteration of food articles obnoxious for health. At the most it only points towards misbranding.

7. Learned trial court while rejecting the discharge application by the impugned order has only narrated the allegations of prosecution version as per the F.I.R. and without properly appreciating the evidence available on case diary has observed that at this stage the case is not being considered on merits, only prosecution evidence is to be considered for framing of charge, it is to be seen whether on the basis of evidence available on record, the prima case is made out or not and even only on the basis of suspicion charge can be framed, has rejected the discharge application. Learned trial court has not dealt with any of the factual and legal points raised by the accused-applicant in his discharge application. Learned trial court has also failed to appreciate the legal aspect of the entire matter.

8. It is settled law that trial court while considering the discharge application is not acting as mere post office. It is to sift through evidence in order to find out whether there is sufficient grounds to try a suspect, the court has to consider the broad probability, total effect of evidence and basic infirmities. The Apex Court in ***P. Vijayan Versus State of Kerala and another (2010) 2 SCC 398*** has held that the words "no sufficient ground for proceeding against the accused" clearly show that judge is not a mere post-office to frame the charge at the behest of 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.

9. In ***Yogesh alias Sachin Jagdish Joshi Versus State of Maharashtra (2008) 10 SCC 394,*** the Apex Court in para-16 has observed as follows:

"It is trite that the words "not sufficient ground for proceeding against the accused" appearing in the Section postulate exercise of judicial mind on the part of the Judge to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. However, in assessing this fact, the Judge has the power to sift and weigh the material 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 a prima facie case depends upon the facts of each case and in this regard it is neither feasible nor desirable 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 gives rise to suspicion only as distinguished from grave suspicion, he will be fully within his right to discharge the accused. At this stage, he is not to see as to whether the trial will end in conviction or not. The broad test to be applied is whether the materials on record, if unrebutted, makes a conviction reasonably possible."

10. Learned court below has not considered each and every relevant contents of the discharge application and rejected the same in a cursory manner. Although while disposing of discharge application the trial court may not appreciate the defence of the accused, but at the same time it is incumbent upon the trial court to consider and adjudicate the contents and contentions of the discharge application after perusing the material available on record. If any specific plea has been taken, the trial court must consider it and address the same by speaking and reasoned order. The trial court may accept or reject the pleas, but it should be clear and unambiguous and it should be seen that

the trial court has applied its judicial mind while disposing of discharge application. The trial court while disposing discharge application by the impugned order has not considered the relevant contentions and has rejected the same in a mechanical manner, therefore, a fresh order is required to be passed by the trial court on the discharge application.

11. Accordingly, this application under Section 482 Cr.P.C. is allowed. The impugned order dated 8.02.2021 passed by Additional Session Judge, Court No.04/Gangsters Act, Gorakhpur in G. T. No.148 of 2011 arising out of Case Crime No.406 of 2010 under Sections 419, 420 I.P.C. and 3(1) of U.P. Gangster and Anti Social Activities (Prevention) Act, 1986, Police Station Khorabar, Disrict Gorakhpur is hereby set aside. The trial court is directed to pass a fresh order on the discharge application of the applicant by a speaking and reasoned order, expeditiously strictly in accordance with law, after affording an opportunity of hearing to the parties.

(2023) 3 ILRA 506
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.01.2023 & 18.01.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application U/S 482. No. 37389 of 2022

Dara Singh @ Dara Nishad ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Sujeet Kumar, Sri Pramod Kumar Sahani, Sri Amrendra Nath Singh

Counsel for the Opposite Parties:
G.A., Sri Manoj Kumar

Criminal Law - Code of Criminal Procedure, 1973 – Section 293-In firearm cases ballistic expert's opinion is important–Both firearm and crime cartridge must be recovered during investigation–Need for ballistic expert examination depends on case circumstances–If accused wants to cross-examine ballistic expert, trial court should allow it–Grounds exist to summon and examine ballistic expert who gave opinion–Trial court's order rejecting plea to examine expert is set aside. Trial court directed to summon and examine expert witness. Accused to be allowed to cross-examine.

Application allowed. (E-9)

List of Cases cited:

1. Ramdayal Vs Delhi Coorp., AIR 1970 SC366

2. Bhupinder Singh Vs St. of Pun., AIR , 1988 SC 1011

3. Gulab Vs St. of U.P., 2021 SCC online SC1211

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

1. आवेदक की ओर से विद्वान अधिवक्ता श्री अमरेंद्र नाथ सिंह, श्री प्रमोद कुमार सिंह और सुजीत कुमार एवं विपक्षी संख्या-2 की तरफ से विद्वान अधिवक्ता श्री मनोज कुमार एवम् राज्य की ओर से विद्वान अपर शासकीय अधिवक्ता को सुना गया तथा पत्रावली का परिशीलन किया गया।

2. प्रार्थी ने धारा 482 दण्ड प्रक्रिया संहिता के अंतर्गत जी. टी. वाद संख्या-55 सन् 2007, राज्य विरुद्ध दारा निषाद एवं अन्य अपराध संख्या-253, सन् 2006, अंतर्गत धारा 147, 148, 149, 302 भारतीय दण्ड संहिता तथा धारा-3(1), उत्तर-प्रदेश गुण्डा अधिनियम, थाना बडहलगंज, जिला-गोरखपुर में अपर सत्र न्यायाधीश न्यायालय संख्या-3, विशेष न्यायाधीश, गुण्डा अधिनियम को निरस्त करने के लिए प्रस्तुत किया गया है।

3. संक्षेप में याचिका के तथ्य यह है कि विपक्षी संख्या-2 द्वारा दर्ज कराये गये प्रथम सूचना रिपोर्ट, दिनांकित 10.06.2006 के अंतर्गत विपक्ष संख्या-2 का बयान बारा-161 दण्ड प्रक्रिया संहिता में अंकित किया गया, जिसमें उन्होंने प्रार्थी के विरुद्ध कोई विशिष्ट आरोप नहीं लगाया है। आरोपपत्र प्रस्तुत करने के उपरांत मुख्य न्यायिक दण्डाधिकारी गोरखपुर द्वारा संज्ञान लिया गया तथा मामले को सत्र सुपुर्द किया गया तथा सत्र वाद का विचारण प्रारम्भ हुआ। प्रार्थी को झूठा फंसाया गया है। प्रार्थी के पास शस्त्र अनुज्ञप्ति के आधार पर एक राइफल है, अतः राजनीतिक व्यक्ति होने के कारण उसे दूषित आशयों से राइफल का प्रयोग करते हुए दिखाया गया है। शस्त्र विशेषज्ञ की आख्या विधि विज्ञान प्रयोगशाला लखनऊ से मंगाई गई। बचाव में साक्ष्य प्रस्तुत करने के अवसर पर यह ज्ञात हुआ कि विशेषज्ञ की आख्या नहीं मंगाई गई है। तदुपरांत शस्त्र • विशेषज्ञ को साक्षी के रूप में आहूत करने के लिए प्रार्थनापत्र प्रस्तुत किया गया। क्योंकि वही बता सकते हैं कि किस प्रकार का आग्नेयास्त्र प्रयोग हुआ है। उक्त प्रार्थनापत्र को विचारण न्यायालय ने यह कहते हुए दिनांक 17.10.2022 को खारिज कर दिया कि यह बिलंब करने के लिए दूषित प्रार्थनापत्र है जिससे न्यायिक अपहानि होगी। अंततः परीक्षक/ चिकित्सक अशोक कुमार यादव का साक्ष्य प्रस्तुत किया गया है, अतः उपरोक्त परिस्थितियों में प्रश्नगत आदेश निरस्त साक्ष्य हेतु शस्त्र विशेषज्ञ को परीक्षित करने का आदेश पारित किया जाए।

4. पत्रावली पर संलप्रक-5 के रूप में विधि विज्ञान प्रयोगशाला के आग्नेयास्त्र विशेषज्ञ की आख्या दिनांकित 24.02.2007 भी प्रस्तुत की गई है। आप्रेयास्त्र के संबंध में पृष्ठ संख्या-55 पर मूल आख्या की छायाप्रति संलग्न की गई है। धारा -293 दण्ड प्रक्रिया संहिता के अनुसार विधि विज्ञान प्रयोगशाला की आख्या प्रदर्श डालने योग्य एवं साक्ष्य में स्वतः ग्राह्य होती है, परंतु न्यायालय उचित समझे तो ऐसे विशेषज्ञ को उसके द्वारा प्रस्तुत आख्या के संबंध में साक्षी के रूप में आहूत कर सकता है। धारा -293(4) के अनुसार यह धारा आग्नेयास्त्र विशेषज्ञ के संबंध में भी प्रयुक्त होती है। आग्नेयास्त्र विशेषज्ञ की आख्या में देशी पिस्तौल से विवादित कारतूस, चिह्नित ई.सी. -1, देशी पिस्तौल चिह्नित 1/07 द्वारा चलाये जाने का परिणाम दिया गया है तथा अन्य मत भी दिए गए हैं। प्रार्थी के अनुसार अभियोजन ने उसके द्वारा राइफल से फायर कर हत्या करने एवं राइफल को घटना में प्रयुक्त करने का कथन किया है। वर्ष 2005 में संशोधन के द्वारा मुख्य विस्फोटक नियंत्रक का नाम भी विशेषज्ञों की सूची में सम्मिलित किया गया है। वैसे भी आग्नेयास्त्र विशेषज्ञ विधि विज्ञान प्रयोगशाला के वैज्ञानिक एवम् विशेषज्ञ माने जाएंगे। **रामदयाल विरुद्ध दिल्ली कार्पोरेशन ए.आई.आर. 1970, उच्चतम न्यायालय 366,** में यह अवधारित किया गया है कि अभियुक्त को जन विश्लेषक को परीक्षित एवं प्रतिपरीक्षित करने का अधिकार विद्यमान है। **भूपिंदर सिंह विरुद्ध पंजाब राज्य, ए.आई.आर. 1988, उच्चतम न्यायालय 1011,** में अवधारित किया गया कि रासायनिक परीक्षक मृत्यु के कारणों के बारे में मात्र एक आख्या देता है, जिसके अनौपचारिक साक्ष्य की आवश्यकता नहीं है, परंतु न्यायालय यदि उचित समझे, तो रासायनिक परीक्षक को आख्या के संबंध में बुलाकर उसे परीक्षित करा सकती है। **जयमाल सिंह विरुद्ध उत्तर- प्रदेश राज्य, 1987 (1), क्राइम्स 760 इलाहाबाद उच्च न्यायालय** में अवधारित किया। गया कि जहां शस्त्र विशेषज्ञ की आख्या निदेशक अथवा उप निदेशक द्वारा हस्ताक्षरित नहीं है, ऐसी आख्या शस्त्र विशेषज्ञ के साक्ष्य के बिना ग्राह्य नहीं है। ऐसे मामले हो सकते हैं, जिनमें न्याय हित में रासायनिक विशेषज्ञ को साक्षी के रूप में आहूत करना तथा उनका परीक्षण आवश्यक हो। धारा-293 (3) के अंतर्गत न्यायालय को शक्ति प्राप्त है कि ऐसे विशेषज्ञ को साक्षी स्वरूप आहूत कर सके।

5. **गुलाब बनाम उत्तर प्रदेश राज्य, 2021 एस.सी.सी. ऑनलाइन (उच्चतम न्यायालय) 1211** के निर्णय का पैरा 19 से 23 महत्वपूर्ण है, जिसे निम्नवत् अंकित किया जाता है-

"19. The deceased had sustained a gun-shot injury with a point of entry and exit. The non-recovery of the weapon of offences would therefore not discredit the case of the prosecution which has relied on the eyewitness accounts of PWs 1, 2 and 3. In ***Sukhwant Singh v. State of Punjab, Dr***

A S Anand (as the learned Chief Justice then was) speaking for a two-judge Bench held:

"21. There is yet another infirmity in this case. We find that whereas an empty [sic] had been recovered by PW 6, ASI Raghubir Singh from the spot and a pistol along with some cartridges were seized from the possession of the appellant at the time of his arrest, yet the prosecution, for reasons best known to it, did not send the recovered empty [sic] and the seized pistol to the ballistic expert for examination and expert opinion. Comparison could have provided link evidence between the crime and the accused. This again is an omission on the part of the prosecution for which no explanation has been furnished either in the trial court or before us**. It hardly needs to be emphasised that in cases where injuries are caused by firearms, the opinion of the ballistic expert is of a considerable importance where both the firearm and the crime cartridge are recovered during the investigation to connect an accused with the crime. Failure to produce the expert opinion before the trial court in such cases affects the creditworthiness of the prosecution case to a great extent."**

(emphasis supplied)

20. The above extract which has been relied upon by the learned Counsel for the appellant emphasises that in a case where injury has been caused by a firearm, the opinion of the ballistic expert is of considerable importance where both the firearm and the crime cartridge had been recovered during the investigation. Failure to produce the expert opinion in such a case affects the creditworthiness of the prosecution case.

21. However, a three-judge Bench of this Court, in Gurucharan Singh v. State of Punjab, has analysed the precedents of this Court and held that examination of a ballistic expert is not an inflexible rule in every case involving use of a lethal weapon. Speaking through Justice P B Gajendragadkar (as the learned Chief Justice then was), this Court held:

"41. It has, however, been argued that in every case where an accused person is charged with having committed the offence of murder by a lethal weapon, it is the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which, and in the manner in which, they have been alleged to have been caused; and in support of this proposition, reliance has been placed on the decision of this Court in ***Mohinder Singh v. State [(1950) SCR 821]*** **.** In that case, this Court has held that where the prosecution case was that the accused shot the deceased with a gun, but it appeared likely that the injuries on the deceased were inflicted by a rifle and there was no evidence of a duly qualified expert to prove that the injuries were caused by a gun, and the nature of the injuries was also such that the shots must have been fired by more than one person and not by one person only, and there was no evidence to show that another person also shot, and the oral evidence was such which was not disinterested, the failure to examine an expert would be a serious infirmity in the prosecution case**. It would be noticed that these observations were made in a case where the prosecution evidence suffered from serious infirmities and in determining the effect of these observations, it would not be fair or reasonable to forget the facts in respect of which they came to be made. These observations do not purport to lay down an inflexible Rule that in every case where an accused person is charged with**

murder caused by a lethal weapon, the prosecution case can succeed in proving the charge only if an expert is examined. It is possible to imagine cases where the direct evidence is of such an unimpeachable character and the nature of the injuries disclosed by post-mortem notes is so clearly consistent with the direct evidence that the examination of a ballistic expert may not be regarded as essential. Where the direct evidence is not satisfactory or disinterested or where the injuries are alleged to have been caused with a gun and they prima facie appear to have been inflicted by a rifle, undoubtedly the apparent inconsistency can be cured or the oral evidence can be corroborated by leading the evidence of a ballistic expert. In what cases the examination of a ballistic expert is essential for the proof of the prosecution case, must naturally depend upon the circumstances of each case. Therefore, we do not think that Mr Purushottam is right in contending as a general proposition that in every case where a firearm is alleged to have been used by an accused person, in addition to the direct evidence, prosecution must lead the evidence of a ballistic expert, however good the direct evidence may be and though on the record there may be no reason to doubt the said direct evidence."

(emphasis supplied)

22. Similarly, a two-judge Bench of this Court in State of Punjab v. Jugraj Singh6 had noticed that surrounding circumstances in the prosecution case are sufficient to prove a death caused by a lethal weapon, without a ballistic examination of the recovered weapon. The Court, speaking through Justice R P Sethi, had noted:

"18. In the instant case the investigating officer has categorically stated that guns seized were not in a working condition and he, in his discretion, found that no purpose would be served by sending the same to the ballistic expert for his opinion. No further question was put to the investigating officer in cross-examination to find out whether despite the guns being defective the fire pin was in order or not. In the presence of convincing evidence of two eyewitnesses and other attending circumstances we do not find that the non-examination of the expert in this case has, in any way, affected the creditworthiness of the version put forth by the eyewitnesses."

23. The present case is not one where despite the recovery of a firearm, or of the cartridge, the prosecution had failed to produce a report of the ballistic expert. Therefore, the failure to produce a report by a ballistic expert who can testify to the fatal injuries being caused by a particular weapon is not sufficient to impeach the credible evidence of the direct eye-witnesses."

6. इस न्यायालय के मतानुसार प्रस्तुत वाद के तथ्यों एवम् परिस्थितियों में यदि विशेषज्ञ की प्रति परीक्षा की बाँछा अभियुक्त द्वारा की जाती है, तो कोई कारण नहीं है कि उसे खारिज किया जाए। यह उचित होगा कि शस्त्र विशेषज्ञ जिसने शस्त्र संबंधी आख्या प्रस्तुत किया है, को मुख्य एवं प्रति परीक्षा के लिए आहूत किया जाए। इस न्यायालय के मतानुसार प्रस्तुत बाद के तथ्यों एवं परिस्थितियों में आयुध विशेषज्ञ, जिन्होंने इस अपराध संख्या में आख्या प्रस्तुत किया है, उनको साक्ष्य के लिए आहूत किये जाने का पर्याप्त आधार विद्यमान है। अतः यह याचिका *स्वीकार* की जाती है तथा आदेश दिनांकित 17.10.2022 खण्डित किया जाता है तथा विचारण न्यायालय को आदेशित किया जाता है कि वह अभियुक्त द्वारा प्रस्तुत 117 ख प्रार्थनापत्र को स्वीकार कर शस्त्र विशेषज्ञ को विशेष वाहक द्वारा अथवा सामान्य प्रकार से आहूत कर उसे परीक्षित कर प्रार्थी/ अभियुक्त को उसकी प्रति परीक्षा का अवसर प्रदान करे।

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

1. Heard Sri Amrendra Nath Singh, Advocate assisted by Sri Pramod Kumar Singh and Sujeet Kumar, learned counsels for the applicant, Sri Manoj Kumar, learned counsel for the respondent no. 2, learned A.G.A. for the State and perused the records.

2. Order in Chamber.

(2023) 3 ILRA 510
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.03.2023

BEFORE

THE HON'BLE SIDDHARTH, J.

Crl. Misc. Bail Cancellation Application (U/S 438 Cr.P.C.) No. 36 of 2023

Isha Agrawal ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Veerendra Singh, Sri Prateek Kumar Srivastava, Sri V.P. Srivastava (Sr. Advocate), Smt. Isha Agrawal (In Person)

Counsel for the Opposite Parties:
G.A., Sri Manu Sharma, Sri Dinesh Kumar Pandey

A. Criminal Law - Code of Criminal Procedure, 1973-Section 439(2) - Indian Penal Code, 1860-Sections 186, 228, 352, 353, 354, 354-D, 506& 509 – Information Technology Act, 2000 - Section 67 - applicant who was posted as Civil Judge, Junior Division, one practicing advocate started sending obnoxious message to her CUG number and facebook and gazed her continuously in the court room-this is a case where judicial officer/Presiding officer of a court of law has been harassed on the basis of gender-recovery of mobile phone of the opposite party shows that he used the said mobile phone in the commission of the alleged crime against the applicant-The session court granted bail to the opposite party but the Session Judge did not consider the impact of the conduct attributed to opposite party that it will have deleterious effect on the functioning of the judicial system at the grass root level, his conduct was not only criminal in nature but he also committed criminal contempt of court since his act amounted to interference with course of justice and obstruction in the administration of justice-Hence, bail granted by the court below to opposite party is cancelled.(Para 1 to 10)

The bail cancellation application is allowed. (E-6)

List of Cases cited:

Satendra Kumar Antil Vs C.B.I & anr.,SLP(Crl.) No 5191 of 2021

(Delivered by Hon'ble Siddharth, J.)

1. Heard Smt. Isha Agrawal, applicant in person; Sri Manu Sharma, learned counsel for opposite party no.2; learned AGA for the State and perused the material placed on record.

2. This bail cancellation application has been filed by the applicant praying for cancellation of bail granted to the accused-opposite party no.2, Abhay Pratap, in Case Crime No. 577 of 2022, under Sections 186, 228, 352, 353, 354, 354-D, 506, 509 IPC and Section 67 I.T Act, Police Station Kotwali, District- Maharajganj by the court of Sessions Judge, Maharajganj, in Bail Application No.1927 of 2022, Abhay Pratap Vs. State of U.P. on 17.12.2022 wrongly relying upon the judgement of Apex Court in the case of ***Satendra Kumar Antil Vs. C.B.I. & Another, passed in***

S.L.P.(Crl.) No. 5191 of 2021, judgement dated 11.7.2022.

3. The applicant is posted as Metropolitan Magistrate, Kanpur Nagar at present. At the time of the incident in question, she was posted as Civil Judge (Junior Division)/Judicial Magistrate in District Court Maharajganj. While she was performing her judicial duty, the opposite party no.2, Abhay Pratap, who is also a practicing Advocate in the same court, started sending obnoxious messages and casting certain remarks through messages on facebook account of the applicant. On noticing the messages of opposite party no.2, the applicant blocked the opposite party no.2 from sending messages. Thereafter opposite party no.2 got the official mobile number of the applicant and started sending messages on the same. He used to come to her court without any work and gazed her continuously. When the limit to tolerance was crossed by the opposite party no.2, applicant lodged the FIR against him at the police station Kotwali Maharajganj, on 11.11.2022 and also sent a representation to this Court through District Judge, Maharajganj, on 11.11.2022. Opposite party no.2 was never connected to the applicant on facebook or through any media platform nor his friend request was ever accepted by the applicant. Opposite party no.2 started sending messages to the applicant w.e.f. 29.9.2021 and thereafter he sent various messages to her, which were never replied by the applicant. On 17.7.2022 at about 1:58 a.m. he sent message, *"I love you Isha"*, then again he sent *"Is janam me nahi to agle janam me tujhe pane ki koshish prayas karta rahunga aur ho sake to sato janam"*. Being fed up with the conduct of the opposite party no.2, applicant blocked the opposite party no.2 on facebook account on 17.7.2022. On her CUG mobile number, he sent the message on 8.11.2022 at 4:31 a.m., *"Good Morning"* and then *"I love you Baby"*. The opposite party no.2 was arrested on 23.11.2022 and the learned Sessions Judge granted him bail on 17.12.2022 relying upon the case ***Satendra Kumar Antil (Supra).***

4. The applicant has appeared in person in Court and submitted that she is a Judicial Officer and was posted as Civil Judge (Junior Division), in District Court, Maharajganj, when the opposite party no.2 indulged in the undesirable and objectionable behaviour against her. She was not in a position to concentrate on her work and was apprehensive towards her security. She was distracted from discharge of her judicial duties freely and was in constant fear of maligning of her reputation by the opposite party no.2. Her marriage was settled and these messages could have destroyed her marital life in future and may have affected her prospective marital life. The opposite party no.2 is setting up dangerous trend and should be dealt with severely and bail granted to him should be cancelled. She has further submitted that the reliance of learned Sessions Judge on the judgment of ***Satendra Kumar Antil (supra)*** in the bail order is not correct since the charge-sheet was not filed against the opposite party no.2, when he was granted bail on 17.12.2022. Learned Sessions Judge has stated that charge-sheet against the opposite party no.2 is ready. It was not filed till then. All the offences against the opposite party no.2 are not bailable in nature. She has submitted that the findings of the learned Sessions Judge that the charge-sheet against the opposite party no.2 is ready is incorrect. By means of rejoinder affidavit dated 15.2.2023 applicant has brought on record the questionnaire issued by the court of Judicial Magistrate,

Maharajganj, which shows that charge-sheet was not filed in the Case Crime No.577 of 2022 till 17.12.2022 nor cognizance was taken thereon till that date. She has submitted that the benefit of the judgment of ***Satendra Kumar Antil (supra)*** of the Apex Court has wrongly been extended to the applicant since he was arrested prior to the submission of the charge-sheet by the Investigating Officer.

5. Learned counsel for opposite party no.2 has submitted that opposite party no.2 is seeking unconditional apology from the applicant since he has highest regard for the law of the land and every member of the judicial fraternity. He has stated that he may be pardoned for any act which has hurt the position, respect, feelings or emotions of the applicant. He has undertaken not to repeat the misdeeds committed by him earlier. He has further submitted that all the offences alleged are punishable upto seven years and he has not violated any condition of bail granted to him.

6. Learned AGA has submitted that from the mobile phone of the opposite party no.2 recovered by the Investigating Officer, it was found that the aforesaid phone was used in the commission of the alleged crime against the applicant by the opposite party no.2.

7. After hearing the rival contentions, this Court finds that the learned Sessions Judge has neither considered the correct, legal and factual position of the case while granting bail to the opposite party no.2 nor has applied mind to the future repercussions of granting bail to an accused involved in committing such offences against a female Presiding Officer of a Court of Law. of It is clear from the record that the charge-sheet was not submitted against the opposite party no.2, when he was granted bail by the learned Sessions Judge, Maharajganj, relying upon the judgment of Apex Court in the case of ***Satendra Kumar Antil (supra).*** The investigation was in progress when the opposite party no.2 was put behind bars on 23.11.2022 and sent to jail. It may be true that all the offence against opposite party no.2 are punishable with terms of imprisonment below 7 years, but all offences are not bailable. At least two of the alleged offences punishable under Sections 353 and 354 IPC are non bailable. It is not a case where bail should have been granted on a matter of right. Normally lenient view in matters of bail pending trial are taken where offences are punishable with terms below 7 years. The facts of this case are different from ordinary course. There is a case where a Judicial Officer/ Presiding Officer of a court of law, has been harassed on the basis of gender. Onerous conduct on the part of opposite party no.2, who is no other than very responsible officer of the court, was expected. The impact of the conduct attributed to opposite party no.2 is such that it will have deleterious effect on the functioning of the judicial system at the grass root of level. It ought to have considered by the Sessions Judge in that context. This has not been done. This Court is of the view that given aforesaid circumstances and the fact that Investigation was under progress, grant of bail to opposite party no.2 cannot be countenanced. Hence bail granted by the court below to opposite party no.2 is hereby cancelled. The opposite party no.2 is directed to surrender forthwith before the court concerned.

8. The trial court is directed to conclude the trial against opposite party no.2, within six months.

9. Before parting with this case, this Court finds that the conduct of the opposite

party no.2, namely, Abhay Pratap, was not only criminal in nature and unbecoming of an Officer of the court, but he also committed criminal contempt of court since his act amounted to interference with course of justice and obstruction in the administration of justice.

10. "Criminal contempt" means the publication (whether by words, spoken or written or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which: 1. scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court, or 2. prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or 3. interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner. Section 2(c) of the Act emphasizes to the interference with the courts of justice or obstruction of the administration of justice or scandalizing or lowering the authority of the court. Section 10 deals with power of High Court to punish contempts of subordinate courts. Section 12 deals with the punishment for the contempt of court. Section 14(2) permits a person charged with the contempt to have charge against him tried by some Judge other than the judge or judges in whose presence or hearing the offence is alleged to have been committed and the court is of opinion that it is practicable to do so. Section 15 of the Act empowers the court to take suo moto action for cognizance of Criminal Contempt.

11. Conduct of opposite party no.2 against the applicant amounted to creation of fear in the minds of the female Presiding Officers of District Court faced with the acts of sexual harassment. No Presiding Officer of a court can be expected to discharge her official duties of administration of justice freely and fairly with a balanced and composed state of mind, if such acts or the mere apprehension thereof are there. The apprehension of harassment through spoken words and written words and stalking in court will always loom large over her psyche. In a situation where Presiding Officer of the court is herself not secure, it cannot be expected that she would be able to protect the litigants, who appear before her for protection of their modesty from unwarranted incursions and outrage by accused, like opposite party no.2. This Court has come across another such case of another district, wherein a future date has been fixed and it appears that this malice is spreading fast in the district courts. The case which came before this Court earlier also involved a lawyer of District Court committing such offences against a female Presiding Officer. In such a situation, this Court is of the firm view that before this meance spreads further the accused, like the opposite party no.2, ought to be dealt with iron hands through initiation of proceedings for criminal contempt. Policy of Zero Tolerance in such matters has become imperative.

12. Accordingly, the Registry of this Court is directed place this case before the appropriate Bench, within two weeks for taking suo moto cognizance of the criminal contempt committed by the opposite party no.2., Abhay Pratap.

(2023) 3 ILRA 513
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.03.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Crl. Misc. Anticipatory Bail Application (U/S 438 Cr.P.C.) No. 846 of 2023

Srijan Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ajeet Singh, Sri Shaghir Ahmad (Sr. Advocate)

Counsel for the Opposite Parties:
G.A., Sri Ankit Kapoor, Sri Prashant Pandey

A. Criminal 60-A-Code of Criminal Procedure, 1973-Section 438 - Indian Penal Code-1860-Sections 307 & 506-application-rejection-enmity-number of independent witnesses stated that applicant tried to kill the opposite parties due to old enmity which is apparent from previous FIR lodged by the applicant-No probability of any colored or exaggerated version of FIR-Injured sustained a number of injuries-Not only oral evidence, other pieces of evidence like CCTV footage, spot inspection report which corroborates the prosecution theory-More than sufficient evidence to show the complicity of the applicant in the present case-Hence, this is not a fit case for grant of anticipatory bail.(Para 1 to 6)

The bail application is rejected. (E-6)

List of Cases cited:

1. Ravi Kapur Vs St. of Raj. (2012) AIR SC 2986
2. Alister Anthony Pareira Vs St. of Mah. (2012) 2 SCC 648
3. K.Rajapandian Vs St. of NCT of Delhi (2022) LawSuit (Del) 1085

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

1. Heard Sri Shaghir Ahmad, Senior Advocate assisted by Sri Ajeet Singh, learned counsel for the applicant, Sri Prashant Pandey, learned counsel for the first informant, Sri O.P. Mishra, learned AGA for the State and perused the papers on record.

2. The present application has been moved on behalf of the applicant-**Srijan Singh** seeking anticipatory bail in Case Crime no. 0421 of 2022, under Sections 307 and 506 I.P.C., Police Station Bhelupur, District Varanasi.

3. As per allegations in the FIR on the day of occurrence i.e., at about 1 pm on 26.12.2022, one Ashutosh Tiwari alongwith his friend Shariq was going on his motorbike; the moment he reached near R.P.F barrack, Srijan Singh S/o Manoj (present applicant), with the intention to kill him, over an old enmity deliberately and intentionally ran his four wheeler over Ashutosh Tiwari; it is alleged in the FIR that this act was done purposefully and knowingly; three other co-accused were also sitting in that four wheeler; Ashotosh and his friend Shariq sustained number of serious injuries; Srijan Singh and Manoj Singh escaped in their four wheeler thinking that they have died; whole of the incident was recorded in C.C.T.V. camera; they were hospitalized and were referred to another hospital for further management; the injuries sustained by them were dangerous to life.

4. It is contended on behalf of the applicant that he was not driving the vehicle and that he has been falsely implicated in this case out of enmity; one Rajesh Singh, who is family driver of the applicant has stated that in fact it was he who was driving the four wheeler at the time of occurrence; it is next contended that at the most it was a case of rash and negligent driving and no offence under Sections 307 and 506 I.P.C. is made out; the investigation has not been conducted in a fair manner; it has been twisted to make out a case under Section 307 IPC.

To stress the above point, a judgment of Supreme Court given in ***Ravi Kapur vs. State of Rajasthan; AIR 2012***

SC 2986 has been cited before me. I went through the above judgment. It appears that the Supreme Court has analyzed the meaning of words 'negligence', 'culpable negligence', 'reasonable care', 'doctrine of res ipsa loquitur', 'difference between rashness and culpable rashness' and certain other matters in the light of Section 279 IPC. On the basis of above judgment, it is argued that this case essentially fell within the scope of Section 279 IPC only and not Section 307 IPC. I fail to understand how this judgment can be of any utility on the point stressed before this Court. Incidentally, in Para-15 of the judgment, the Supreme Court has referred to its own judgment in ***Alister Anthony Pareira vs. State of Maharashtra; (2012) 2 SCC 648,*** highlighting the fact that if a person doing an act of rash and negligent driving, is aware of the risk that a particular consequences is likely to follow and that consequences indeed occurs, he may be held guilty not only for the act but also for the consequences. In my view where the act is either intentional or done with conscious awareness of the consequences there is no need to go into finer points of differences between the rash and negligent act and any rash or negligent act with the knowledge of likelihood of dangerous consequences. In my view no benefit of this judgment can be derived by the applicant in view of the fact that the accused applicants act was allegedly intentional and deliberate.

Another judgment which has been cited before me is ***K. Rajapandian vs. State of NCT of Delhi; 2022 LawSuit (Del) 1085*** decided on 06.05.2022. I went through the above judgment too. Again I failed to understand how this judgment can give any benefit to the applicant.

5. The anticipatory bail application is vehemently opposed by other side pointing out certain facts, circumstances and also the reply in response to the point raised by the applicant which are as below:-

(i) There are number of independent witnesses including Chandrashekhar, Shariq, Ritesh Kumar and injured one, who have clearly stated that the applicant was driving the four wheeler and that he intentionally caused/changed the direction of his vehicle and ran over them; It is with god's grace that they have been saved;

(ii) The injured sustained a number of injuries which could have been proved fatal had timely medical assistance not given to them;

(iii) Not only the inculpatory oral evidence, there are other pieces of evidence like C.C.T.V. footage, the spot inspection report which corroborate the prosecution theory;

(iv) In this case, the FIR has been lodged in a prompt manner ruling out probability of introduction of any colored or exaggerated version or false implication;

(vii) Both the parties had strained relationship; This fact finds ample strength from the previous FIR lodged by Srijan Singh (the present applicant) against Shariq Khan and 2 others under Sections 279, 504, 323, 427, 506, 342 IPC. It is further argued that if enmity can be one of the causes for false implication, it can be one of the reasons which motivated the accused to try to kill the persons of the other side;

(viii) The admission of guilt by his man indicates that applicant can exert his influence over others to turn things in his favour;

(ix) It is argued that there is more than sufficient evidence to show the complicity of the applicant in this case and that he is one of the main accused persons, hence this is not a fit case for grant of anticipatory bail.

6. I considered the nature of allegations, the submissions of both the sides and went through all the material on record. It may be noted that an anticipatory bail is not a substitute for regular bail. The parameters for grant of anticipatory bail are fundamentally different from the grant of regular bail in certain respects. The exercise of this extra-ordinary powers calls for existence of some circumstances which may prompt this court to intervene in the regular process of law for the purpose of furthering the ends of justice and for preventing abuse/misuse of process of law. I do not find any material to form an opinion that the name of the applicant has been dragged in to merely bring disgrace to his name. I do not find any ground good enough to give benefit of anticipatory bail to the applicant, hence, the present anticipatory bail application is **rejected**.

7. **It is made clear that observations made herein shall not in any way affect the learned trial Judge in forming his independent opinion based on material before him at any stage of the trial.**

(2023) 3 ILRA 516
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.02.2023

BEFORE

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

Crl. Misc. Anticipatory Bail Application (U/S 438 Cr.P.C.) No. 1346 of 2023

And

Crl. Misc. Anticipatory Bail Application (U/S 438 Cr.P.C.) No. 1348 of 2023

Vinod Bihari Lal ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Rajiv Lochan Shukla, Sri Kumar Vikrant

Counsel for the Opposite Parties:
G.A.

A. Criminal Law -Code of Criminal Procedure,1973-Section 438 - Indian Penal Code, 1860-Sections 153-A, 506, 420, 467, 468 & 471 - U.P. Prohibition of Unlawful Conversion of Religion Act, 2021-Sections 3 & 5(1) - allegations of conversion with regard to vulnerable segments of society –applicants being influential persons are channelizing the funds collected from overseas group-the applicants are not cooperating with the police even after having knowledge of non-bailable warrants-Protection was granted but the applicants failed to ensure appearance before the Investigating Officer which shows that they do not have any intention to cooperate in the investigation-More so, the applicants cannot be excused only that they have not been named in the FIR-In the present case, sentiments of public at large are involved wherein any secular country like India the same would amount in shattering the peace and harmony-Hence, the power u/s 438 Cr.P.C. cannot be utilized in a routine manner as a substitute for regular bail.(Para 1 to 47)

B. The power of granting 'anticipatory bail' is extraordinary in character and only in exceptional cases where it appears that a person is falsely implicated or a frivolous case is launched against him or there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, such power is to be exercised. (Para 9)

The application is rejected. (E-6)

List of Cases cited:

1. Manish Yadav Vs St. of U.P. ABAIL NO. 4645 of 2022

2. Suresh Babu Vs St. of U.P. & anr., ABAIL No. 3532 of 2022

3. Nathu Singh Vs St. of U.P. & ors. (2021) 6 SCC 64

4. Rev. Stainislaus Vs St. of M.P. & ors. (1977) 1 SCC 677

5. Ali @ Ali Ahmad Vs St. of U.P. & ors., ABAIL No. 2904 fo 2022

6. Amish Devgan Vs U.O.I. & ors. (2021) 1 SCC 1

7. Shri Gurbaksh Singh Sibbia & ors. Vs St. of Punj.(1980) 2 SCC 565

8. Siddharam Satlingappa Mhetre Vs St. of Mah. & ors. (2011) 1 SCC 694

9. Sushila Aggarwal & ors. Vs St. (NCT of Delhi) & anr. (2020) 5 SCC 1

10. Sumitha Pradeep Vs Arun Kumar C.K. & anr..(2022) SCC OnLine SC 1529

11. Pokar Ram Vs St. of Raj. & ors..

12. Saddhna Chaudhary Vs The St. of Raj. & anr..

13. Pokar Ram Vs St. of Raj. & ors. (1985) 2 SCC 597

14. Jose Prakash George & ors Vs. St. of U.P. & ors, CMWP 1814 of 2023

15. Sadhna Chaudhary Vs. St. of Raj. & anr.. (2022) SCC OnLine SC 869

16. Shri Gurbaksh Singh Sibbia & ors. Vs St. of Punj.(1980) 2 SCC 565

17. Vipin Kumar Dhir Vs St. of Punj. & anr. (2021) AIR SC 4865

18. P. Chidambaram Vs ED(2019) 9 SCC 24

19. K.H. Nazar Vs Mathew K. Jacob & ors. (2020) 14 SCC 126

20. Deepika Singh Vs CAT & ors. (2022) SCC OnLine SC 1088

21. Lavesh Vs St. (NCT of Delhi) (2012) 8 SCC 730

22. St. of M.P. Vs Pradeep Sharma (2014) 2 SCC 171

23. In Re: The Issue Of Religion Conversion, WP (Civil) No. 63 of 2022

24. Badshah Vs Urmila Badshah Godse (2014) 1 SCC 188

25. Mahadev Meena Vs Praveen Rathore & anr. (2021) SCC OnLine SC 804

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

1. Both anticipatory bail applications have been moved for grant of anticipatory bail in Case Crime No. 224 of 2022, under Sections 153-A, 506, 420, 467, 468, 471 Indian Penal Code, 1860 and 3 & 5(1) U.P. Prohibition of Unlawful Conversion of Religion Act, 2021 (U.P. Act No. 3 of 2021), Police Station Kotwali, District Fatehpur.

2. Instant case, as the prosecution version, is that; a first information report was lodged by the informant- Himanshu Dixit with the allegations that about 90 persons of Hindu religion have been congregated at Evangelical Church of India, Hariharganj, Fatehpur for the purpose of their conversion to Christianity by putting them under undue influence, coercion and luring them by playing fraud and promise of easy money etc.; on receiving this information, the Government

officers reached the place and interrogated the pastor Vijay Massiah; he disclosed that the process for conversion was going on for the last 34 days and that this process shall be completed within 40 days; that they have been trying to convert even the patients admitted to the Mission Hospital and the employees have played an active role in the same; the Government officers found 35 persons (named in the F.I.R.) and 20 unknown persons as having been involved in this conversion of 90 persons of Hindu community to Christianity. The F.I.R. was registered under Sections 153A, 506, 420, 467, 468 I.P.C. and Sections- 3/5(1) of Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act and the matter was investigated upon.

3. **Facts & Arguments of learned Counsel for the Applicant in Anticipatory Bail Application No. 1346 of 2023:**

3.1. Sri Rajiv Lochan Shukla and Sri Kumar Vikrant, learned counsel appear for the applicant.

3.2. Learned counsel appearing for the applicant submits that the applicant is, at present, working as Director (Administration), Sam Higginbottom University of Agriculture, Technology and Sciences, Naini, Prayagraj (Allahabad), a Christian Minority Institution. He keeps a long stint of 37 years of unblemished service career in SHUATS, however, due to political change in State, he has been embroiled in 11 criminal cases between 2017 and 2018. The applicant professes Christian faith. He is being implicated in a false case of mass conversion, whereas on 14.4.2022 the applicant and his family members were peacefully congregated to participate in Special Prayer of Maundy Thursday which is attended by Christian community in respective Churches to offer special prayer. However, the informant along with his close associates barged into the Church and created chaos and turbulence. A first information report was lodged by the informant under Sections 153A, 506, 420, 467, 468 I.P.C. and Sections- 3/5(1) of Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act. Remand of few arrested accused was sought in various Sections, however, the learned Magistrate granted remand only under Sections 153-A and 506 IPC.

3.3. Learned counsel for the applicant further submits that after about eight months from the date of incident, the applicant has been issued notice under Section 41(1) The Code of Criminal Procedure, 1973, dated 16.12.2022 (Annexure-1), giving rise to apprehension of the applicant's arrest. Ostensibly, the said notice appears to have been issued for the purposes of getting statements recorded. To substantiate his submission regarding apprehension of arrest, he draws attention of the Court to Section 41(1) of Cr.P.C. which says any police officer may without an order from a Magistrate and without warrant, arrest any person who commits a cognizable offence.

3.4. Learned counsel for the applicant has drawn attention of the Court to the statements of witnesses, Issac Frank and Dinesh Shukla, recorded under Section 164 Cr.P.C. He submits that star witness of prosecution, Issac Frank, himself belongs to Christian religion and resides in Prayagraj, thus, no occasion arises for him to be converted. Since Issac Frank was chargesheeted and dismissed from services and later on he was reinstated after

tendering apologies, thus, he is an interested witness. Second witness Dinesh Shukla is an ex-student who was suspended on the allegations of misbehaving with female students. Learned counsel questions the fairness of Sri Dinesh Shukla also as a witness in this case.

3.5. The Investigating Officer - Amit Kumar Mishra, has also been mistrusted by the learned counsel for the applicant as being the Chawki Incharge of the Police Station Naini, Prayagraj because of friendly relations with other prosecution witnesses.

3.6. Learned counsel for the applicant further submits that there is no allegation against the applicant regarding mass conversion, as admittedly, the applicant was not present at Fatehpur on the date specified in FIR.

3.7. Learned counsel for the applicant has placed emphasis on Section 3 of the Act, 2021 which provides prohibition of conversion from one religion to another religion by misrepresentation, force, fraud, undue influence, coercion and allurement, clearly specifying that conversion on the aforesaid grounds from one religion to another religion is prohibited. False allegations regarding allurement and undue influence for the purposes of mass conversion have been made. It has also been alleged that free treatment was being provided to patients in the hospital which can not be said to be a temptation for purposes of mass conversion.

3.8. Learned counsel for the applicant emphasised upon the definition of "allurement' and "undue influence'. He submits that providing free treatment to patients who are in immediate need of it, does not amount to undue influence or allurement, rather it would be a failure on the part of the State to provide basic facilities to individuals in need of the same.

3.9. Emphasizing upon Section 5 of the Act, 2021 wherein punishment for contravention of provisions of Section 3 of the Act, 2021 is provided, learned counsel for the applicant submits that the punishment for allurement shall not be less than one year, which may extend up to three years. Placing the said provision forth, he tried to submit that the offence is not serious in nature and there being no allegation to be proved against the applicant, who is a respectable person, however, concerted efforts are being made to implicate him in the offence and he is being victimized for reasons best known to the persons concerned.

3.10. Learned counsel for the applicant further submits that as per Section-7 of the Act, 2021 all the offences under the Act, 2021 are considered to be cognizable and triable by the courts of Sessions, therefore, issuance of notices in this regard to ensure compliance of the Section leads to apprehension of arrest of the applicant. To brief the apprehension of arrest, he has also placed the provisions of Sections 209 and 437 Cr.P.C.

3.11. In paragraph-13 of the anticipatory bail application, it has been averred that six cases have been lodged against the applicant by office bearers of a political organization, namely, Diwakar Nath Tripathi and Dr. Shyam Prakash Dwivedi, which shows that the applicant is being dragged into the case.

3.12. In paragraph-37 of the affidavit filed in support of anticipatory bail application, learned counsel for the

applicant has mentioned about the procedure which is to be adopted for conversion through Baptism.

3.13. From the evidences collected during the course of investigation, certain C.D. Parchas have been placed by the learned A.G.A., wherein statements under Sections 161 and 164 Cr.P.C. of some persons have been recorded, however, learned counsel for the applicant submits that the statements under Section 164 Cr.P.C. should be given importance over statement under Section 161 Cr.P.C. As already submitted, name of the applicant has surfaced in the matter on the basis of statements of two interested witnesses and the Investigating Officer, who are biased against the applicant. Reliance cannot be placed upon Section 164 Cr.P.C., as the same is an afterthought and the persons who earlier did not utter any such allegation, are turning up with fallacious application after a number of days since lodging of the FIR. He also submits that no material connecting the applicant has been placed till date to show involvement of the applicant in the aforesaid case.

3.14. Mr. Shukla relied upon the judgements of this Court in the case of **Manish Yadav v. State of U.P.** and **Suresh Babu v. State of U.P. and another**, dated 14.7.2022 and 16.7.2022 respectively, wherein it has been observed that in case at the time of filing of anticipatory bail application the applicant was not a proclaimed offender, the bar imposed by the Apex Court for entertaining the anticipatory bail application of proclaimed offender would not attract.

3.15. Learned counsel for the applicant also apprised the Court of filing a a writ petition being Criminal Misc. Writ Petition No. 1814 of 2023 challenging the FIR dated 23.1.2023 filed by the victim, giving rise to Case Crime No. 54 of 2023, under Sections 420, 467, 468, 506, 120-B IPC & Section 3/5(1) of the Act, 2021, wherein the judgement was informed to have been reserved by Hon'ble Division Bench.

3.16. Some photographs showing the apprehension of arrest have been placed by learned counsel for the applicant.

4. **Facts & Arguments of learned Counsel for the Applicant in Anticipatory Bail Application No. 1348 of 2023:**

4.1. Sri G.S. Chaturvedi, learned Senior Advocate assisted by Sri Kumar Vikrant, learned counsel appears for the applicant.

4.2. Learned Senior Counsel submits that the applicant is a Scientist and Vice Chancellor of SHUATS. He is not aware of the chain of events alleged to have occurred on the date of incident. The applicant has no concern with Evangelical Church of India, Hariharganj, Fatehpur or Mission Hospital. He has illegally been dragged into controversy due to preconceived notion of Police Officials against the applicant.

4.3. It has also been argued by learned counsel for the applicant that the offence is punishable with only imprisonment up to five years, thus, as per the provisions of First Schedule of Cr.P.C., five years sentence is in minor offences, hence the applicant should not be denied anticipatory bail. He next argued that conversion to another religion is not an offence per se. It is open for everybody to follow the procedure to get himself or herself

converted, however, it should not be by tempting or alluring. Allurement is an offer and it is of two types: one either by force or by temptation.

4.4. Learned Senior Counsel further submits that the applicant has been implicated to add fun in the case. If the confession is ignored for the time being, there is nothing to show that conversion took place. He also submits that after about nine months, name of the applicant, surfaced in the statement of Issac Frank, came into picture. In regard to criminal history, he submits that criminal history of accused is relevant but where no evidence is against the accused, criminal history should not be taken into consideration for grant of bail. It has also been submitted by learned Senior Counsel that insofar as confessional statements are concerned, these are wholly inadmissible as also the statements of 65-70 persons are verbatim reproduction of FIR.

4.5. It is further argued that the allegations regarding conversion going on, can, at the utmost, be said to be preparation of conversion and it cannot be said that even an attempt was being made for converting persons from one religion to another religion. Placing reliance on Sections 8 and 9 of the Act, 2021 which is a Special Act, he further submits that provisions of the Act, 2021 should be strictly applied because safeguards have been provided in aforesaid Sections to prevent forceful conversion of any person.

4.6. Learned Senior Counsel submits that keeping in mind Sections 8 and 9 of the Act, 2021, no allegation in this regard has been found against the applicant. The Act of 2021 came into force on 27.11.2020. The allegations regarding funding for the purposes of alluring persons for mass conversion is lacking as no activity of applicant has been found in syphoning of funds for the purposes of mass conversion.

4.7. Learned Senior Counsel for the applicant submitted that earlier a writ petition was filed by the applicant challenging the FIR dated 15.4.2022 giving rise to Case Crime No. 224 of 2022, under Sections 153A, 506, 420, 467, 468 IPC and Section 3/5(1) of the Act, 2021 which was dismissed on the ground of locus as the applicant was not named in first information report.

4.8. Lastly, while placing reliance upon a judgement passed by the Supreme Court in the case of **Nathu Singh v. State of Uttar Pradesh & Ors** learned Senior Counsel submits that it is necessary to protect the person apprehending arrest for sometime due to exceptional circumstances as in the present case and as few persons have already been released on anticipatory bail, the applicant is entitled for the same on the ground of parity also.

5. **SUBMISSIONS OF STATE**:

5.1. Sri Manish Goel, learned Additional Advocate General/ learned Senior Advocate assisted by Sri A.K. Sand and Sri Amit Singh Chauhan, learned Additional Government Advocate-I, appears for the State.

5.2. Mr. Manish Goel, learned Addl. Advocate General, appearing for the State submits that it is a case of mass conversion, thus, the proviso to the Section - 5 of the Act, 2021 would be applicable, wherein the punishment up to ten years is prescribed. He submits that the object of Act, 2021 is to provide for prohibition of unlawful

conversion from one religion to another religion by misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means. The FIR has been lodged under Section 153A IPC, which envisages acts prejudicial to maintenance of harmony and since it is an offence against public tranquillity, therefore, insofar as legality concerning process of lodging FIR by third party, victims had also lodged FIR that made separate cause of action as also FIR has been lodged under several sections of IPC, therefore, third party cannot be ousted from lodging FIR for the offence against public tranquillity. He further argues that offences for which present FIR has been lodged have warring ramifications as some offences are those which violate fundamental rights of an individual whereas the other affect the mass i.e. public at large. There is abundance of details showing applicants' complicity with other persons who were regularly connected for the purposes of promoting mass conversion.

5.3. Mr. Goel further submits that the police found that there were about 100 application forms including that of minors, along with pamphlets for adopting and propagating Christianity mentioning therein that Rs. 35000/- would be paid if one adopts Christianity; there were trainers to educate how to propagate Christianity and to visit different places for gathering people and bringing them to motivate for conversion purpose.

5.4. Learned Addl. Advocate General emphasized over the ingredients of Section 2 of the Act, 2021 which elaborates the definitions of Allurement, Coercion, Conversion, Fraudulent means, Mass Conversion, Minor, Religion, Religion Convertor and Undue Influence. Next, he submits that statement of Issac Frank (CD-51) shows how the money was being received from various countries and subsequently channelized. There are different kinds of organizations and the present one is run by Mr. R.B. Lal. It has also been argued that Section 4 of Cr.P.C. provides for investigation to be done by same provisions, subject to enactment of provision in the Special Act. Here, the Act, 2021 does not provide any mechanism for investigation, and, if so, the provisions of the Code of Criminal Procedure would apply as also the Act, 2021 does not prohibits operation of Cr.P.C.

5.5. Replying to the submission regarding a writ petition filed by the applicant - R.B. Lal, Sri Manish Goel submits that though the petition was dismissed on the ground that the applicant was not named in FIR, however, it has been observed by the Division Bench in the said case that as per settled position of law, if upon perusal of FIR accepting every word therein to be correct, if no offence is disclosed, the FIR is liable to be quashed. In the present case though the petition was dismissed being not maintainable as the applicant being not named in the aforesaid case, a perusal of the FIR discloses offence against the applicant and during the course of investigation pursuant to said FIR, material evidence has been collected to point out the culpability of the applicant.

5.6. In regard to the submissions of police raid in the office of the applicant - V.B. Lal by the SIT, learned Addl. Advocate General submits that the team was constituted for investigating the matter regarding allegations in FIR with respect to syphoning of funds.

5.7. Stressing upon applicant's complicity in mass conversion, learned AAG shows that the statement of Santosh

Kumar Saini, an independent witness of the offence & employee of the Hospital since 2017 who disclosed names of several persons belonging to Hindu family of poor economic condition were forced to adopt other religion by conversion. He stated about the allurements provided to persons belonging to marginal section of the society for conversion. He also revealed Hariharganj incident dated 24.1.2023 pointing out the identity of influential persons (CD-68).

5.8. Mr. Goel submits that the applicants have been issued non-bailable warrants and it is a well settled law of the Apex Court that wherein non-bailable warrants are in operation, the accused-applicants in such cases are not entitled for anticipatory bail. It is the culpability of the applicant only to establish that he is entitled for grant of anticipatory bail. He has drawn attention of the Court to the statements of Sayapal and Kishanpal further stating that charge-sheet has been submitted against 43 persons on 27.1.2023 and Section 8 of the Act, 2021 has also been added. Thus, culpability of the applicants is well established from the sort of work which he was doing as also the funds in the manner being channelized.

5.9. Learned counsel for the applicants also placed on record a judgement of the Apex Court in the Case of **Rev. Stainislaus v. State of Madhya Pradesh and others**, wherein the term "allurement' fell for consideration and expression "public order' has been dealt with extensively.

5.10. To demonstrate defiance by the applicants, learned Additional Advocate General sought attention of the Court to the interim order granted by this Court on 09.2.2023, in the following terms:

"It is provided that, if the applicant appears before the Investigating Officer on 13th & 15th February, 2023 and files an undertaking to that effect before the Investigating Officer on 13th February, 2023 itself surrendering his passport, if any, to further the investigation, Investigating Officer shall ensure that neither the applicant be arrested nor any coercive action is taken in the present case till 15.2.2023. It is also directed that the Senior Officials as well as Investigating Officer concerned shall ensure that the applicant be not arrested on 13th and 15th February, 2023 when he comes to cooperate in the investigation."

5.11. It is next submitted that the applicants were expected to cooperate in the investigation appearing before the Investigating Officer on the dates given in the order itself i.e. 13th February and 15th February, 2023, but they failed to abide by the directions of this Court whereas the Investigating Officer waited for them on 13th February, 2023 up till 11:40 p.m. and on 15th February, 2023 up till 11:21 p.m., thus demeanour of the applicants amounts to breach of the order passed by this Court which shows sheer disrespect of the spirit of Section 438 Cr.P.C. and also amounts to misuse of liberty, hence the applicants are not entitled to be released on anticipatory bail on this ground itself.

5.12. Relying upon a judgement of this Court in the case of **Ali @ Ali Ahmad v. State of U.P. and 2 Others** Mr. Manish Goel submits that it is not necessary that the accused be declared proclaimed offender, but, intention of not cooperating in the investigation is sufficient, as in the present case, even after having knowledge of non-bailable warrants the applicants are not cooperating with the police and thus

they are not entitled for consideration to be released on anticipatory bail.

5.13. Learned AAG further relied upon the judgement of the Apex Court in the case of **Amish Devgan v. Union of India and others** pressing upon the principles of diminished autonomy wherein underprivileged section of society in terms of money, caste, gender have to be protected. He submits that hospital in question which is a Mission Hospital is the best example of diminished autonomy.

5.14. It is argued that the following material has been collected to show the involvement of the applicants in the present case:

(i) Statements of witness Pramod Kumar Dixit, Sanjay Singh and Rajesh Kumar Trivedi, which form part of CD Parcha No. 9 and of independent witnesses, namely, Keshan and Satya Pal forming part of CD Parch No. 12, stated to have been allured for conversion.

(ii) CD Parcha Nos. 15, 16, 20 and 29 show that the remand was accepted in all Sections mentioned in FIR.

(iii) In CD Parcha No. 18, victims Keshan and Satyapal have narrated the entire version in detail.

(iv) CD Parcha No 26 shows statements of ten witnesses, namely, Honey S/o Rampal; Suresh S/o Kallu; Riya D/o Govind; Brijesh Kumar S/o Rajnesh Prasad; Ramesh S/o Pannalal; Rampal S/o Late Bajpali; Ashok Kumar S/o Late Sualal; Vijay S/o Late Chunku Prasad; Vijay S/o Late Vishkarma Lohar, and Amit Maurya S/o Ram Shriomani Maurya. They have stated that Church along with Vijay Massiah (Pastor) and other accused persons are involved in unlawful conversion of large number of persons to Christianity.

(v) In CD Parcha No. 29 statement of victim Sanjay Singh has been recorded. CD Parcha No. 36 shows that 39 accused persons have obtained orders under Section 82 Cr.P.C.

(vi) Statement of victim Virendra Kumar has been recorded in CD Parcha No. 38. CD Parcha No. 41, which shows that notice under Section 91 Cr.P.C. was given to Dr. Mathew Samuel, Chairman, Broadwell Christian Hospital Society, Fatehpur. Replying to the said notice, he supplied copy of Aadhar Cards of 17 accused persons being employee of the Society, Bank Account details along with society registration papers.

(vi) Daud Massiah and Ratna Massiah co-accused persons have confessed about conversion being carried out with the assistance of applicants and other accused persons naming various organizations including the applicants for being involved in such offence which are recorded in CD Parcha No. 46.

(vii) Parcha No. 48 is statement of independent witness Dinesh Shukla, examined on 19.12.2022 who has stated complicity of the applicants. In CD Parcha No. 50 statements of persons who have mentioned the names of applicants and have shown their complicity in the offence has been recorded.

(viii) CD Parcha No. 54 shows a list of beneficiaries who were converted and their photographs were found from Broadwell Christian Hospital.

(ix) In spite of notice under Section 41(2) Cr.P.C. to Dr. Mathew Samuel and Parminder Singh, Clerk, they did not turn up as is evident from CD Parcha No. 55.

(x) In CD Parcha No. 61 names of various institutions involved in conversion have been revealed.

(xi) CD Parcha No. 64 is a collection of various documents regarding mass conversion found from Broadwell

Christian Hospital wherein material with regard to religious conversion has also been found.

(xii) Statements and details of SHUATS Bank account were taken by the I.O. which forms part of CD Parcha No. 67. Charge-sheet has been filed against 44 accused persons on 27.1.2023.

5.15. Apart from the above grounds, learned AAG has opposed the anticipatory bail applications on the following grounds:

(i) The incident created a lot of flutter and tension amongst the persons of one community and also created a law and order situation. In aftermath, the persons of one community collected at a place and raised slogans and the police had difficult time in controlling them and any untoward incident could have taken place if they were not sufficiently prepared and alert.

(ii) It is stated by one of the witnesses Shri Keshan that on same kind of assurances like free of cost medical assistance, education and employment to his children and monetary benefits once he is converted to their faith, he was lured into this process; that his Aadhaar card was taken and his name was changed from Shri Keshan to Keshan Joseph; he was also threatened by the accused persons that in case he disclosed the incident to anybody, his life will be at risk.

(iii) There was a bigger conspiracy hatched by the applicants and their associates with wider ramifications; they were acting in an organized manner for mass conversion. This is not a case where an individual was driven by his conscience to convert to a different faith, but, the accused persons in tandem with each other systematically went on to influence the persons who usually came in their contact for medical treatment or otherwise. Their poor socio-economic condition was exploited to lure them into participating in mass conversion. The offer for easy money, jobs etc. were used as a bait to tempt them in this incident. The incident might seem not so grave on surface but had a hidden agenda behind it.

(iv)) It is also argued that there is no substance in the argument that applicants have been falsely implicated or that F.I.R. was motivated one.

(v) The bail at this stage may prove a hurdle in effective investigation in this case.

5.16. Learned AAG submits that while rejecting the anticipatory bail application, the Sessions Court has discussed in details about non-cooperation of the applicants in investigation in an offence which is affecting the public at large.

6. I have considered the rival submissions advanced by learned counsel appearing for the parties and perused the material available on record.

7. The gravamen of the matter, wherein the applicants before this Court are for grant anticipatory bail, is "Conversion'. Party titled as applicant in both applications calls it "conversion by law', however, the party - Respondent worded it as "conversion for allurement'.

8. This Court finds it more appropriate to align the arguments advanced by learned counsel for the applicants and learned Additional Advocate General for the State, factual and legal aspects, object and principles, with the ingredients of conditions for the grant of anticipatory bail as well as the law settled in respect thereof.

9. **Object and purposes of Anticipatory Bail are summarized as under:**

(i) The power of granting `anticipatory bail' is extraordinary in character and only in exceptional cases where it appears that a person is falsely implicated or a frivolous case is launched against him or there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, such power is to be exercised. Therefore, the power being `unusual and extraordinary in nature' is entrusted only to the higher echelons of judicial service, i.e. a Court of Session and a High Court.

(ii) The conflict of judicial opinion whether a High Court had inherent powers to make an order of bail in anticipation of arrest and the need to curb the acts of, influential persons trying to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days were the necessities, carved out by Law Commission of India in its 41st Report to introduce provision relating to Anticipatory bail.

(iii) As most things have a dark side, so do this provision of the Code. The object behind enacting this law was to prevent the innocent from getting trapped, but with time, the picture has changed and now persons accused of heinous offences and even habitual offenders are invoking it repeatedly, which was not the intent of the relief sought to be given by this section.

(iv) The Courts have felt that wide discretionary power conferred by the Legislature on the higher echelons in the criminal justice delivery system cannot be put in the form of strait-jacket rules for universal application as the question whether to grant bail or not depends, for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. A circumstance which, in a given case, turns out to be conclusive may or may not have any significance in another case. Nonetheless, the discretion under the Section has to be exercised with due care and circumspection depending on circumstances justifying its exercise.

(v) Section 438(1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has reason to believe that he may be arrested for a non-bailable offence. The use of the expression "reason to believe" shows that the belief that applicant may be so arrested must be founded on reasonable grounds. Mere fear is not belief, for this reason, it is not enough for the applicant to show that he has some sort of a vague apprehension that someone is going to make an accusation against him, in pursuance of which he may be arrested.

(vi) 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.' 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's keep in mind while deciding an application for anticipatory bail.'

(vii) In evaluation of the consideration whether the applicant is likely to abscond, there can be no

presumption that the wealthy and the mighty will submit themselves to trial and that the humble and the poor will run away from the course of justice, and more than there can be a presumption that the former are not likely to commit a crime and the latter are more likely to commit it. In considering a petition for grant of bail necessarily, if public interest requires, detention of citizen in custody for purpose of investigation could be considered and rejected, as otherwise, there could be hurdles in investigation even resulting in tempering of evidence.

(viii) The Apex Court has held that anticipatory bail cannot be granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution and that it cannot be considered as an essential ingredient of Article 21 of the Constitution. Therefore its non-application to a certain special category of offences cannot be considered as violative of Article 21.

(ix) A duty has been thrust on the courts, to examine the facts carefully and to ensure that no prejudice is caused to investigation. It is a delicate balance whereby the liberty of citizen and the operation of criminal justice system have both to be safeguarded. Custodial interrogation of such accused is indispensable necessary for the investigating agency to unearth all the links involved in the criminal conspiracies committed by the persons which ultimately led to capital tragedy.

(x) Where it is pointed out that the action is malafide or tainted the courts are required to reach out the conclusion and do justice by preventing harassment and unjustified detention. Specific events and facts must be disclosed by the applicant in order to enable the court to judge the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the section.

(xi) But, while granting such anticipatory bail, the Court may impose such conditions as it thinks fit, but the object of putting conditions should be to avoid the possibility of the person hampering investigation. Harsh, onerous and excessive conditions which frustrate the very object of anticipatory bail cannot to be imposed. Subjecting an accused to any condition other than conditions mentioned in the Section is beyond the jurisdiction of the court.

(xii) Filing of F.I.R is not a condition precedent to the exercise of the power under Section 438 and the imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an F.I.R. is not yet filed. Anticipatory bail can be granted even after an F.I.R. is filed, so long as the applicant has not been arrested. The provision cannot be invoked after the arrest of an accused. Moreover the salutary provision contained in Section 438 Cr.P.C. were introduced to enable the Court to prevent the deprivation of personal liberty. It cannot be permitted to be jettisoned on technicalities such as the challan having been presented anticipatory bail cannot be granted.

10. In the present case, apart from offences fall amongst other Sections of IPC i.e. Sections 153-A, 506, 420, 467, 468, 471 IPC, allegation of religious conversion by use of allurement, deception or force involved under Section 3 & 5 (1) of the Act, 2021 is involved. Allegation of conversion is with regard to vulnerable segments of society. The applicants herein are praying for grant of anticipatory bail, thus, before adverting to facts and law settled applicable on the present case, it is apposite to quote Section 438 Cr.P.C.:

"438. Direction for grant bail to person apprehending arrest.--(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:--

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested; either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.

(2) Where the High Court or, as the case may be, the Court of Session, considers it expedient to issue an interim order to grant anticipatory bail under sub-section (1), the Court shall indicate therein the date, on which the application for grant of anticipatory bail shall be finally heard for passing an order thereon, as the Court may deem fit, arid if the Court passes any order granting anticipatory bail, such order shall include inter alia the following conditions, namely--

(i) that the applicant shall make himself available for interrogation by a police officer as and when required;

(ii) that the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) that the applicant shall not leave India without the previous permission of the Court; and

(iv) such other conditions as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that section.

Explanation.--The final order made on an application for direction under sub-section (1); shall not be construed as an interlocutory order for the purpose of this Code.

(3) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(4) On the date indicated in the interim order under sub-section (2), the Court shall hear the Public Prosecutor and the applicant and after due consideration of their contentions, it may either confirm, modify or cancel the interim order.

(5) The High Court or the Court of Session, as the case may be, shall finally dispose of an application for grant of anticipatory bail under sub-section (1), within thirty days of the date of such application;

(6) Provisions of this section shall not be applicable,--

(a) to the offences arising out of,--

(i) the Unlawful Activities (Prevention) Act, 1967;

(ii) the Narcotic Drugs and Psychotropic Substances Act, 1985;

(iii) the Official Secret Act, 1923;

(iv) the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986.

(b) in the offences, in which death sentence can be awarded.

(7) If an application under this section has been made by any person to the High Court, no application by the same person shall be entertained by the Court of Session. [U.P. Act 4 of 2019, S. 2 (w.e.f. 1-6-2019).

11. The words **''allurement'** and **''undue influence'**, to which the entire issue encircles, as defined in Section 2 of the Act, 2021, reads thus:

(a) "Allurement" means and includes offer of any temptation in the form of--

(i) any gift, gratification, easy money or material benefit either in cash or kind;

(ii) employment, free education in reputed school run by any religious body; or

(iii) better lifestyle, divine displeasure or otherwise;

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(j) "Undue influence" means the unconscientious use by one person of his/her power or influence over another in order to persuade the other to act in accordance with the will of the person exercising such influence;

12. A Constitution Bench of the Apex Court in the case of **Shri Gurbaksh Singh Sibbia and Others v. State of Punjab**, dealt with the considerations for grant of anticipatory bail in detail. Relying upon the Constitution Bench judgement in **Gurbaksh Singh Sibbia (supra),** the Supreme Court in the case of **Siddharam Satlingappa Mhetre v. State of Maharashtra and others,** laid down parameters and factors to be considered while dealing with application for anticipatory bail:

"112. ...

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or other offences;

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even

greater care and caution because overimplication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

13. Guiding principles in dealing with applications under Section 438 Cr.P.C. have been laid down by another Constitution Bench of the Supreme Court in the case of **Sushila Aggarwal and others v. State (NCT of Delhi) and another**. Said concluding factors read thus:

"**92**. This Court, in the light of the above discussion in the two judgments, and in the light of the answers to the reference, hereby clarifies that the following need to be kept in mind by courts, dealing with applications under Section 438 CrPC.

92.1. Consistent with the judgment in *Gurbaksh Singh Sibbia v. State of Punjab*, when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.

92.2. It may be advisable for the court, which is approached with an application under Section 438, depending on the seriousness of the threat (of arrest) to issue notice to the Public Prosecutor and obtain facts, even while granting *limited interim anticipatory bail.*

92.3. Nothing in Section 438 CrPC, compels or obliges courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc. The courts would be justified -- and ought to impose conditions spelt out in Section 437(3) CrPC [by virtue of Section 438(2)]. The need to impose other restrictive conditions, would have to be judged on a case-by-case basis, and depending upon the materials produced by the State or the investigating agency. Such special or other restrictive conditions may be imposed if the

case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.

92.4. Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.

92.5. Anticipatory bail granted can, depending on the conduct and behaviour of the accused, continue after filing of the charge-sheet till end of trial.

92.6. An order of anticipatory bail should not be "blanket" in the sense that it should not enable the accused to commit further offences and claim relief of indefinite protection from arrest. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence.

92.7. An order of anticipatory bail does not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted pre-arrest bail.

92.8. The observations in Sibbia regarding "limited custody" or "deemed custody" to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e. deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail. *Sibbia* had observed that: (SCC P. 584, para 19)

"19. ... if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in *State of U.P. v. Deoman Upadhyaya*."

92.9. It is open to the police or the investigating agency to move the court concerned, which grants anticipatory bail, for a direction under Section 439(2) to arrest the accused, in the event of violation of any term, such as absconding, non-cooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc."

14. The Apex Court in the case of **Sumitha Pradeep v. Arun Kumar C.K. & Another** noticing common argument being canvassed in numerous anticipatory bail matters that no custodial interrogation is required, observed that there appears to be a serious misconception of law that if no case of custodial interrogation is made out by the prosecution, then that alone would be a good ground to grant anticipatory. Relevant part of the said judgements reads thus:

"16. ...In many anticipatory bail matters, we have noticed one common argument being canvassed that no custodial interrogation is required and, therefore,

anticipatory bail may be granted. **There appears to be a serious misconception of law that if no case for custodial interrogation is made out by the prosecution, then that alone would be a good ground to grant anticipatory bail.** Custodial interrogation can be one of the relevant aspects to be considered along with other grounds while deciding an application seeking anticipatory bail. There may be many cases in which the custodial interrogation of the accused may not be required, but that does not mean that the prima facie case against the accused should be ignored or overlooked and he should be granted anticipatory bail. The first and foremost thing that the court hearing an anticipatory bail application should consider is the prima facie case put up against the accused. Thereafter, the nature of the offence should be looked into along with the severity of the punishment. Custodial interrogation can be one of the grounds to decline anticipatory bail. However, even if custodial interrogation is not required or necessitated, by itself, cannot be a ground to grant anticipatory bail."

15. Power of Section 438 while granting anticipatory bail should not be exercised *sub silentio* as to reasons or on considerations relevant or germane to the determination. The Supreme Court in the case of **Pokar Ram v. State of Rajasthan and others** has held that the anticipatory bail to some extent intrudes in the sphere of investigation of crime. Relevant excerpt of the said case is reproduced as under:

11. ...Anticipatory bail to some extent intrudes in the sphere of investigation of crime and the court must be cautious and circumspect in exercising such power of a discretionary nature. ...."

Applicability of settled law on the facts of the present cases:

16. Insofar as factor no. (i) as enumerated in Section 438 - **''the nature and gravity of the accusation'**, learned Counsel appearing for both the applicants tried to convince the Court pressing that since the punishment, as provided under Section 5 of the Act, 2021, for contravention of provisions of Section-3 of the Act, 2021, attracts only one year imprisonment which may extend to five years, therefore, the offence does not fall under the category which may impinge on granting anticipatory bail.

16.1. This Court finds though the offence warrants only five year imprisonment, however, the proviso to Section 5 also envisages that contravention in respect of mass conversion shall attract imprisonment for a term not less than three years but may extend to ten years as also the FIR in addition to Section 3/5(1) of the Act, 2021 includes offences under Sections 153A, 506, 420, 467, 468, 471 IPC for which the Magistrate did not issue remand at initial stage, however, subsequently the remand has been accorded in the remaining sections also.

17. Second factor which the Section 438 requires for consideration is **''that the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer'.** Learned counsel for the applicants have demonstrated the profile of the respective applicants stating that they do not have any connection with the offence and can never think to induce, threat or promise to dissuade anyone thus

the condition as factored is not presumed to be affected.

17.1. Arguments weighed in with regard to the applicants' position show that hardly it can be ensured that no such effect would be undertaken where the offence in question is of allurement as the victims belong to marginal section of society and are coming forward to lodge FIR. The arguments advanced by learned AAG outpaced the contention of the applicants.

18. With regard to the third factor that the applicants will not flee from justice and will extend cooperation at their end, they have shaken assurance by not adhering to the directions of this Court issued in the interim order passed on 09.02.2023. Issuance of non-bailable warrants due to non-cooperation and failing in ensuring presence before the Investigating Officer even after interim protection was granted by this Court also smashes the trustworthiness of the applicants which they tried to pose in arguments.

19. Regarding the fact that the FIR has not been lodged by a competent person as required under the relevant Sections of the Act, 2021. This Court feels that the FIR was lodged under other Sections of IPC also including Section 153-A IPC, therefore, it is not liable to be ousted only on the ground that same has been lodged by a person who is Secretary of some political organization.

20. It was pointed out by learned counsel for the applicant that the FIR has been lodged by victims being Case Crime No. 54 of 2023 and Case Crime No. 55 of 2023 under relevant Sections including Sections 3/5(1) of the Act, 2021, one of them i.e. Case Crime No. 54 of 2023 was under challenge before the Division of this Court, in which judgement was reserved 03.2.2023. Judgement in the present case was reserved on 17.2.2023 before lunch hours, after which it came to be known that the Division Bench of this Court has delivered the judgement in Criminal Misc. Writ Petition No. 1814 of 2023 on the same day i.e. 17.2.2023. While passing the aforesaid judgement, the Division Bench has made an observation that the FIR dated 15.4.2022 bearing Case Crime No. 224 of 2023 was not lodged by a person competent to make it.

21. The FIR itself reveals that it has been lodged in Sections 153-A, 506, 420, 467, 468, 471 IPC including Section 3/5(1) of the Act, 2021 which was challenged before the Division Bench of this Court in Criminal Misc. Writ Petition No. 324 of 2023 wherein while dismissing the writ petition as not maintainable, an observation came from the Bench that as per settled position, upon bare perusal of the FIR and keeping every word, therein, to be correct, if no offence is disclosed, FIR is liable to be quashed. It was also observed that if during the course of investigation any evidence is collected, the same cannot be considered or appreciated by the writ court. In the present case FIR, apart from Section 3/5(1) of the Act, 2021 includes other Sections for offences under IPC, therefore, the averments in the FIR cannot be ignored when material evidence has been collected against the applicants for offence affecting a large section of society which disturbs public order and the fact that the victims have also come forward to lodge FIR.

22. Be that as it may, the observation of the Division Bench of this Court in **Jose Prakash George (supra)** regarding the FIR being of no consequence (when the

same is not in question before the writ court in Criminal Misc. Writ Petition No. 1814 of 2023 as well as in the present case), is that there can be no apprehension with respect to the aforesaid FIR which is of no consequence and is not in existence. Even otherwise it is not necessary that the FIR should be in existence against the applicants when their involvement is being shown in the offence of mass conversion by the victims who have now come forward to lodge an FIR against the applicants.

23. The object of arrest and detention of the accused is primarily to secure his appearance at the time of trial and to ensure that if he is found guilty he is available to receive sentence. If presence at the relevant time could be ensured otherwise, it would be unfair and unjust to deprive the accused of liberty during the pendency of criminal proceedings.

24. Keeping in mind the object of Section 438 Cr.P.C., the Court vide order dated 09.2.2023 had protected the applicants with condition that they will cooperate in the investigation and appear before the Investigating Officer on 13th and 15th February, 2023. As pointed out by learned AAG the applicants did not appear which has not been disputed by learned counsel for the applicants. However, Mr. Shukla, learned counsel for the applicant - Vinod Bihari showed photographs to the Court, proving bonafide of the applicant, that a team of police officials had entered the office of one of the applicants hence there was apprehension of arrest, to which the learned A.G.A. has already submitted that a team of SIT has been constituted for investigation in the matter, wherein criminal cases regarding channelization of funds are already pending.

25. The Court finds that the applicants have misused the liberty which was one of the conditions while granting protection to the applicants, therefore, they are not entitled for the relief as claimed.

26. While arguing the matter, period of punishment has been stressed upon in order to make out a case where offence is not serious in nature. Looking into the provisions of relevant Sections, period of punishment has been pointed out, which is up to ten years but it is not only the period of punishment, but, the nature of offence which is to be taken into consideration as the same is affecting human body or society at large and that is what matters and has relevance. In the present case, as has already been pointed out by learned AGA, material evidence regarding mass conversion has been collected which affects society at large and hence is a serious offence and cannot be taken lightly.

27. Substantial evidence has been unearthed which proves involvement of the applicants in the offence pertaining to the cause of affecting public at large, thus, such offence cannot be taken up in a normal course. Efforts regarding collection of evidence pertaining to channelizing funding being done by the Investigating Officer wherein the applicants are required to cooperate with the investigation. In such cases, the investigation must proceed without the applicants being under the protection of this Court through the Investigating Officer who is well versed with the process of law and is a part of law enforcement machinery. Reference may be made to the judgement of the Supreme Court in the case of **Sadhna Chaudhary v. The State of Rajasthan & Anr**, wherein the Apex Court has observed that being a law-abiding person (accused therein),

adherence to law has to be stringent than expected in general by a common man. The applicants herein bears high position, thus, they should have been diligent about the conditions of interim protection whereby they were asked to appear before the Investigating Officer on the scheduled dates mentioned therein.

28. As discussed in various judgements, certain relevant factors have to be considered while granting anticipatory bail, one of them, being the gravity of offence, this Court finds that the present case has transcended and gone beyond a simple case for anticipatory bail, where, during pendency of present application several first information reports have been lodged by the victims who have been converted by undue influence or allurement. This Court cannot close its eyes to the fact that the material evidence has been collected regarding mass conversion of persons and this case has taken a far more serious turn where the victims are coming forward to give evidence, thus, in case protection is granted, same would hamper process of investigation.

29. While considering the guidelines regarding grant of anticipatory bail the Supreme Court in case of **Pokar Ram v. State of Rajasthan and others** discussed about the judgement of a Constitution Bench of the Apex Court in the case of Shri Gurbaksh Singh Sibbia and Others v. State of Punjab28 and observed that a caution was voiced in the evaluation of consideration whether the applicant is likely to abscond, there can be no presumption that the wealthy and the mighty will submit themselves to trial and that the humble and the poor will run away from the course of justice, and more than that, there can be a presumption that the former are not likely to commit a crime and the latter are more likely to commit it: Relevant paragraph of said judgement in **Pokar Ram (supra)** reads thus:

"6. The decision of the Constitution Bench in Gurbaksh Singh Sibbia v. State of Punjab clearly lays down that "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". Unlike a post-arrest order of bail, it 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. A direction under Section 438 is intended to confer conditional immunity from the touch as envisaged by Section 46(1) or confinement. In para 31, Chandrachud, C.J. clearly demarcated the distinction between the relevant considerations while examining an application for anticipatory bail and an application for bail after arrest in the course of investigation. Says the learned Chief Justice that 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. It was observed that "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". Some of the relevant considerations which govern the discretion, noticed therein are "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". A caution was voiced that "in the evaluation of the consideration whether the applicant is likely to abscond, there can be no presumption that the wealthy and the mighty will submit themselves to trial and that the humble and the poor will run away from the course of justice, any more than there can be a presumption that the former are not likely to commit a crime and the latter are more likely to commit it".

30. It is a settled law that while considering the case for granting anticipatory bail, the Court must not overlook the possibility of accused to influence the prosecution witnesses, threatening family members, fleeing from justice, creating other impediments and fair investigation. In the case of **Vipin Kumar Dhir v. State of Punjab and another** the Apex Court has held that even if there is any procedural irregularity in declaring the accused an absconder that by itself was not a justifiable ground to grant pre-arrest bail. Relevant part of the judgement is quoted hereinbelow:

"13. Even if there was any procedural irregularity in declaring the Respondent-Accused as an absconder, that by itself was not a justifiable ground to grant pre-arrest bail in a case of grave offence save where the High Court on perusal of case-diary and other material on record is, prima facie, satisfied that it is a case of false or over-exaggerated accusation. Such being not the case here, the High Court went on a wrong premise in granting anticipatory bail to the Respondent-Accused."

31. Non-bailable warrants have been issued on 04.2.2023, however, presuming that proper procedure was not followed for issuance of the same, protection was granted after 04.2.2023 with condition to appear before the Investigating Officer, which the applicants failed to ensure. Non-appearance of the applicants shows that they do not have any intention to cooperate in the investigation.

32. The offence as per present FIR as well as the material collected during investigation and the FIR as lodged by the victims, sentiments of public at large are involved wherein any secular country like India the same would amount in shattering the peace and harmony which would affect public order. The applicants cannot be excused only considering the fact that they have not been named in the first information report.

33. Though object of Section 438 Cr.P.C. is to safeguard the personal liberty of individual. A delicate balance is required to be established between the two rights i.e. safeguarding the personal liberty of an individual and societal interest as has been held in the case of **P. Chidambaram v. Directorate of Enforcement**. Relevant paragraphs of the said judgement are reproduced hereunder:

"72. We are conscious of the fact that the legislative intent behind the

introduction of Section 438 CrPC is to safeguard the individual's personal liberty and to protect him from the possibility of being humiliated and from being subjected to unnecessary police custody. However, the court must also keep in view that a criminal offence is not just an offence against an individual, rather the larger societal interest is at stake. Therefore, a delicate balance is required to be established between the two rights - safeguarding the personal liberty of an individual and the societal interest. It cannot be said that refusal to grant anticipatory bail would amount to denial of the rights conferred upon the appellant under Article 21 of the Constitution of India.

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74. Ordinarily, arrest is a part of the process of the investigation intended to secure several purposes. There may be circumstances in which the accused may provide information leading to discovery of material facts and relevant information. Grant of anticipatory bail may hamper the investigation. Pre-arrest bail is to strike a balance between the individual's right to personal freedom and the right of the investigating agency to interrogate the accused as to the material so far collected and to collect more information which may lead to recovery of relevant information. In State v. Anil Sharma31, the Supreme Court held as under : (SCC p. 189, para 6)

"6. We find force in the submission of CBI that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well-ensconced with a favourable order under Section 438 of the Code. In a case like this, effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders."

34. With respect to the arguments that Section 4 of Cr.P.C. provides for investigation to be done by same provisions, subject to enactment of provision in the Special Act (the Act, 2021 does not provide any mechanism for investigation), reference to a judgement of the Supreme Court is made in the case of **K.H. Nazar v. Mathew K. Jacob and others** wherein it has been held that provisions of beneficial legislation have to be construed with a purpose-oriented approach and literal construction of the provisions of a beneficial legislation has to be avoided:

"11. Provisions of a beneficial legislation have to be construed with a purpose-oriented approach. The Act should receive a liberal construction to promote its objects. Also, literal construction of the provisions of a beneficial legislation has to be avoided. It is the court's duty to discern the intention of the legislature in making

the law. Once such an intention is ascertained, the statute should receive a purposeful or functional interpretation.

12. In the words of O. Chinnappa Reddy, J., the principles of statutory construction of beneficial legislation are as follows: (Workmen case, SCC p. 76, para 4)

"4. The principles of statutory construction are well settled. Words occurring in statutes of liberal import such as "social welfare legislation and human rights' legislation are not to be put in Procrustean beds or shrunk to Lilliputian dimensions. In construing these legislations the imposture of literal construction must be avoided and the prodigality of its misapplication must be recognised and reduced. Judges ought to be more concerned with the "colour", the "content" and the "context" of such statutes (we have borrowed the words from Lord Wilberforce's opinion in Prenn v. Simmonds). In the same opinion Lord Wilberforce pointed out that law is not to be left behind in some island of literal interpretation but is to enquire beyond the language, unisolated from the matrix of facts in which they are set; the law is not to be interpreted purely on internal linguistic considerations. In one of the cases cited before us, that is, Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court33, we had occasion to say: (Surendra Kumar Verma, SCC p. 447, para 6)

"6. ...Semantic luxuries are misplaced in the interpretation of "bread and butter" statutes. Welfare statutes must, of necessity, receive a broad interpretation. Where legislation is designed to give relief against certain kinds of mischief, the court is not to make inroads by making etymological excursions.' "

13. While interpreting a statute, the problem or mischief that the statute was designed to remedy should first be identified and then a construction that suppresses the problem and advances the remedy should be adopted. ..."

35. Aforesaid judgement has been recently followed by the Apex Court in the case of **Deepika Singh v. Central Administrative Tribunal and Others.**

36. To the submissions as raised by learned counsel for the applicants regarding the fact that the applicants were not proclaimed offenders at the time of filing of the application, this Court, from the record, finds that they had knowledge of non-bailable warrants having been issued against them on 04.2.2022. The applicants were also well aware of the offence as a notice under Section 41(1) Cr.P.C. given to them to which reply was submitted and after collecting material evidence when remand of few persons was taken under the relevant Sections. The applicants were required to cooperate with the investigation but they have been absconding since then which resulted in issuance of non-bailable warrants on 04.2.2023.

37. Here in the present case, the applicants even after interim protection granted to them on 09.2.2023 did not cooperate in the investigation, therefore, they cannot be allowed to take stand that the bar as held by the Apex Court in connection with proclaimed offender is not applicable in the case of the applicants.

38. The Supreme Court in the case of **Lavesh v. State (NCT of Delhi)** has held that normally in the matter of absconding, power to grant anticipatory bail is not exercised. The said judgement has been followed in the case of **State of Madhya Pradesh v. Pradeep Sharma.**

39. Insofar as the arguments of the learned AAG regarding diminished autonomy of underprivileged are concerned, it is duty of the State to check such activities which are threatening, insulting, intimidating to such persons and affect rights and interest of weaker section of the society in every respect and on the other hand affect the majority of persons.

40. It can also be interpreted in a manner that the allegations of mass conversion as levelled against the applicants, who are influential persons, and they are channelizing the funds collected from overseas groups for the above purpose, such act shows the gravity of offence, therefore, instant case is not fit for grant of anticipatory bail as the issue of security and violation of citizens' right to freedom of conscience and right to freely profess, practice and propagate religion is involved.

41. I find it appropriate to mention the reference of a case pending before the Apex Court regarding conversion of religion which is titled as **''In Re: The Issue Of Religion Conversion'**, wherein the Court on 14.11.2022 while calling counter affidavit observed as under:

"The issue with respect to the alleged conversion of religion if it is found to be correct and true, is a very serious issue which may ultimately affect the security of the nation and violate citizens' right to freedom of conscience and right to freely profess, practice and propagate religion.

Therefore, it is better that the Union Government may make their stand clear and file a counter on what further steps can be taken by the Union of India and/or others to curb such forced conversion, may be, by force, allurement or fraudulent means.

...."

42. In the case of **Badshah v. Urmila Badshah Godse**, the Apex Court has held that role of the Court is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. The Supreme Court has also observed that there are number of social justice legislations giving special protection and benefits to vulnerable groups in the society. Relevant paragraphs of the judgement in **Badshah (supra)** are reproduced below:

14. Of late, in this very direction, it is emphasised that the courts have to adopt different approaches in "social justice adjudication", which is also known as "social context adjudication" as mere "adversarial approach" may not be very appropriate. There are number of social justice legislations giving special protection and benefits to vulnerable groups in the society. Prof. Madhava Menon describes it eloquently:

"It is, therefore, respectfully submitted that "social context judging' is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the social-economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the Judge has to be not only sensitive to the inequalities of parties

involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication." ....

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16. The law regulates relationships between people. It prescribes patterns of behaviour. It reflects the values of society. The role of the court is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. Sometimes change in law precedes societal change and is even intended to stimulate it. In most cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law. It can be said that the history of law is the history of adapting the law to society's changing needs. In both constitutional and statutory interpretation, the court is supposed to exercise discretion in determining the proper relationship between the subjective and objective purposes of the law.

43. The applicants are influential persons who are also required in other matters wherein SIT has been constituted to investigate channelization of funds of the Institution which according to the material collected till date by the Investigating Officer, is being used for the purposes of mass conversion.

44. As regards the fact that number of persons have already been released on anticipatory bail, therefore, parity has been claimed, this Court finds that while granting bail, focus should be upon role of the accused, position of the accused in relation to the incident as well as to the victims, are utmost important factors to be considered, as has been held by the Supreme Court in the case of **Mahadev Meena v. Praveen Rathore and another.**

45. This Court finds that accused are influential persons who are involved in mass conversion as the evidence in this regard has already been collected by the Investigating Officer, therefore, they cannot claim parity with other persons who have been released on anticipatory bail.

46. It may be kept in mind that anticipatory bail is an extraordinary remedy to be exercised in suitable cases only. The power under section 438 Cr.P.C. cannot be utilized in a routine manner as a substitute for regular bail. This discretionary power calls for existence of facts of the kind where the court is satisfied that its interference is necessary to further the cause of justice and to prevent misuse of process of law.

47. Having gone through the submissions of learned counsel for the parties, nature of accusation of offence, role of the applicants being highly influential person, their intent behind the charitable works, appears to be dubious, affecting the interest of marginal section of society, object of the law and the impact of the same on society, I do not find it a fit case for granting anticipatory bail.

48. The anticipatory bail applications stand rejected.

(2023) 3 ILRA 541
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.02.2023

BEFORE

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

Crl. Misc. Anticipatory Bail Application (U/S 438 Cr.P.C.) No. 1425 of 2023
And
Crl. Misc. Anticipatory Bail Application (U/S 438 Cr.P.C.) No. 1376 of 2023

Parminder Singh & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Ms. Mary Puncha (Sheeb Jose), Sri Mohd. Kalim, Sri Rizwan Ahmad, Sri Dilip Kumar (Sr. Advocate)

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 438 - Indian Penal Code,1860-Sections 153-A, 506, 420, 467, 468 & 471 - U.P. Prohibition of Unlawful Conversion of Religion Act, 2021-Sections 3 & 5(1) - allegations of conversion with regard to vulnerable segments of society –applicants being influential persons are channelizing the funds collected from overseas group-the applicants are not cooperating with the police even after having knowledge of non-bailable warrants-Protection was granted but the applicants failed to ensure appearance before the Investigating Officer which shows that they do not have any intention to cooperate in the investigation-More so, the applicants cannot be excused only that they have not been named in the FIR-In the present case, sentiments of public at large are involved wherein any secular country like India the same would amount in shattering the peace and harmony-Hence, the power u/s 438 Cr.P.C. cannot be utilized in a routine manner as a substitute for regular bail.(Para 1 to 47)

B. The power of granting 'anticipatory bail' is extraordinary in character and only in exceptional cases where it appears that a person is falsely implicated or a frivolous case is launched against him or there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, such power is to be exercised. (Para 9)

The application is rejected. (E-6)

List of Cases cited:

1. Manish Yadav Vs St. of U.P. ABAIL NO. 4645 of 2022

2. Suresh Babu Vs St. of U.P. & anr., ABAIL No. 3532 of 2022

3. Nathu Singh Vs St. of U.P. & ors. (2021) 6 SCC 64

4. Rev. Stainislaus Vs St. of M.P. & ors. (1977) 1 SCC 677

5. Ali @ Ali Ahmad Vs St. of U.P. & ors., ABAIL No. 2904 fo 2022

6. Amish Devgan Vs U.O.I. & ors. (2021) 1 SCC 1

7. Shri Gurbaksh Singh Sibbia & ors. Vs St. of Punj.(1980) 2 SCC 565

8. Siddharam Satlingappa Mhetre Vs St. of Mah. & ors. (2011) 1 SCC 694

9. Sushila Aggarwal & ors. Vs St. (NCT of Delhi) & anr. (2020) 5 SCC 1

10. Sumitha Pradeep Vs Arun Kumar C.K. & anr..(2022) SCC OnLine SC 1529

11. Pokar Ram Vs St. of Raj. & ors..

12. Saddhna Chaudhary Vs The State of Rajasthan & anr..

13. Pokar Ram Vs St. of Raj. & ors. (1985) 2 SCC 597

14. Jose Prakash George & ors Vs. St. of U.P. & ors., CMWP 1814 of 2023

15. Sadhna Chaudhary Vs. St. of Raj. & anr.. (2022) SCC OnLine SC 869

16. Shri Gurbaksh Singh Sibbia & ors. Vs St. of Punj.(1980) 2 SCC 565

17. Vipin Kumar Dhir Vs St. of Punj. & anr. (2021) AIR SC 4865

18. P. Chidambaram Vs ED(2019) 9 SCC 24

19. K.H. Nazar Vs Mathew K. Jacob & ors. (2020) 14 SCC 126

20. Deepika Singh Vs CAT & ors. (2022) SCC OnLine SC 1088

21. Lavesh Vs St. (NCT of Delhi) (2012) 8 SCC 730

22. St. of M.P. Vs Pradeep Sharma (2014) 2 SCC 171

23. In Re: The Issue Of Religion Conversion, WP (Civil) No. 63 of 2022

24. Badshah Vs Urmila Badshah Godse (2014) 1 SCC 188

25. Mahadev Meena Vs Praveen Rathore & anr. (2021) SCC OnLine SC 804

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

1. Both anticipatory bail applications have been moved for grant of anticipatory bail in Case Crime No. 224 of 2022, under Sections 153-A, 506, 420, 467, 468, 471 Indian Penal Code, 1860 and 3 & 5(1) U.P. Prohibition of Unlawful Conversion of Religion Act, 2021 (U.P. Act No. 3 of 2021), Police Station Kotwali, District Fatehpur.

2. Instant case, as the prosecution version surfaces, is; a first information report was lodged by the informant- Himanshu Dixit with the allegations that about 90 persons of Hindu religion have been congregated at Evangelical Church of India, Hariharganj, Fatehpur for the purpose of their conversion to Christianity by putting them under undue influence, coercion and luring them by playing fraud and promise of easy money etc.; on receiving this information, the Government officers reached the place and interrogated the pastor Vijay Massiah; he disclosed that the process for conversion was going on for the last 34 days and that this process shall be completed within 40 days; that they have been trying to convert even the patients admitted to the Mission Hospital and the employees have played an active role in the same; the Government officers found 35 persons (named in the F.I.R.) and 20 unknown persons as having been involved in this conversion of 90 persons of Hindu community to Christianity. The F.I.R. was registered under Sections 153A, 506, 420, 467, 468 I.P.C. and Sections- 3/5(1) of Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act and the matter was investigated upon.

3. Sri Dilip Kumar, learned Senior Advocate assisted by Sri Rizwan Ahmad, learned counsel appears for the applicants, Sri Manish Goel, learned Additional Advocate General/ learned Senior Advocate assisted by Sri Amit Singh Chauhan, learned AGA-I, and Sri Pankaj Srivastava, learned AGA, appears for the State - respondent.

4. **Brief facts in Anticipatory Bail Application No. 1425 of 2023:**

4.1 The applicants are not named as accused in first information report. The applicant no. 1 is a Sikh. He performs his duties as a Clerk/ Cashier in Broadwell Christian Hospital, Fatehpur, while the applicant no. 2 is Bishop of Bible Ceremony at Allahabad. The applicant no. 2 is about 64 years old person and has no concern with Broadwell Christian Hospital, Fatehpur in any manner. However, he happened to be a Member of Broadwell Christian Society and his name was reflected from the documents furnished in response to the notice under Section 91 of the Code of Criminal Procedure, 1973 that once upon a time he happened to be a Member of that Society.

5. **Brief facts in Anticipatory Bail Application No. 1376 of 2023:**

5.1. The applicant is not named as an accused in first information report. He is a Doctor by profession and working as Senior Orthopedic Surgeon (MS) in Harbertpur Christian Hospital Society at Dehradun after being transferred from Mussoorie since 07.3.2010. He possesses Diploma of National Board (DNB) to his credit.

6. **Arguments on behalf of Applicants:**

6.1 In regard to applicants - Parminder Singh and Paul Sigamony Rjmony in Criminal Misc. Anticipatory Bail Application No. 1425 of 2023, learned counsel for the applicants invited attention of the Court to a notice dated 22.11.2022 issued under Section 91 Cr.P.C. (Annexed at Page-34 of applicants' anticipatory bail application), to Manager, Broadwell Christian Mission Hospital, Hariharganj, District Fatehpur requiring documents mentioned therein i.e. (1) Name, address and present status of accused persons relating to Hospital; (2) Registration Certificate of the Hospital; (3) Account Number of Hospital and, (3) Details of persons/ institutions who provided aid to the Hospital since 01.01.2022. Further, he required the Court's attention to another notice which was subsequently issued to the applicants under Section 41(1) Cr.P.C. on 31.1.2023. He submits that on issuance of the said notice, the applicants apprehended arrest, thereafter anticipatory bail application was filed before the District Judge, Fatehpur, which was dismissed on 19.1.2023.

6.2 Insofar as applicant - Mathew Samuel in Criminal Misc. Anticipatory Bail Application No. 1376 of 2023 is concerned, learned Senior Counsel appearing for the applicant submits that applicant is not named as an accused in first information report. He is a Doctor by profession and working as Senior Orthopedic Surgeon (MS) in Harbertpur Christian Hospital Society at Dehradun after being transferred from Mussoorie since 07.3.2010. He possesses Diploma of National Board (DNB) to his credit. Learned counsel for the applicant has invited attention of the Court to a notice dated 22.11.2022 issued under Section 91 Cr.P.C. (Annexed at Page - 34 of co-accused Perminder's Anticipatory Bail Application), to Manager, Broadwell Christian Mission Hospital, Hariharganj, District Fatehpur to the persons who have been added subsequently requiring documents mentioned therein i.e. (1) Name, address and present status of accused persons relating to Hospital; (2) Registration Certificate of the Hospital; (3) Account Number of Hospital and, (3) Details of persons/ institutions who provided aid to

the Hospital since 01.01.2022. Further, he required the Court's attention to another notice which was issued to the applicant under Section 41(1) Cr.P.C. on 31.1.2023, Annexed as Annexure-4 to the instant application. He submits that on issuance of the said notice the applicant apprehended his arrest, thereafter anticipatory bail application was filed before the District Judge, Fatehpur, which was dismissed on 19.1.2023. The applicant happens to be the Member of Broadwell Christian Society. The said Society runs various hospitals in different places including hospitals at Fatehpur as well as Dehradun where the applicant is posted. The applicant was inducted as a member sometimes in the year 2005. He very occasionally used to visit different places including Fatehpur in meetings of the Society, which is the only connection of the applicant with the Broadwell Hospital.

6.3 Learned Senior Counsel next submits that apart from the merits of this case in actual sphere, there is a legal submission that the FIR has been registered at the instance of Sri Himanshu Dixit, Sah-Mantri, Vishwa Hindu Parishad, who is not the person competent to lodge first information report in view of the provisions of the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021. He further advanced that there is no averment to this effect in the FIR nor has any material been made available which establishes competence of the person on whose instance the FIR is lodged, which defects the FIR on legal spectrum.

6.4 Learned counsel of the applicants has drawn attention of the Court to a remand order whereby the Chief Judicial Magistrate concerned refusing the remand in other Sections, granted it only under Sections 153A/ 506 of IPC. The investigation is in process. The applicants are not, at all, connected with the present incident. They were not present at the place of incident where the mass conversion was being carried out, however, merely because of their association with the Society which runs as many as five hospitals would not attract complicity in commission of the offence and the applicants are not feeling shy to cooperate the process of investigation but instead of effecting custodial interrogation, they seeks indulgence to grant anticipatory bail.

6.5 Insofar as Sections 153A and 506 IPC are concerned, learned counsel for the applicants submits that the applicants are proved to be not present at the place of incident. There is no material to prove prior meeting of minds.

6.6 Learned counsel for the applicants furthers his argument stating that nine persons who were produced on that date have been enlarged on bail by the Magistrate.

6.7 Learned Senior Counsel also points out that few other persons have already been released on anticipatory bail, thus the applicants are entitled for the same on the ground of parity.

6.8 Learned counsel next submits that Section 4 Cr.P.C. provides if there is any special Statute, the investigation would be conducted as per the Special Statute along with enquiry and the trial. For the purposes of Section 4 it should be a legal first information report, however, in the present case the informant is not competent as per the provisions of the Act, 2021. The Legislature bearing in mind the expected misuse kept a general person at bay from

lodging first information report and it, in itself, is the case of the State that FIR was lodged under the Act, 2021. However, the informant has no authority to initiate FIR.

7. **SUBMISSIONS BY STATE**:

7.1 Sri Manish Goel, Addl. Advocate General submits that it is a case of mass conversion, thus, the proviso to the Section - 5 of the Act, 2021 would be applicable, wherein the punishment up to ten years is prescribed. He submits that the object of Act, 2021 is to provide for prohibition of unlawful conversion from one religion to another by misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means. The FIR has been lodged under Section 153A IPC, which envisages acts prejudicial to maintenance of harmony and since it is an offence against public tranquillity, therefore, insofar as the legality concerning process of lodging FIR by third party, victims had also lodged FIR that made separate cause of action as also FIR has been lodged under several sections of IPC, therefore, third party cannot be ousted from lodging FIR for the offence against public tranquillity. He further argues that offences for which present FIR has been lodged have warring ramifications as some offences are those which violate fundamental rights of an individual, whereas, the other affect the mass i.e. public at large. There is abundance of details showing applicants' complicity with other persons who were regularly connected for the purposes of promoting mass conversion.

7.2 Mr. Goel further submits that the police found that there were about 100 application forms including that of minors, along with pamphlets for adopting and propagating Christianity mentioning therein that Rs. 35000/- would be paid if one adopts Christianity; there were trainers to educate how to propagate Christianity and to visit different places for gathering people and bringing them to motivate for conversion purpose.

7.3 Learned Addl. Advocate General in the course of his arguments emphasized over the ingredients of Section 2 of the Act, 2021 which elaborates the definitions of Allurement, Coercion, Conversion, Fraudulent means, Mass Conversion, Minor, Religion, Religion Convertor and Undue Influence. Next, he submits that statement of Issac Frank (CD-51) shows how the money was being received from various countries and subsequently channelized. There are different kinds of organizations and the present one is run by Mr. R.B. Lal. It has also been argued that Section 4 of Cr.P.C. provides for investigation to be done by same provisions, subject to enactment of provision in the Special Act. Here, the Act, 2021 does not provide any mechanism for investigation, and, if so, the provisions of the Code of Criminal Procedure would apply as also the Act, 2021 does not prohibits operation of Cr.P.C.

7.4 Stressing upon applicant's complicity in mass conversion, learned AAG shows that the statement of Santosh Kumar Saini, an independent witness of the offence & employee of the Hospital since 2017 who disclosed names of several persons belonging to Hindu family of poor economic condition were forced to adopt other religion by conversion. He stated about the allurements provided to persons belonging to marginal section of the society for conversion. He also revealed Hariharganj

incident dated 24.1.2023 pointing out the identity of influential persons (CD-68).

7.5 Mr. Goel next submits that the applicants have been issued non-bailable warrants and it is a well settled law of the Apex Court that wherein non-bailable warrants are in operation, the accused-applicants in such cases are not entitled for anticipatory bail. It is the culpability of the applicant only to establish that he is entitled for grant of anticipatory bail. He has drawn attention of the Court to the statements of Sayapal and Kishanpal further stating that charge-sheet has been submitted against 43 persons on 27.1.2023 and Section 8 of the Act, 2021 has also been added. Thus, culpability of the applicant is well established from the sort of work which he was doing, as also, the funds in the manner being channelized.

7.6 Learned counsel for the applicants also placed on record a judgement of the Apex Court in the Case of Rev. Stainislaus v. State of Madhya Pradesh and others, wherein the term ''allurement' fell for consideration and expression ''public order' has been dealt with extensively.

7.7 Relying upon a judgement in the case of Ali @ Ali Ahmad v. State of U.P. and 2 Others Mr. Manish Goel submits that it is not necessary that the accused be declared proclaimed offender, but, intention of not cooperating in the investigation is sufficient, as in the present case even after having knowledge of non-bailable warrants the applicants are not cooperating with the police and thus they are not entitled for consideration to be released on anticipatory bail.

7.8 Learned AAG further relied upon the judgement in the case of Amish Devgan v. Union of India and others pressing upon the principles of diminished autonomy wherein underprivileged section of society in terms of money, caste, gender have to be protected. He submits that hospital in question which is a Mission Hospital is the best example of diminished autonomy.

7.9 It is argued that the following material has been collected to show the involvement of the applicants in the present case:

(i) Statements of witness Pramod Kumar Dixit, Sanjay Singh and Rajesh Kumar Trivedi, which form part of CD Parcha No. 9 and of independent witnesses, namely, Keshan and Satya Pal forming part of CD Parch No. 12, stated to have been allured for conversion.

(ii) CD Parcha Nos. 15, 16, 20 and 29 show that the remand was accepted in all Sections mentioned in FIR.

(iii) In CD Parcha No. 18, victims Keshan and Satyapal have narrated the entire version in detail.

(iv) CD Parcha No 26 shows statements of ten witnesses, namely, Honey S/o Rampal; Suresh S/o Kallu; Riya D/o Govind; Brijesh Kumar S/o Rajnesh Prasad; Ramesh S/o Pannalal; Rampal S/o Late Bajpali; Ashok Kumar S/o Late Sualal; Vijay S/o Late Chunku Prasad; Vijay S/o Late Vishkarma Lohar, and Amit Maurya S/o Ram Shriomani Maurya. They have stated that Church along with Vijay Massiah (Pastor) and other accused persons are

involved in unlawful conversion of large number of persons to Christianity.

(v) In CD Parcha No. 29 statement of victim Sanjay Singh has been recorded. CD Parcha No. 36 shows that 39 accused persons have obtained orders under Section 82 Cr.P.C.

(vi) Statement of victim Virendra Kumar has been recorded in CD Parcha No. 38. CD Parcha No. 41, which shows that notice under Section 91 Cr.P.C. was given to Dr. Mathew Samuel, Chariman, Broadwell Christian Hospital Society, Fatehpur. Replying to the said notice, he supplied copy of Aadhar Cards of 17 accused persons being employee of the Society, Bank Account details along with society registration papers.

(vi) Accused Daud Massiah and Ratna Massiah - co accused have confessed about conversion being carried out with the assistance of applicants and other accused persons naming various organizations including the applicants for being involved in such offence which are recorded in CD Parcha No. 46.

(vii) Parcha No. 48 is statement of independent witness Dinesh Shukla, examined on 19.12.2022 who has stated complicity of the applicants. In CD Parcha No. 50 statements of persons who have mentioned the names of applicants and have shown their complicity in the offence has been recorded.

(viii) CD Parcha No. 54 shows a list of beneficiaries who were converted and their photographs were found from Broadwell Christian Hospital.

(ix) In spite of notice under Section 41(2) Cr.P.C. Dr. Mathew Samuel and Parminder Singh, Clerk, they did not turn up as is evident from CD Parcha No. 55.

(x) In CD Parcha No. 61 names of various institutions involved in conversion have been revealed.

(xi) CD Parcha No. 64 is a collection of various documents regarding mass conversion found from Broadwell Christian Hospital wherein material with regard to religious conversion has also been found.

(xii) Statements and details of SHUATS Bank account were taken by the I.O. which forms part of CD Parcha No. 67. Charge-sheet has been been filed against 44 accused persons on 27.1.2023.

7.10 Apart from the above grounds, learned AAG has opposed the anticipatory bail applications on the following grounds:

(i) The incident created a lot of flutter and tension amongst the persons of one community and also created a law and order situation. In aftermath, the persons of one community collected at a place and raised slogans and the police had difficult time in controlling them and any untoward incident could have taken place if they were not sufficiently prepared and alert.

(ii) It is stated by one of the witnesses Shri Keshan that on same kind of assurances like free of cost medical assistance, education and employment to his children and monetary benefits once he is converted to their faith, he was lured into this process; that his Aadhaar card was taken and his name was changed from Shri Keshan to Keshan Joseph; he was also threatened by the accused persons that in case he disclosed the incident to anybody, his life will be at risk.

(iii) There was a bigger conspiracy being hatched by the applicants and their associates with wider ramifications; they were acting in an organized manner for mass conversion. This is not a case where an individual was driven by his conscience to convert to a different faith, but, the accused persons in

tandem with each other systematically went on to influence the persons who usually came in their contact for medical treatment or otherwise. Their poor socio-economic condition was exploited to lure them into participating in mass conversion. The offer for easy money, jobs etc. were used as a bait to tempt them in this incident. The incident might seem not so grave on surface but had a hidden agenda behind it.

(iv)) It is also argued that there is no substance in the argument that applicants have been falsely implicated or that F.I.R. was motivated one.

(v) The bail at this stage may prove a hurdle in effective investigation in this case.

7.11 Learned AAG submits that while rejecting the anticipatory bail application, the Sessions Court has discussed in details about non-cooperation of the applicants in investigation in an offence which is affecting the public at large.

8. I have considered the rival submissions advanced by learned counsel appearing for the parties and perused the material available on record.

9. The gravamen of the matter, wherein the applicants before this Court are for grant of anticipatory bail, is "Conversion'. Party titled as applicant in both applications calls it "conversion by law', however, the party - Respondent worded it as "conversion for allurement'.

10. This Court finds it more appropriate to align the arguments advanced by learned counsel for the applicants and learned Additional Advocate General for the State, factual and legal aspects, object and principles, with the ingredients of conditions for the grant of anticipatory bail as well as the law settled in respect thereof.

11. Object of section 438 Cr.P.C. is that a person should not be unnecessarily harassed or humiliated in order to satisfy personal vendetta or grudge of complainant or any other person operating the things directly or from behind the curtains. It is well settled that discretionary power conferred by the legislature on this Court cannot be put in a straitjacket formula, but such discretionary power either grant or refusal of anticipatory bail has to be exercised carefully in appropriate cases with circumspection on the basis of the available material after evaluating the facts of the particular case and considering other relevant factors (nature and gravity of accusation, role attributed to accused, conduct of accused, criminal antecedents, possibility of the applicants to flee from justice, apprehension of tampering the witnesses or threat to the complainant, impact of grant of anticipatory bail in investigation, trial or society, etc.) with meticulous precision maintaining balance between the conflicting interest, namely, sanctity of individual liberty and interest of society.

12. In the present case, apart from offences fall amongst other Sections of IPC i.e. Sections 153-A, 506, 420, 467, 468, 471 IPC, allegation of religious conversion by use of allurement, deception or force involved under Section 3 & 5 (1) of the Act, 2021 is involved. Allegation of conversion is with regard to vulnerable segments of society. The applicants herein are praying for grant of anticipatory bail, thus, before adverting to facts and law settled applicable on the present case, it is apposite to quote Section 438 Cr.P.C.:

"438. Direction for grant bail to person apprehending arrest.--(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:--

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested;

either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.

(2) Where the High Court or, as the case may be, the Court of Session, considers it expedient to issue an interim order to grant anticipatory bail under sub-section (1), the Court shall indicate therein the date, on which the application for grant of anticipatory bail shall be finally heard for passing an order thereon, as the Court may deem fit, arid if the Court passes any order granting anticipatory bail, such order shall include inter alia the following conditions, namely--

(i) that the applicant shall make himself available for interrogation by a police officer as and when required;

(ii) that the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) that the applicant shall not leave India without the previous permission of the Court; and

(iv) such other conditions as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that section.

Explanation.--The final order made on an application for direction under sub-section (1); shall not be construed as an interlocutory order for the purpose of this Code.

(3) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(4) On the date indicated in the interim order under sub-section (2), the Court shall hear the Public Prosecutor and the applicant and after due consideration of their contentions, it may either confirm, modify or cancel the interim order.

(5) The High Court or the Court of Session, as the case may be, shall finally

dispose of an application for grant of anticipatory bail under sub-section (1), within thirty days of the date of such application;

(6) Provisions of this section shall not be applicable,--

(a) to the offences arising out of,--

(i) the Unlawful Activities (Prevention) Act, 1967;

(ii) the Narcotic Drugs and Psychotropic Substances Act, 1985;

(iii) the Official Secret Act, 1923;

(iv) the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986.

(b) in the offences, in which death sentence can be awarded.

(7) If an application under this section has been made by any person to the High Court, no application by the same person shall be entertained by the Court of Session. [U.P. Act 4 of 2019, S. 2 (w.e.f. 1-6-2019).

13. The the words **''allurement'** and **''undue influence'**, to which the entire issue encircles, as defined in Section 2 of the Act, 2021, reads thus:

(a) "Allurement" means and includes offer of any temptation in the form of--

(i) any gift, gratification, easy money or material benefit either in cash or kind;

(ii) employment, free education in reputed school run by any religious body; or

(iii) better lifestyle, divine displeasure or otherwise;

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(j) "Undue influence" means the unconscientious use by one person of his/her power or influence over another in order to persuade the other to act in accordance with the will of the person exercising such influence;

14. A Constitution Bench of the Apex Court in the case of **Shri Gurbaksh Singh Sibbia and Others v. State of Punjab,** dealt with the considerations for grant of anticipatory bail in detail. Relying upon the Constitution Bench judgement **in Gurbaksh Singh Sibbia (supra),** the Supreme Court in the case of **Siddharam Satlingappa Mhetre v. State of Maharashtra and others,** laid down parameters and factors to be considered while dealing with application for anticipatory bail:

"112. ...

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or other offences;

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also

clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution because overimplication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

15. Guiding principles in dealing with applications under Section 438 Cr.P.C. have been laid down by another Constitution Bench of the Supreme Court in the case of **Sushila Aggarwal and others v. State (NCT of Delhi) and another.** Said concluding factors read thus:

"92. This Court, in the light of the above discussion in the two judgments, and in the light of the answers to the reference, hereby clarifies that the following need to be kept in mind by courts, dealing with applications under Section 438 CrPC.

92.1. Consistent with the judgment in Gurbaksh Singh Sibbia v. State of Punjab, when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.

92.2. It may be advisable for the court, which is approached with an application under Section 438, depending on the seriousness of the threat (of arrest) to issue notice to the Public Prosecutor and obtain facts, even while granting limited interim anticipatory bail.

92.3. Nothing in Section 438 CrPC, compels or obliges courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc. The courts would be justified -- and ought to impose conditions spelt out in Section 437(3) CrPC [by virtue of Section 438(2)]. The need to impose other restrictive

conditions, would have to be judged on a case-by-case basis, and depending upon the materials produced by the State or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.

92.4. Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.

92.5. Anticipatory bail granted can, depending on the conduct and behaviour of the accused, continue after filing of the charge-sheet till end of trial.

92.6. An order of anticipatory bail should not be "blanket" in the sense that it should not enable the accused to commit further offences and claim relief of indefinite protection from arrest. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence.

92.7. An order of anticipatory bail does not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted pre-arrest bail.

92.8. The observations in Sibbia regarding "limited custody" or "deemed custody" to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e. deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail. Sibbia had observed that: (SCC P. 584, para 19)

"19. ... if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v. Deoman Upadhyaya."

92.9. It is open to the police or the investigating agency to move the court concerned, which grants anticipatory bail, for a direction under Section 439(2) to arrest the accused, in the event of violation of any term, such as absconding, non-cooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc."

16. The Apex Court in the case of **Sumitha Pradeep v. Arun Kumar C.K. & Another** noticing common argument being canvassed in numerous anticipatory bail matters that no custodial interrogation is required, observed that there appears to be a serious misconception of law that if no case of custodial interrogation is made out by the prosecution, then that alone would be a good ground to grant anticipatory.

Relevant part of the said judgements reads thus:

"16. ...In many anticipatory bail matters, we have noticed one common argument being canvassed that no custodial interrogation is required and, therefore, anticipatory bail may be granted. **There appears to be a serious misconception of law that if no case for custodial interrogation is made out by the prosecution, then that alone would be a good ground to grant anticipatory bail.** Custodial interrogation can be one of the relevant aspects to be considered along with other grounds while deciding an application seeking anticipatory bail. There may be many cases in which the custodial interrogation of the accused may not be required, but that does not mean that the prima facie case against the accused should be ignored or overlooked and he should be granted anticipatory bail. The first and foremost thing that the court hearing an anticipatory bail application should consider is the prima facie case put up against the accused. Thereafter, the nature of the offence should be looked into along with the severity of the punishment. Custodial interrogation can be one of the grounds to decline anticipatory bail. However, **even if custodial interrogation is not required or necessitated, by itself, cannot be a ground to grant anticipatory bail."**

17. Power of Section 438 while granting anticipatory bail should not be exercised sub silentio as to reasons or on considerations relevant or germane to the determination. The Supreme Court in the case of **Pokar Ram v. State of Rajasthan and others** has held that the anticipatory bail to some extent intrudes in the sphere of investigation of crime. Relevant excerpt of the said case is reproduced as under:

11. ...Anticipatory bail to some extent intrudes in the sphere of investigation of crime and the court must be cautious and circumspect in exercising such power of a discretionary nature. ...."

Applicability of settled law on the facts of the present cases:

18. Insofar as factor no. (i) as enumerated in Section 438 - **''the nature and gravity of the accusation',** learned Counsel appearing for both the applicants tried to convince the Court pressing that since the punishment, as provided under Section 5 of the Act, 2021, for contravention of provisions of Section-3 of the Act, 2021, attracts only one year imprisonment which may extend to five years, therefore, the offence does not fall under the category which may impinge on granting anticipatory bail.

19. This Court finds though the offence warrants only five year imprisonment, however, the proviso to Section 5 also envisages that contravention in respect of mass conversion shall attract imprisonment for a term not less than three years but may extend to ten years as also the FIR in addition to Section 3/5(1) of the Act, 2021 includes offences under Sections 153A, 506, 420, 467, 468, 471 IPC for which the Magistrate did not issue remand at initial stage, however, subsequently the remand has been accorded in the remaining sections also.

20. Second factor which the Section 438 requires for consideration is **''that the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to**

any police officer'. Learned counsel for the applicants have demonstrated the profile of the respective applicants stating that they do not have any connection with the offence and can never think to induce, threat or promise to dissuade anyone thus the condition as factored is not presumed to be affected.

21. Arguments weighed in with regard to the applicants' position show that hardly it can be ensured that no such effect would be undertaken where the offence in question is of allurement as the victims belong to marginal section of society and are coming forward to lodge FIR. The arguments advanced by learned AAG outpaced the contention of the applicants.

22. With regard to the third factor that the applicants will not flee from justice and will extend cooperation on their end, it has already been discussed by the court below that the applicants are not cooperating in the investigation and presently NBW has been issued against the applicants.

23. Regarding the fact that the FIR has not been lodged by a competent person as required under the relevant Sections of the Act, 2021. This Court feels that the FIR was lodged under other Sections of IPC also including Section 153-A IPC, therefore, it is not liable to be ousted only on the ground that same has been lodged by a person who is Secretary of some political organization.

24. The object of arrest and detention of the accused is primarily to secure his appearance at the time of trial and to ensure that if he is found guilty he is available to receive sentence. If presence at the relevant time could be ensured otherwise, it would be unfair and unjust to deprive the accused of liberty during the pendency of criminal proceedings.

25. While arguing the matter, period of punishment has been stressed upon in order to make out a case where offence is not serious in nature. Looking into the provisions of relevant Sections, period of punishment has been pointed out, which is up to ten years but, it is not only the period of punishment, but, the nature of offence which is to be taken into consideration as the same is affecting human body or society at large and that is what matters and has relevance. In the present case, as has already been pointed out by learned AGA, material evidence regarding mass conversion has been collected which affects society at large and hence is a serious offence and cannot be taken lightly.

26. Substantial evidence has been unearthed which proves involvement of the applicants in the offence pertaining to the cause of affecting public at large, thus, such offence cannot be taken up in a normal course. Efforts regarding collection of evidence pertaining to channelizing funding being done by the Investigating Officer wherein the applicants are required to cooperate with the investigation. In such cases, the investigation must proceed without the applicants being under the protection of this Court through the Investigating Officer who is well versed with the process of law and is a part of law enforcement machinery. Reference may be made to the judgement of the Supreme Court in the case of **Sadhna Chaudhary v. The State of Rajasthan & Anr,** wherein the Apex Court has observed that being a law-abiding person, adherence to law has to be stringent than expected in general by a common man.

27. As discussed in various judgements, certain relevant factors have to

be considered while granting anticipatory bail, one of them, being the gravity of offence, this Court finds that the present case has transcended and gone beyond a simple case for anticipatory bail, where, during pendency of present application several first information reports have been lodged by the victims who have been converted by undue influence or allurement. This Court cannot close its eyes to the fact that the material evidence has been collected regarding mass conversion of persons and this case has taken a far more serious turn where the victims are coming forward to give evidence, thus, in case protection is granted, same would hamper process of investigation.

28. While considering the guidelines regarding grant of anticipatory bail Supreme Court in case of **Pokar Ram v. State of Rajasthan and others** discussed about the judgement of a Constitution Bench of the Apex Court in the case of **Shri Gurbaksh Singh Sibbia and Others v. State of Punjab** and observed that a caution was voiced in the evaluation of consideration whether the applicant is likely to abscond, there can be no presumption that the wealthy and the mighty will submit themselves to trial and that the humble and the poor will run away from the course of justice, and more than that there can be a presumption that the former are not likely to commit a crime and the latter are more likely to commit it: Relevant paragraph of said judgement in **Pokar Ram (supra)** reads thus:

"6. The decision of the Constitution Bench in Gurbaksh Singh Sibbia v. State of Punjab clearly lays down that "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". Unlike a post-arrest order of bail, it 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. A direction under Section 438 is intended to confer conditional immunity from the touch as envisaged by Section 46(1) or confinement. In para 31, Chandrachud, C.J. clearly demarcated the distinction between the relevant considerations while examining an application for anticipatory bail and an application for bail after arrest in the course of investigation. Says the learned Chief Justice that 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. It was observed that "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". Some of the relevant considerations which govern the discretion, noticed therein are "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". A caution was voiced that "in the evaluation of the consideration whether the applicant is likely to abscond, there can be no presumption that the wealthy and the mighty will submit themselves to trial and that the humble and the poor will run away from the course of justice, any more than there can be a presumption that the former are not likely to commit a crime and the latter are more likely to commit it".

29. It is a settled law that while considering the case for granting anticipatory bail, the Court must not overlook the possibility of accused to influence the prosecution witnesses, threatening family members, fleeing from justice, creating other impediments and fair investigation. In the case of **Vipin Kumar Dhir v. State of Punjab and another** the Apex Court has held that even if there is any procedural irregularity in declaring the accused an absconder that by itself was not a justifiable ground to grant pre-arrest bail. Relevant part of the judgement is quoted hereinbelow:

"13. Even if there was any procedural irregularity in declaring the Respondent-Accused as an absconder, that by itself was not a justifiable ground to grant pre-arrest bail in a case of grave offence save where the High Court on perusal of case-diary and other material on record is, prima facie, satisfied that it is a case of false or over-exaggerated accusation. Such being not the case here, the High Court went on a wrong premise in granting anticipatory bail to the Respondent-Accused."

30. The present FIR as well as the FIR lodged by victims and the material collected during investigation, sentiments of public at large are involved wherein any secular country like India the same would amount to breaking the harmony which would affect public order. The applicants cannot be excused only considering the fact that they have not been named in the first information report.

31. Though object of Section 438 Cr.P.C. is to safeguard the personal liberty of individual. A delicate balance is required to be established between the two rights i.e. safeguarding the personal liberty of an individual and societal interest as has been held in the case of **P. Chidambaram v. Directorate of Enforcement**. Relevant paragraphs of the said judgement are reproduced hereunder:

"72. We are conscious of the fact that the legislative intent behind the introduction of Section 438 CrPC is to safeguard the individual's personal liberty and to protect him from the possibility of being humiliated and from being subjected to unnecessary police custody. However, the court must also keep in view that a criminal offence is not just an offence against an individual, rather the larger societal interest is at stake. Therefore, a delicate balance is required to be established between the two rights - safeguarding the personal liberty of an individual and the societal interest. It cannot be said that refusal to grant anticipatory bail would amount to denial of the rights conferred upon the appellant under Article 21 of the Constitution of India.

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74. Ordinarily, arrest is a part of the process of the investigation intended to secure several purposes. There may be circumstances in which the accused may provide information leading to discovery of material facts and relevant information. Grant of anticipatory bail may hamper the investigation. Pre-arrest bail is to strike a balance between the individual's right to personal freedom and the right of the investigating agency to interrogate the accused as to the material so far collected and to collect more information which may lead to recovery of relevant information. In State v. Anil Sharma26, the Supreme Court held as under : (SCC p. 189, para 6)

"6. We find force in the submission of CBI that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well-ensconced with a favourable order under Section 438 of the Code. In a case like this, effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders."

32. With respect to the arguments that Section 4 of Cr.P.C. provides for investigation to be done by same provisions, subject to enactment of provision in the Special Act (the Act, 2021 does not provide any mechanism for investigation), reference to a judgement of the Supreme Court is made in the case of **K.H. Nazar v. Mathew K. Jacob and others** wherein it has been held that provisions of beneficial legislation have to be construed with a purpose-oriented approach and literal construction of the provisions of a beneficial legislation has to be avoided.

"11. Provisions of a beneficial legislation have to be construed with a purpose-oriented approach. The Act should receive a liberal construction to promote its objects. Also, literal construction of the provisions of a beneficial legislation has to be avoided. It is the court's duty to discern the intention of the legislature in making the law. Once such an intention is ascertained, the statute should receive a purposeful or functional interpretation.

12. In the words of O. Chinnappa Reddy, J., the principles of statutory construction of beneficial legislation are as follows: *(Workmen case, SCC p. 76, para 4)*

"4. The principles of statutory construction are well settled. Words occurring in statutes of liberal import such as "social welfare legislation and human rights' legislation are not to be put in Procrustean beds or shrunk to Lilliputian dimensions. In construing these legislations the imposture of literal construction must be avoided and the prodigality of its misapplication must be recognised and reduced. Judges ought to be more concerned with the "colour", the "content" and the "context" of such statutes (we have

borrowed the words from Lord Wilberforce's opinion in Prenn v. Simmonds). In the same opinion Lord Wilberforce pointed out that law is not to be left behind in some island of literal interpretation but is to enquire beyond the language, unisolated from the matrix of facts in which they are set; the law is not to be interpreted purely on internal linguistic considerations. In one of the cases cited before us, that is, Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court28, we had occasion to say: (Surendra Kumar Verma, SCC p. 447, para 6)

"6. ...Semantic luxuries are misplaced in the interpretation of "bread and butter" statutes. Welfare statutes must, of necessity, receive a broad interpretation. Where legislation is designed to give relief against certain kinds of mischief, the court is not to make inroads by making etymological excursions.' "

13. While interpreting a statute, the problem or mischief that the statute was designed to remedy should first be identified and then a construction that suppresses the problem and advances the remedy should be adopted. ..."

33. Aforesaid judgement has been recently followed by the Apex Court in the case of **Deepika Singh v. Central Administrative Tribunal and Others.**

34. To the submissions as raised by learned counsel for the applicants regarding the fact that the applicants were not cooperating in investigation, this Court feels that they had knowledge of the offence as notice under Section 41(1) Cr.P.C. was given to them, to which reply was submitted and after collecting material evidence, when remand of few persons was taken under the relevant Sections, the applicants were required to cooperate in the investigation but they have been absconding since then which resulted in issuance of non-bailable warrants on 04.2.2023.

35. The Supreme Court in the case of **Lavesh v. State (NCT of Delhi)** has held that normally in the matter of absconding, power to grant anticipatory bail is not exercised. The said judgement has been followed in the case **of State of Madhya Pradesh v. Pradeep Sharma.**

36. Insofar as the arguments of the learned AAG regarding diminished autonomy of underprivileged are concerned, it is duty of the State to check such activities which are threatening, insulting, intimidating to such persons and affect rights and interest of weaker section of the society in every respect and on the other hand affect the majority of persons.

37. It can also be interpreted in a manner that the allegations as levelled against the applicants are of mass conversion and the complicity of the applicants has been found on the basis of material collected by the Investigating Officer, the applicants being connected with the Society, such act shows the gravity of offence, therefore, instant case is not fit for grant of anticipatory bail as the issue of security and violation of citizens' right to freedom of conscience and right to freely profess, practice and propagate religion is involved.

38. I find it appropriate to mention the reference of a case pending before the Apex Court regarding conversion of religion which is titled as **''In Re: The Issue Of Religion Conversion',** wherein

the Court on 14.11.2022 while calling counter affidavit observed as under:

"The issue with respect to the alleged conversion of religion if it is found to be correct and true, is a very serious issue which may ultimately affect the security of the nation and violate citizens' right to freedom of conscience and right to freely profess, practice and propagate religion.

Therefore, it is better that the Union Government may make their stand clear and file a counter on what further steps can be taken by the Union of India and/or others to curb such forced conversion, may be, by force, allurement or fraudulent means.

...."

39. In the case of **Badshah v. Urmila Badshah Godse**, the Apex Court has held that role of the Court is to understand the purpose of law in society and to help the law achieves its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. The Supreme Court has also observed that there are number of social justice legislations giving special protection and benefits to vulnerable groups in the society. Relevant paragraphs of the judgement in **Badshah (supra)** are reproduced below:

14. Of late, in this very direction, it is emphasised that the courts have to adopt different approaches in "social justice adjudication", which is also known as "social context adjudication" as mere "adversarial approach" may not be very appropriate. There are number of social justice legislations giving special protection and benefits to vulnerable groups in the society. Prof. Madhava Menon describes it eloquently:

"It is, therefore, respectfully submitted that "social context judging' is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the social-economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the Judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication." ....

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16. The law regulates relationships between people. It prescribes patterns of behaviour. It reflects the values of society. The role of the court is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. Sometimes change in law precedes societal change and is even intended to stimulate it. In most cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, responsiveness to change in social reality is

the life of the law. It can be said that the history of law is the history of adapting the law to society's changing needs. In both constitutional and statutory interpretation, the court is supposed to exercise discretion in determining the proper relationship between the subjective and objective purposes of the law.

40. As regards the fact that number of persons have already been released on anticipatory bail, therefore, parity has been claimed, this Court finds that while granting bail, focus should be upon role of the accused, position of the accused in relation to the incident as well as to the victims, are utmost important factors to be considered, as has been held by the Supreme Court in the case of **Mahadev Meena v. Praveen Rathore and another.**

41. This Court finds that accused are persons connected with Broadwell Christian Society and involved in mass conversion as the evidence in this regard has been collected by the Investigating Officer, who found them to be custodian of the premises from where recovery of relevant material proving offence of mass conversion has been done.

42. It may be kept in mind that anticipatory bail is an extraordinary remedy to be exercised in suitable cases only. The power under section 438 Cr.P.C. cannot be utilized in a routine manner as a substitute for regular bail. This discretionary power calls for existence of facts of the kind where the court is satisfied that its interference is necessary to further the cause of justice and to prevent misuse of process of law.

43. Having gone through the submissions of learned counsel for the parties, nature of accusation of offence, role of the applicants being persons connected with the Society, their intent behind the charitable works, appears to be dubious, affecting the interest of marginal section of society, object of the law and the impact of the same on society, I do not find it a fit case for granting anticipatory bail.

44. The anticipatory bail applications stand rejected.

(2023) 3 ILRA 560
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.02.2023

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Crl. Misc. Bail Application No. 1943 of 2023

Govind Prakash Pandey ...Applicant
Versus
Directorate of Enforcement, G.O.I. ...Opposite Party

Counsel for the Applicant:
Aviral Raj Singh, Alok Kumar Singh, Dhruv Kumar Singh, Palash Banerjee, Ritwick Rai, Vaibhav Tiwari

Counsel for the Opposite Party:
Rohit Tripathi

A. Criminal Law -Code of Criminal Procedure, 1973-Section 439 - Prevention of Money Laundering Act, 2002-Sections 3 & 4-In the present case, there was no requirement to take the applicant into custody when he appeared before the learned trial court pursuant to the summons being issued inasmuch as he has never flouted the process of law, he cooperated in the investigation throughout, the Investigating Agency has never thought to arrest him under Section 19 of the PMLA despite he appeared

before the E.D. to record his statement twice pursuant to the summons being issued u/s 50 of the PMLA and there was no request of the E.D. before the learned trial court to the effect that arrest of the present applicant is warranted-the applicant's bail application was rejected observing that the twin conditions of Section 45 of the PMLA are not being satisfied, without considering the relevant aspect that the Investigating Agency has never arrested the applicant u/s 19 of the PMLA-Hence, the rigour of Section 45 of the PMLA would not be attracted in the present case-Learned trial court has taken the custody of the present applicant without following the settled proposition of law of the Apex Court in Aman Preet Singh and Satender Kumar Antil.(Para 1 to 29)

B. The twin conditions provided u/s 45 of the 2002 Act, though restrict the right of the accused to grant of bail, but it cannot be said that the conditions provided u/s 45 impose absolute restraint on the grant of bail. The discretion vests in the Court which is not arbitrary or irrational but judicial, guided by the principles of law as provided u/s 45 of the 2002 Act...."(Para 26)

The bail application is allowed. (E-6)

List of Cases cited:

1. Satender Kumar Antill Vs CBI & anr. (2022) 10 SCC 51

2. Aman Preet Singh Vs CBI Thru Director (2021) SCC OnLine SC 941

3. Katar Singh Vs ED, SLP (Crl.) No. 12635 of 2022

4. Rana Kapoor Vs ED (2022) SCC OnLine Del 4065

5. Vijay Madanlal Choudhary & ors. Vs U.O.I. & ors. (2022) SCC OnLine SC 929

6. Gautam Kundu Vs ED (PMLA), GOI, thru Manoj Kumar, Asst. Dir., Eastern Region (2015) 16 SCC 1

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

1. Heard Sri Jaideep Narain Mathur, learned Senior Advocate, assisted by Sri Ritwick Rai, Sri Rajiv Shaker Bhatnagar, Sri Birendra Kumar Mishra, Sri Anshuman Mohit Chaturvedi, Sri Agni Sen, Sri Vaibhav Tiwari and Sri Aviral Rai, learned counsel for the applicant as well as Sri Rohit Tripathi, learned counsel for the Enforcement Directorate.

2. Sri Rohit Tripathi has filed counter affidavit, the same is taken on record.

3. As per learned counsel for the applicant, the present applicant is in jail since 10.01.2023 in Sessions Case No.2791 of 2022, arising out of ECIR No.ECIR/04/PMLA/LZO/2012, under Sections 3 & 4 of the Prevention of Money Laundering Act, 2002, currently pending in the Court of learned Special Judge, PMLA, Lucknow.

4. Brief facts of the case are that the present case pertains to the National Rural Health Mission (hereinafter referred to as "NRHM") in the State of U.P., which was floated on the joint efforts of the Central Government and State Government. One M/s. Jagran Solutions was established in the year 2005 as a unit of Jagran Prakashan Ltd. (for short "JPL"). Jagran Solutions is a reputed concern involved in business activities of brand activation, Meetings Incentives Conferences and Events (for short "M.I.C.E"), retail & ISP, Rural Marketing and Activation Consulting. Jagran Solutions has so far executed more than 4500 projects with total turn-over of over Rs.500 Crores and has to its credit, 63 National-level and 76 International-level Awards.

5. The Applicant joined Jagran Solutions in the year 2007 as Senior Accounts Manager and is presently working as the business head of Jagran Solutions. As a part of his official duties, the applicant undertook business development and client servicing for Jagran Solutions.

6. The Director General, Family Welfare, U.P., published an advertisement seeking private bidders to operate MMUs in selected districts of U.P. for a period of three years. Jagran Solutions submitted a proposal for providing MMUs in all 15 districts as advertised in the Request For Proposal (for short "RFP"). The financial proposal submitted by Jagran Solutions quoted a composite price (Capital Expenditure plus Recurring Expenditure) of INR 1,36,97,098/- as the cost per MMU. The financial proposals of Jagran Solutions were approved and the Firm entered into four different agreements with the Director General, Family Welfare. On the complaint of huge bungling, fraud and forgery in the issue relating to the NRHM, the matter was referred to the CBI and CBI registered preliminary enquiry on 19.11.2011 pursuant to the order being passed by the High Court in Writ Petitions No.3611 (MB) of 2011, 3301 (MB) of 2011 and 2647 (MB) of 2011, dated 15.11.2011. Pursuant to the report of preliminary enquiry, CBI registered FIR No.RC 04(A)/2012, SCU-V/SC-II, New Delhi (FIR) on 05.02.2012, inter alia, against M/s. Jagran Solutions, under Section 420 IPC, Sections 13(2) r/w Section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereinafter referred to as "PC Act".

7. The Enforcement Directorate also registered ECIR/04/PMLA/LZO/2012 (ECIR) on 14.04.2012.

8. Notably, after some litigations at the High Court and the Apex Court, the present applicant was sent to the judicial custody on 03.07.2014 by the Special Judge, P.C. Act in relation to the predicate offence due to his non-appearance in the court on the date fixed owing to death of the father of the applicant. However, his counsel was duly appeared before the learned trial court. Thereafter, vide order dated 28.08.2015 passed in Criminal Misc. Second Bail Application No.934 of 2015 (Annexure No.11), the present applicant was granted bail by this Court. In the aforesaid order dated 28.08.2015, this Court has observed that the applicant has throughout cooperated in the investigation, has not absconded and there is no likelihood of tampering with the evidence by the applicant. This Court further directed the applicant to deposit a sum of Rs.4.89 Crores, the alleged misappropriated amount before the learned trial court. The applicant has deposited the aforesaid amount of Rs.4.89 Crores in compliance of the order dated 28.08.2015.

9. Since the Enforcement Directorate (hereinafter referred to as "E.D.") was continuing with its investigation under the Prevention of Money-Laundering Act, 2002 (hereinafter referred to as "PMLA") in furtherance of ECIR, the applicant duly cooperated in the investigation and his statement was recorded by the E.D. under Section 50 of PMLA on 23.12.2016 and 10.06.2019. Since the present applicant was properly cooperating in the investigation, therefore, he was not arrested by the E.D. under Section 19 of the PMLA during the course of the investigation.

10. After more than 10 years from the registration of ECIR, the E.D. on 05.12.2022 filed a prosecution complaint

under Section 44 read with Section 45 of the PMLA, inter alia, making the present applicant and JPL as accused no.3 & 4 therein. The Special Judge, PMLA took cognizance of the prosecution complaint on 17.12.2022 and issued summons on 22.12.2022 to the applicant for appearance on 10.01.2023, however, no proper service of summons was effected on the applicant and only a constructive service was effected. Learned Senior Advocate has stated that no property of the applicant or JPL has been attached by the E.D.

11. On 22.12.2022, summons have been issued against the applicant. Learned Senior Advocate has stated that the aforesaid summons issued to the applicant did not contain copy of the prosecution complaint filed by the E.D., copy of statements and relevant documents of the complaint, which is a clear cut violation of Sections 204 (3) & 208 Cr.P.C. For the convenience, Sections 204 (3) & 208 Cr.P.C. are being reproduced herein below:-

"204. (3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub- section (1) shall be accompanied by a copy of such complaint.

208. Supply of copies of statements and documents to accused in other cases triable by Court of Session. *Where, in a case instituted otherwise than on a police report, it appears to the Magistrate issuing process under section 204 that the offence is triable exclusively by the Court of Session, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-*

(i) the statements recorded under section 200 or section 202, of all persons examined by the Magistrate;

(ii) the statements and confessions, if any, recorded under section 161 or section 164;

(iii) any documents produced before the Magistrate on which the prosecution proposes to rely:

Provided that if the Magistrate is satisfied that any such document is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."

12. Specific recital to this effect has been given in para-8 (xxix) of the bail application.

13. Sri Mathur has stated that the aforesaid fact has been admitted in the counter affidavit in para-37 thereof indicating that while proceedings were being conducted, the accused or his counsel never asked for the copies, however, the E.D. is always willing to provide copies of the documents to the accused-applicant and those copies can be collected from the office of E.D. As per Sri Mathur, despite the summons having not been served upon the applicant, he came to know the date, therefore, he appeared before the learned trial court on 10.01.2023 where he has been taken into custody. Admittedly, copies of the complaint and other relevant documents have not been provided to the applicant or his counsel. On the same date, the application for bail was pressed on behalf of the applicant; on that, learned counsel for the E.D. prayed time to file objection, therefore, the applicant pressed ad-interim bail apprising that the present applicant has not been arrested by the E.D. under Section 19 of the PMLA, he cooperated in the investigation, he never flouted the process of law and he further undertakes to cooperate with the proceedings, therefore,

in the light of the dictum of the Apex Court in re; **Satender Kumar Antil Vs. Central Bureau of Investigation & Another, (2022) 10 SCC 51,** he may be given ad-interim bail but his ad-interim bail application was rejected by the learned trial court on 10.01.2023 and the applicant was sent to the judicial custody fixing the date as 18.01.2023. The regular bail application of the present applicant was rejected by the learned trial court on 24.01.2023 by observing that the twin conditions of Section 45 of PMLA are necessary and those conditions are not satisfied, therefore, the applicant is not entitled for bail.

14. Sri Jaideep Narain Mathur, learned Senior Advocate, has submitted that the Apex Court in re; **Aman Preet Singh vs. C.B.I. Through Director, 2021 SCC OnLine SC 941,** has held that if during investigation, the accused has cooperated in the investigation and has not been arrested by the Investigating Agency, merely because charge sheet has been filed, he should not be arrested. He has referred paragraphs 10, 11 & 12 of the aforesaid judgment, which are as under:-

"10. A reading of the aforesaid shows that it is the guiding principle for a Magistrate while exercising powers under Section 170, Cr.P.C. which had been set out. The Magistrate or the Court empowered to take cognizance or try the accused has to accept the charge sheet forthwith and proceed in accordance with the procedure laid down under Section 173, Cr.P.C. It has been rightly observed that in such a case the Magistrate or the Court is required to invariably issue a process of summons and not warrant of arrest. In case he seeks to exercise the discretion of issuing warrants of arrest, he is required to record the reasons as contemplated under Section 87, Cr.P.C. that the accused has either been absconding or shall not obey the summons or has refused to appear despite proof of due service of summons upon him. In fact the observations in Sub-para (iii) above by the High Court are in the nature of caution.

11. Insofar as the present case is concerned and the general principles under Section 170 Cr.P.C., the most apposite observations are in sub-para (v) of the High Court judgment in the context of an accused in a non-bailable offence whose custody was not required during the period of investigation. In such a scenario, it is appropriate that the accused is released on bail as the circumstances of his having not been arrested during investigation or not being produced in custody is itself sufficient to entitle him to be released on bail. The rationale has been succinctly set out that if a person has been enlarged and free for many years and has not even been arrested during investigation, to suddenly direct his arrest and to be incarcerated merely because charge sheet has been filed would be contrary to the governing principles for grant of bail. We could not agree more with this.

12. If we may say, the observation hereinabove would supplement our observations made in Siddharth v. State of Uttar Pradesh, 2021 SCC OnLine SC 615 and must be read together with that judgment.

15. Sri Mathur has further drawn attention of this Court towards the dictum of the Apex Court in re; **Satender Kumar Antil** (supra) referring para-2 where three categories have been indicated for applying the judgment; para-2 reads as under:-

"2. After allowing the application for intervention, an appropriate order was

passed on 7-10-2021 [Satender Kumar Antil v. CBI, (2021) 10 SCC 773 : (2022) 1 SCC (Cri) 153] . The same is reproduced as under : (Satender Kumar Antil case [Satender Kumar Antil v. CBI, (2021) 10 SCC 773 : (2022) 1 SCC (Cri) 153] , SCC pp. 774-76, paras 2-11)

"2. We have been provided assistance both by Mr S.V. Raju, learned Additional Solicitor General and Mr Sidharth Luthra, learned Senior Counsel and there is broad unanimity in terms of the suggestions made by the learned ASG. In terms of the suggestions, the offences have been categorised and guidelines are sought to be laid down for grant of bail, without fettering the discretion of the courts concerned and keeping in mind the statutory provisions.

3. We are inclined to accept the guidelines and make them a part of the order of the Court for the benefit of the courts below. The guidelines are as under:

"Categories/Types of Offences

(A) Offences punishable with imprisonment of 7 years or less not falling in Categories B & D.

(B) Offences punishable with death, imprisonment for life, or imprisonment for more than 7 years.

(C) Offences punishable under Special Acts containing stringent provisions for bail like NDPS (Section 37), PMLA (Section 45), UAPA [Section 43-D(5)], Companies Act, [Section 212(6)], etc.

(D) Economic offences not covered by Special Acts.

REQUISITE CONDITIONS

(1) Not arrested during investigation.

(2) Cooperated throughout in the investigation including appearing before investigating officer whenever called.

(No need to forward such an accused along with the charge-sheet (Siddharth v. State of U.P. [Siddharth v. State of U.P., (2022) 1 SCC 676 : (2022) 1 SCC (Cri) 423])

CATEGORY A

After filing of charge-sheet/complaint taking of cognizance

(a) Ordinary summons at the 1st instance/including permitting appearance through lawyer.

(b) If such an accused does not appear despite service of summons, then bailable warrant for physical appearance may be issued.

(c) NBW on failure to appear despite issuance of bailable warrant.

(d) NBW may be cancelled or converted into a bailable warrant/summons without insisting physical appearance of the accused, if such an application is moved on behalf of the accused before execution of the NBW on an undertaking of the accused to appear physically on the next date/s of hearing.

(e) Bail applications of such accused on appearance may be decided without the accused being taken in physical custody or by granting interim bail till the bail application is decided.

CATEGORIES B/D

On appearance of the accused in court pursuant to process issued bail application to be decided on merits.

CATEGORY C

Same as Categories B and D with the additional condition of compliance of the provisions of Bail under NDPS (Section 37), Section 45 of the PMLA, Section 212(6) of the Companies Act, Section 43-D(5) of the UAPA, POSCO, etc.'

4. Needless to say that Category A deals with both police cases and complaint cases.

5. The trial courts and the High Courts will keep in mind the aforesaid guidelines while considering bail applications. The caveat which has been put by the learned ASG is that where the accused have not cooperated in the investigation nor appeared before the investigating officers, nor answered summons when the court feels that judicial custody of the accused is necessary for the completion of the trial, where further investigation including a possible recovery is needed, the aforesaid approach cannot give them benefit, something we agree with.

6. We may also notice an aspect submitted by Mr Luthra that while issuing notice to consider bail, the trial court is not precluded from granting interim bail taking into consideration the conduct of the accused during the investigation which has not warranted arrest. On this aspect also we would give our imprimatur and naturally the bail application to be ultimately considered, would be guided by the statutory provisions.

7. The suggestions of the learned ASG which we have adopted have categorised a separate set of offences as "economic offences" not covered by the special Acts. In this behalf, suffice to say on the submission of Mr Luthra that this Court in Sanjay Chandra v. CBI [Sanjay Chandra v. CBI, (2012) 1 SCC 40 : (2012) 1 SCC (Cri) 26 : (2012) 2 SCC (L&S) 397] has observed in para 39 that in determining whether to grant bail both aspects have to be taken into account:

(a) seriousness of the charge, and

(b) severity of punishment.

Thus, it is not as if economic offences are completely taken out of the aforesaid guidelines but do form a different nature of offences and thus the seriousness of the charge has to be taken into account but simultaneously, the severity of the punishment imposed by the statute would also be a factor.

8. We appreciate the assistance given by the learned counsel and the positive approach adopted by the learned ASG.

9. The SLP stands disposed of and the matter need not be listed further.

10. A copy of this order be circulated to the Registrars of the different High Courts to be further circulated to the trial courts so that the unnecessary bail matters do not come up to this Court.

11. This is the only purpose for which we have issued these guidelines, but they are not fettered on the powers of the courts."

16. Sri Mathur has stated that the present case is relating to the category "C', which has been dealt in para-86 of the judgment, which reads as under:-

"Special Acts (Category C)

86. Now we shall come to Category C. We do not wish to deal with individual enactments as each special Act has got an objective behind it, followed by the rigour imposed. The general principle governing delay would apply to these categories also. To make it clear, the provision contained in Section 436-A of the Code would apply to the Special Acts also in the absence of any specific provision. For example, the rigour as provided under Section 37 of the NDPS Act would not come in the way in such a case as we are dealing with the liberty of a person. We do feel that more the rigour, the quicker the adjudication ought to be. After all, in these types of cases number of witnesses would be very less and there may not be any justification for prolonging the trial. Perhaps there is a need to comply with the directions of this Court to expedite the

process and also a stricter compliance of Section 309 of the Code."

17. Sri Mathur has also drawn attention of this Court towards the judgment and order dated 09.01.2023 passed by the Apex Court in re; **Katar Singh Vs. Directorate of Enforcement, Petition(s) for Special Leave to Appeal (Crl.) No(s).12635 of 2022,** to submit that the Apex Court protected the liberty of that accused considering the fact that the Investigating Agency did not arrest the accused under Section 19 of the PMLA when investigation begins. For the convenience, the order dated 09.01.2023 reads as under:-

"Applications for exemption from filing documents/facts/annexures and exemption from filing O.T. are allowed.

Learned counsel for the petitioners submit that the petitioners have already suffered pre trial custody for more than four years in respect of the scheduled offence, the investigating agency did not arrest the petitioners under Section 19 PMLA when investigation begins, that they are senior citizens of approximately 66,70, 68 and 67 years of age respectively and properties of petitioners in SLP (Crl.) Nos. 12635/2022 and 12615/2022 have even attached worth Rs. 8,00,000/- and Rs. 5,50,000/- and petitioners in SLP (Crl.) Nos. 12646/2022 and 12919/2022 have deposited the alleged amount of Rs. 11,88,000/- and 50,00,000/- in the respective matters. It is further submitted that the total period of incarceration in case of conviction is only seven years and Section 45 PMLA will not be applicable as it is pre-amendment.

Issue notice.

In the meantime, the petitioners be not arrested but shall continue to cooperate with further investigation."

18. Sri Mathur has also referred the judgment of the High Court of Delhi in re; **Rana Kapoor Vs. Directorate of Enforcement, 2022 SCC OnLine Del 4065,** to submit that in more or less in similar facts and circumstances, the Delhi High Court has granted bail to the accused persons. The ratio of the judgment has been indicated in paras 33 & 34, which reads as under:-

"33. The applicant was not implicated in FIR bearing RC No.2232021A0005 registered by CBI. The applicant was implicated in present criminal complaint filed by the respondent/ED and arrayed as accused no 2. The investigating officer consciously did not arrest the applicant. The applicant participated in investigation as his three statements under section 50 PMLA were recorded. The respondent also did not allege that the applicant neither participated nor cooperated in investigation. The concerned Special Court after taking cognizance on present criminal complaint ordered for summoning of the accused persons including the applicant. The investigating officer even after filing of present complaint did not apply for custody of the applicant. The co-accused Gautam Thapar was arrested consciously by the investigating officer during investigation and was denied bail by the Special Court and High Court and as such the applicant is standing on different footing from co-accused Gautam Thapar. The applicant was taken into custody due to dismissal of bail application vide order dated 20.01.2022 passed by the court of Sh. Sanjeev Aggarwal, Special Judge (PC Act)(CBI)-02 Rouse Avenue District Court, New Delhi. The applicant primarily not seeking bail on merit but on basis of observation made by the Supreme Court in

para no 65 of Satinder Kumar Antil decision and as such applicant is not required to pass the test of section 45 PMLA. The conditions as per section 45 PMLA would be applicable, had the applicant filed an application either under section 439 of the Code after arrest during investigation or under section 438 of the Code apprehending his arrest during investigation. As mentioned in present criminal complaint filed by the respondent, the applicant was not arrested during investigation by the investigating agency. There is legal force in argument advanced by the learned Senior Counsel of the applicant that applicant is entitled to bail in view of observations/legal proposition as laid down by the Supreme Court in Satinder Kumar Antil. It is not mandate of section 170 of the Code that if the accused is not taken into custody or arrested during investigation can be arrested or taken into custody after appearance in court post summoning order particularly when neither investigation agency nor prosecution agency sought arrest of accused.

34. The arguments advanced by the learned Special Counsel for the respondent that the applicant has misinterpreted para no 65 of Satinder Kumar Antil is misplaced. There is no force in argument advanced by the learned Special Counsel for the respondent that the applicant before grant of bail required to pass test of 45 of PMLA. The position would have been different, had the applicant arrested during investigation. The investigating agency as mentioned hereinabove consciously preferred not to arrest the applicant during investigation or post filing of charge sheet. The arguments advanced and case law relied on by the Special Counsel for the respondent are considered in right perspective to the given facts and circumstances but they do not provide much legal help to the respondent in opposing present bail application."

19. Therefore, to sum up, Sri Mathur, learned Senior Advocate, has submitted that while granting the bail to the present applicant in the predicate offence, this Court has observed that the applicant has never flouted the process of law and has cooperated in the investigation properly. The direction was issued to deposit a sum of Rs.4.89 Crore, which has been deposited by the applicant in the year 2015 itself. Since then, the applicant is cooperating in the investigation being conducted by the Enforcement Directorate as he has been called twice to record his statement under Section 50 of the PMLA and the present applicant has recorded his statement. The E.D. did not arrest the applicant under Section 19 of the PMLA as the Investigating Agency did not find it appropriate to arrest the applicant during investigation as he was cooperating. After filing of the prosecution complaint, the learned trial court took cognizance and issued summons to the applicant without making compliance of the mandatory provisions of Section 204 (3) Cr.P.C. as neither copy of the complaint has been supplied to the applicant nor any relevant documents have been provided. Even when the present applicant appeared before the learned trial court on 10.01.2023, none of the documents either the prosecution complaint or its supporting documents have been provided. Not only the above, copies of statements and other documents have not been provided to the applicant in compliance of Section 208 Cr.P.C. when the applicant appeared before the learned trial court. The present applicant could have been given ad-interim bail in the light of the dictum of the Apex Court in re; **Aman Preet Singh** (supra) and **Satender**

Kumar Antil (supra), but his ad-interim bail application has been rejected and he has been sent to the judicial custody in a sheer illegal and unwarranted manner. Thereafter, his bail application has been rejected observing that the twin conditions of Section 45 of the PMLA are not being satisfied, without considering the relevant aspect that the Investigating Agency has never arrested the applicant under Section 19 of the PMLA nor any request was made before the learned trial court on 10.01.2023 when the applicant appeared before the learned trial court. Therefore, as per Sri Mathur, in such circumstances, the rigour of Section 45 of the PMLA would not be attracted in the present case. The present applicant undertakes that he shall cooperate in the trial proceedings and shall not misuse the liberty of bail and shall abide by all terms and conditions of the bail order, if he is enlarged on bail.

20. *Per contra*, Sri Rohit Tripathi, learned counsel for the E.D. has submitted that a person accused of the offence of money laundering can only be released when the conditions stipulated under Section 45 of the PMLA are satisfied i.e. prosecution/E.D. is given an opportunity to oppose the release/bail of the accused applicant and if the accused is released, reasons have to be recorded that there is a reasonable satisfaction that the accused has not committed the offence of money laundering. In support of his aforesaid submission, he has placed reliance upon paragraphs 398 & 399 of the dictum of the Apex Court in re; **Vijay Madanlal Choudhary and Others Vs. Union of India and Others, 2022 SCC OnLine SC 929,** which reads as under:-

"398. Thus, it is well settled by the various decisions of this Court and policy of the State as also the view of international community that the offence of money-laundering is committed by an individual with a deliberate design with the motive to enhance his gains, disregarding the interests of nation and society as a whole and which by no stretch of imagination can be termed as offence of trivial nature. Thus, it is in the interest of the State that law enforcement agencies should be provided with a proportionate effective mechanism so as to deal with these types of offences as the wealth of the nation is to be safeguarded from these dreaded criminals. As discussed above, the conspiracy of money-laundering, which is a three-staged process, is hatched in secrecy and executed in darkness, thus, it becomes imperative for the State to frame such a stringent law, which not only punishes the offender proportionately, but also helps in preventing the offence and creating a deterrent effect.

399. In the case of the 2002 Act, the Parliament had no reservation to reckon the offence of money-laundering as a serious threat to the financial systems of our country, including to its sovereignty and integrity. Therefore, the observations and in particular in paragraph 47 of Nikesh Tarachand Shah vs. Union of India, (2018) 11 SCC 1, are in the nature of doubting the perception of the Parliament in that regard, which is beyond the scope of judicial review. That cannot be the basis to declare the law manifestly arbitrary."

21. Sri Tripathi has also cited para-37 of the judgment of the Apex Court in re; **Gautam Kundu v. Directorate of Enforcement (Prevention of Money-Laundering Act), Government of India through Manoj Kumar, Assistant Director, Eastern Region, (2015) 16 SCC 1,** which reads as under:-

"37. We do not intend to further state the other facts excepting the fact that admittedly the complaint was filed against the appellant on the allegation of committing offence punishable under Section 4 of PMLA. The contention made on behalf of the appellant that no offence under Section 24 of the SEBI Act is made out against the appellant, which is a scheduled offence under PMLA, needs to be considered from the material collected during the investigation and further to be considered by the competent court of law. We do not intend to express ourselves at this stage with regard to the same as it may cause prejudice to the case of the parties in other proceedings. We are sure that it is not expected at this stage that the guilt of the accused has to be established beyond reasonable doubt through evidence. We have noted that in Y.S. Jagan Mohan Reddy v. CBI [Y.S. Jagan Mohan Reddy v. CBI, (2013) 7 SCC 439 : (2013) 3 SCC (Cri) 552] , this Court has observed that: (SCC p. 449, para 34)

"34. ... The economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country...."

22. On being confronted Sri Rohit Tripathi as to whether the Investigating Agency has ever thought to arrest the applicant during investigation on the basis of material, evidences and allegations against the applicant, Sri Tripathi has fairly stated that during investigation, the Investigating Agency did not think to arrest the applicant pursuant to the ECIR dated 14.04.2012. He has also submitted that the summons were issued to the applicant to cooperate in the investigation and to record his statement under Section 50 of the PMLA and the applicant duly appeared before the E.D. on 23.12.2016 and 10.06.2019, therefore, Sri Tripathi has submitted that the present applicant has not been arrested under Section 19 of the PMLA.

23. On being further confronted as to why the applicant has not been provided copy of complaint and copies of statements and relevant documents to the applicant in compliance of Section 204 (3) and 208 Cr.P.C., Sri Tripathi has stated that such copies have not been demanded by the applicant or his counsel, therefore, the same were not provided. However, he has submitted that the same shall be provided to the applicant or his counsel but at this juncture, he could not dispute that the mandatory compliance of Sections 204 (3) & 208 Cr.P.C. has not been made.

24. Heard learned counsel for the parties and perused the material available on record.

25. At the very outset, it would be apt to deal the rigours of Section 45 of the PMLA, which provides that before granting bail, the twin conditions have to be seen carefully. In the present case, this is an admitted case of the prosecution that after lodging the ECIR on 14.04.2012, the E.D. has not tried to arrest the present applicant under Section 19 of the PMLA. Even after release of the present applicant from jail in the predicate offence in the year 2015, the present applicant was called twice by the E.D. under Section 50 of the PMLA to record his statement on 23.12.2016 and 10.06.2019 where the applicant appeared and recorded his statement but the E.D. has not arrested the applicant under Section 19

of the PMLA. Therefore, it is clear that considering the proper cooperation of the present applicant in the investigation and evidences, material and allegations against the applicant, the Investigating Officer did not find it proper to arrest the applicant under Section 19 of the PMLA. In other words, his arrest was not warranted during investigation. It is also clear from the records that after proper cooperation of the applicant in the investigation, the prosecution compliant was filed by the E.D. where the learned trial court took cognizance and issued summons to the applicant and the applicant appeared before the learned trial court pleading his bonafide conduct apprising each facts and circumstances seeking bail giving undertaking that he shall cooperate in the trial proceedings in the same manner as he has cooperated in the investigation, but on the request of learned counsel for the E.D. to file objection, the bail application was adjourned; then the applicant prayed for ad-interim bail making submission regarding his bonafide but ad-interim bail application of the applicant has been rejected without considering the dictums of the Apex Court in re; **Aman Preet Singh** (supra) and **Satender Kumar Antil** (supra). Even his regular bail application has been rejected on the ground that the twin conditions of Section 45 of the PMLA are not being satisfied whereas in the present case, the applicant has not been arrested by the Investigating Agency under Section 19 of the PMLA and the counsel for the E.D. was properly heard by the trial court, therefore, rigours of Section 45 of the PMLA should not be made applicable in the present case.

26. Sub-clause (2) of Section 44 of PMLA provides that nothing contained in this section shall be deemed to affect the special power of the High Court regarding bail under Section 439 Cr.P.C. The Apex Court vide para 400 in re; **Vijay Madanlal Choudhary** (supra) has observed as under:-

"400. It is important to note that the twin conditions provided under Section 45 of the 2002 Act, though restrict the right of the accused to grant of bail, but it cannot be said that the conditions provided under Section 45 impose absolute restraint on the grant of bail. The discretion vests in the Court which is not arbitrary or irrational but judicial, guided by the principles of law as provided under Section 45 of the 2002 Act...."

27. Notably, the statutory rights of the present applicant defined under Section 204 (3) & 208 Cr.P.C. have been violated by the Investigating Agency inasmuch as he has not been provided copy of complaint, copy of statements and other relevant documents.

28. The Apex Court in re; **Aman Preet Singh** (supra) and **Satender Kumar Antil** (supra) has categorically observed that arrest of any person is not mandatory in each and every case but before curtailing the liberty of an accused person, the relevant facts and circumstances should be visualized. In the present case, prima facie, there was no requirement to take the applicant into custody when he appeared before the learned trial court pursuant to the summons being issued inasmuch as he has never flouted the process of law, he cooperated in the investigation throughout, the Investigating Agency has never thought to arrest him under Section 19 of the PMLA despite he appeared before the E.D. to record his statement twice pursuant to the summons being issued under Section 50 of the PMLA and there was no request of

the E.D. before the learned trial court to the effect that arrest of the present applicant is warranted. Therefore, it appears that the learned trial court has taken the custody of the present applicant without following the settled proposition of law of the Apex Court in re; **Aman Preet Singh** (supra) and **Satender Kumar Antil** (supra).

29. Therefore, in view of the above, the bail application is **allowed**.

30. Let applicant- Govind Prakash Pandey be released on bail in the aforesaid crime case on his furnishing a personal bond and two sureties of Rs.1,00,000/- each before the Trial Court concerned with the following conditions:-

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

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

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

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

(v) The applicant shall not leave India without previous permission of the court.

31. Before parting with, it is made clear that I have not entered into merits of the issue, therefore, learned trial court shall conduct and conclude the trial without being influenced from any observation or finding of this order as the observations are only confined to the disposal of this bail application.

(2023) 3 ILRA 572
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.02.2023

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Crl. Misc. Bail Application No. 4602 of 2023
And
Crl. Misc. Bail Application No. 4605 of 2023

Ramakant Yadav ...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Somya Chaturvedi, Sri Gopal S. Chaturvedi (Sr. Advocate)

Counsel for the Opposite Party:
G.A., Sri Mahesh Chandra Chaturvedi (A.A.G.)

A. Criminal Law - Code of Criminal Procedure, 1973-Section 439 - Indian Penal Code, 1860- Sections 272, 273, 34, 420, 467, 468, 471 - Excise Act-Section 60-A - Nine innocent persons had died by consuming poisonous liquor purchased

from the shop allegedly under the control of the accused-applicant-the accused has 48 criminal history-co-accused has been granted bail-But the nine persons died because of greed and inhuman act of the accused-Such criminals have accumulated wealth by committing such offences – Thus, the applicant is not entitled to be enlarged on bail.(Para 1 to 19)

The bail application is rejected. (E-6)

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

1. Heard Mr. Gopal S. Chaturvedi, learned Senior Advocate, assisted by Ms. Somya Chaturvedi, Advocate, representing the accused-applicant, and Mr. Mahesh Chandra Chaturvedi, learned Senior Advocate/Additional Advocate General, assisted by Mr. Sanjay Singh, learned Additional Government Advocate, representing the respondent - State.

2. These two bail applications under Section 439 CrPC seeks bail in the following cases:-

"i. Crime/FIR No.060 of 2022, under Section 60A Excise Act read with Sections 272,273 and 34 IPC lodged at Police Station Phoolpur, District Azamgarh; and

ii. Crime/FIR No.039 of 2022, under Sections 272, 273, 34, 420, 467, 468, 471 and 60-A Excise Act lodged at Police Station Ahraula, District Azamgarh."

3. The FIRs came to be registered by the family of the victims, who had died after consuming country-made liquor allegedly purchased from the liquor shop of co-accused, Rangesh Yadav, a licensee, who is grand-son of sister of the accused-applicant, his close relative. Though co-accused, Rangesh Yadav is resident of District Jaunpur, but he has been issued license for country-made liquor shop at Town Mahul, District Azamgarh. It is alleged that though the licensee is co-accused, Rangesh Yadav, but real control of the shop is under the present accused-applicant.

4. It is alleged that nine persons had died by consuming spurious liquor purchased from the licensed shop in the name of co-accused, Rangesh Yadav. It is further alleged in the FIRs that co-accused, Rangesh Yadav with other accused, Suryabhan, Punit Kumar Yadav, Rambhoj and Ashok Yadav are manufacturing and selling spurious country-made liquor from the licensed shop which has resulted into death of nine persons. In the forensic examination of the VISCERA of the deceased, who had died after consuming liquor purchased from the shop allegedly under the control of the accused-applicant, methyl alcohol/ethyl alcohol poisonous substance was found. Viscera reports have been placed on record along with the bail applications.

5. The name of the accused-applicant has come into light in commission of the offence during investigation, however, he was not initially named in the FIRs.

6. After completing investigation, charge-sheets have been filed against the accused-applicant and co-accused under Sections 272, 273, 34, 420, 467, 468 and 471 IPC read with Section 60-A of the Excise Act. It is important to mention here that an offence under Section 272 IPC entails imprisonment upto life as per Uttar Pradesh Amendment.

7. The accused-applicant had been four times Member of Parliament from

Azamgarh Parliamentary Constituency and was elected five times as Member of Legislative Assembly from Phoolpur-Pawai Legislative Assembly Constituency. At present also, he represents the said Constituency in Uttar Pradesh Legislative Assembly.

8. The accused-applicant is another *Bahubali*, a dreaded criminal and *mafia don* of Eastern Uttar Pradesh where *Bahubali* and Mafia culture is prevalent. This part of the Uttar Pradesh is adjacent to Bihar and to some extent political discourse and culture is similar to that of Bihar This region is dominated by *Mafias* Dons. These *Mafias* Dons have accumulated mind-boggling wealth and properties from proceeds of crimes. They have been enjoying patronage and shield from law by the Ruling Elite of the State. After entering into world of crime, these *Mafias* Dons and criminals have been exercising influence, terror and fear over the poor, law abiding citizens and have acquired forcibly/illegally properties worth thousand of crores of rupees. They have been successful in going scot-free, despite committing hundreds of heinous offences. They also get elected and become law-maker. It is a slur on Indian Democratic Policy.

9. The inglorious criminal history of the accused-applicant would suggest that he had been involved in as many as 48 other criminal cases and heinous offences, which would include eight cases of murder, registered under Section 302 IPC, besides cases of murder, the cases include offence under Section 307, 364 and 376 IPC, Gangsters Act, Goonda Act and SC/ST Act etc. Such a rich criminal background of the accused-applicant, which has been placed on record by means of Annexure-11 to the bail application, is extracted herein-below:-

"i. Crime/FIR No.043 of 1977, Police Station Didarganj, Azamgarh;

ii. Crime/FIR No. 049 of 1983, Police Station Didarganj, Azamgarh;

iii. Crime/FIR No.94-A of 1983, Police Station Didarganj, Azamgarh;

iv. Crime/FIR No.0111 of 1983, Police Station Phoolpur, Azamgarh;

v. Crime/FIR No.0200 of 1983, Police Station Phoolpur, Azamgarh;

vi. Crime/FIR No.074 of 1985, Police Station Shahganj, Jaunpur;

vii. Crime/FIR No.062 of 1986, Police Station Didarganj, Azamgarh;

8. Crime/FIR No.094 of 1986, Police Station Phoolpur, Azamgarh;

9. NCR No. 075 of 1983, Police Station Didarganj, Azamgarh;

10. NCR No.0118 of 1984, Police Station Didarganj, Azamgarh;

11. NCR No.0123 of 1984, Police Station Didarganj, Azamgarh;

12. NCR No.0104 of 1985, Police Station Didarganj, Azamgarh;

13. NCR No.0105 of 1985, Police Station Didarganj, Azamgarh;

14. NCR No.0188 of 1985, Police Station Didarganj, Azamgarh;

15. NCR No.0168 of 1986, Police Station Didarganj, Azamgarh;

16. NCR No.028 of 1987, Police Station Didarganj, Azamgarh;

17. Crime/FIR No.083 of 1987, Police Station Ahraula; Azamgarh;

18. Crime/FIR No 087 of 1987, Police Station Ahraula, Azamgarh;

19. Crime/FIR No.099 of 1987, Police Station Shahganj, Azamgarh;

20. Crime/FIR No.36 of 1990, Police Station Shahganj, Azamgarh;

21. Crime/FIR No.0108 of 1991, Police Station Didarganj, Azamgarh;

22. Crime/FIR No. 06 of 1993, Police Station Didarganj, Azamgarh;

23. Crime/FIR No. 0425 of 1995, Police Station Hazratganj, Lucknow;

24. Crime/FIR No. 062 of 1995, Police Station Phoolpur, Azamgarh;

25. Crime/FIR No.0120 of 1997, Police Station Didarganj, Azamgarh;

26. Crime/FIR No. 036 of 1998, Police Station Phoolpur, Azamgarh;

27. Crime/FIR No. 0300 of 2000, Police Station Phoolpur, Azamgarh;

28. Crime/FIR No. 0198 of 2001, Police Station Phoolpur, Azamgarh;

29. Crime/FIR No. 0256 of 2002, Police Station Ahraula, Azamgarh;

30.Crime/FIR No. 0407 of 2004, Police Station Didarganj, Azamgarh;

31. Crime/FIR No. 0123 of 2004, Police Station Saraimeer, Azamgarh;

32. Crime/FIR No.049 of 2004, Police Station Ahraula, Azamgarh;

33. Crime/FIR No. 0412 of 2005, Police Station Phoolpur, Azamgarh;

34. Crime/FIR No. 0512 of 2005, Police Station Phoolpur, Azamgarh;

35. Crime/FIR No. 0156 of 2006, Police Station Didarganj, Azamgarh;

36. Crime/FIR No.067 of 2008, Police Station Pawai, Azamgarh;

37. Crime/FIR No. 0622 of 2009, Police Station Phoolpur, Azamgarh;

38.Crime/FIR No. 0241 of 2009, Police Station Didarganj, Azamgarh;

39. Crime/FIR No. 0960 of 2010, Police Station Phoolpur, Azamgarh;

40. Crime/FIR No. 056 of 2011, Police Station Kotwali, Azamgarh;

41. Crime/FIR No. 012 of 2016, Police Station Pawai, Azamgarh;

42.Crime/FIR No.015 of 2016, Police Station Pawai, Azamgarh;

43.Crime/FIR No. 024 of 2016, Police Station Phoolpur, Azamgarh;

44. Crime/FIR No.088 of 2017, Police Station Phoolpur, Azamgarh;

45. Crime/FIR No.058 of 2020, Police Station Sidhari, Azamgarh;

46. Crime/FIR No. 063 of 2020, Police Station Sidhari, Azamgarh;

47. Crime/FIR No. 060 of 2022, Police Station Phoolpur, Azamgarh; and

48. Crime/FIR No. 039 of 2022, Police Station Ahraula, Azamgarh."

10. The aforesaid detail of the criminal cases would disclose that the first offence, which the accused-applicant committed, relates to the year 1977 and first murder, in which he was accused, relates to the year 1983. Such a dreaded criminal, gangster, *bahubali* and *mafia* got elected time & again as a Member of Lok Sabha and Member of Legislative Assembly. This shows that something is seriously wrong and amiss with the electoral system of the largest democracy of the world where criminals, like the present accused-applicant, get elected time & again as a Member of Lok Sabha/ Legislative Assembly and become law-makers.

11. This Court, while rejecting the bail application of another *Bahubali*, Sitting Member of Parliament, Atul Kumar Singh, vide order dated 07.06.2022 passed in Criminal Misc. Bail Application No.5473 of 2022 had noted the increasing trend of criminals entering into politics and Parliament. It has been reported that 43% of the present Member of the Lok Sabha who got elected in 2019 General Elections are having criminal background, including the case of heinous offences. Some of the relevant paragraphs of the order passed in Criminal Misc. Bail Application No.5473 of 2020 are extracted hereunder:-

" 14. A constitution Bench of the Supreme Court in the case of Public Interest Foundation & Ors vs Union of India & Anr : (2019) 3 SCC 224 has taken note of 244th Law Commission report in which it was said that 30 per cent or 152 sitting M.P.s were having criminal cases pending against them, of which about half i.e. 76 were having serious criminal cases. This phenomenon has increased with every general election. In 2004, 24 per cent of Lok Sabha M.Ps. had criminal cases pending, which increased to 30 per cent in 2009 elections. In 2014, it went up to 34 per cent and in 2019 as mentioned above, 43 per cent Members of Parliament who got elected for Lok Sabha are having criminal cases pending against them. The Supreme Court has taken judicial notice of criminalization of politics and imperative needs of electoral reforms. There have been several instances of persons charged with serious and heinous offences like murder, rape, kidnapping and dacoity got tickets to contest election from political parties and even got elected in large number of cases.

15. The Supreme Court has said that this leads to a very undesirous and embarrassing situation of law breakers becoming law makers and moving around police protection. The Supreme Court in the said case has directed the Election Commission of India to take appropriate measures to curb criminalization in politics but unfortunately collective will of the Parliament has not moved in the said direction to protect the Indian Democracy going in the hands of criminals, thugs and law breakers. If the politicians are law breakers, citizens cannot expect accountable and transparent governance and the society governed by the rule of law be an utopian idea. After independence with every election, role of identities such as caste, community, ethnicity, gender, religion etc, has been becoming more and more prominent in giving tickets to winnable candidates. These identities coupled with money and muscle power has made entry of criminals in politics easy and every political party without exception (may be with some difference in degree and extent) uses these criminals to win elections. Giving tickets to candidates with serious criminal charges would break the confidence and trust of the civil society, law abiding citizens of this country in the electoral politics and elections.

16. No one can dispute that the present day politics is caught in crime, identity, patronage, muscle and money network. Nexus between crime and politics is serious threat to democratic values and governance based on rule of law. Elections of Parliament and State Legislature and even for local bodies and panchayats are very expensive affairs. The record would show that the elected members of Lok Sabha with criminal records are extremely wealthier candidates. For example, in 2014 Lok Sabha election 16 out of 23 winners having criminal charges in their credit related to murder were multi-millionaire. After candidates get re-elected, their wealth and income grows manyfold which is evident from the fact that in 2014, 165 M.Ps. who got re-elected, their average wealth growth was Rs.7.5 Crores in 5 years.

17. Earlier, "Bahubalis' and other criminals used to provide support to candidates on various considerations including caste, religion and political shelter but now criminals themselves are entering into politics and getting elected as the political parties do not have any inhibition in giving tickets to candidates with criminal background including those having heinous offence(s) registered against them. Confirmed criminal history

sheeters and even those who are behind bars are given tickets by different political parties and surprisingly some of them get elected as well.

18. It is the responsibility of the Parliament to show its collective will to restrain the criminals from entering into the politics, Parliament or legislature to save democracy and the country governed on democratic principles and rule of law.

19. There is responsibility of civil society as well to rise above the parochial and narrow considerations of caste, community etc and to ensure that a candidate with criminal background does not get elected. Criminalization of politics and corruption in public life have become the biggest threats to idea of India, its democratic polity and world's largest democracy. There is an unholy alliance between organized crime, the politicians and the bureaucrats and this nexus between them have become pervasive reality. This phenomenon has eroded the credibility, effectiveness, and impartiality of the law enforcement agencies and administration. This has resulted into lack of trust and confidence in administration and justice delivery system of the country as the accused such as the present accused-applicant win over the witnesses, influence investigation and tamper with the evidence by using their money, muscle and political power. Alarming number of criminals reaching Parliament and State Assembly is a wake up call for all. Parliament and Election Commission of India are required to take effective measures to wean away criminals from politics and break unholy nexus between criminal politicians and bureaucrats.

20. This unholy nexus and unmindfulness of political establishment is the result of reaching person like the accused-applicant, a gangster, hardened criminal and "Bahubali' to the Parliament and becoming a law maker. This Court, looking at the heinousness of offence, might of the accused, evidence available on record, impact on society, possibility of accused tampering with the evidence and influencing/ winning over the witnesses by using his muscle and money power does not find that there is a ground to enlarge the accused-applicant on bail at this stage. This bail application is thus, rejected."

12. In another case i.e. Criminal Misc. Bail Application No.46494 of 2021 vide order dated 13.06.2022, in respect of another *Bahubali, mafia don* and the most dreaded criminal, a Coordinate Bench of this Court has mentioned that the said *mafia* had managed his affairs in such a way that he has not received any conviction against him, which, in fact, is a challenge to the judicial system that such a dreaded and white colour criminal had remained undefeated and unabated.

13. This Court, in its judgment and Order dated 21.02.2023 passed in Criminal Misc. Bail Application No.22865 of 2020, after noting the criminal history of more than 80 cases of the brother of the accused-applicant, who had also been got elected several times as Member of Lok Sabha and Member of Legislative Assembly, has said that the phenomena of hard-core criminals and *mafia don*s going scot-free in heinous offences and then getting elected and becoming law-makers, does not augur well for democracy, rule of law and society, which is to be governed by rule of law. Paragraph-9 of the order dated 21.02.2023 passed in Criminal Misc. Bail Application No.22865 of 2020 filed by brother of the accused-applicant would read as under:-

"9. The accused applicant had allegedly committed the first offence of murder in the year 1974 and in 48 years of his long and henious journey in world of crime, he could be convicted only in two cases recently in the year 2022. This phenomena is very perturbing and does not auger well for a democratic polity and a society which is governed by rule of law. All wings of the government i.e. executive, legislative and judiciary, must share the blame for allowing such a dreaded criminal to go scot-free in several henious offences which have been noted hereinabove. Such a criminal should not have any place in the society."

14. Mr. Gopal S. Chaturvedi, learned Senior Advocate, representing the accused-applicant, submits that the accused-applicant has been falsely implicated in the present cases as he has nothing-to-do with the business of liquor shop of his relative. It is further submitted that five and half months, after lodging of the FIRs, statements of families of the deceased got recorded, which are stereotype, alleging therein that the accused-applicant is the real person behind the liquor shop and, under his umbrella, co-accused, Rangesh Yadav runs the liquor shop. The accused-applicant has overall control over manufacturing and selling of spurious liquor. It is submitted that these statements have no evidentiary value and, they are hear-say evidence, without there being anything on record to corroborate and suggest the involvement of the accused-applicant in running the liquor shop, manufacturing and selling the spurious liquor, as alleged, or otherwise. It is further submitted that though the accused-applicant has criminal history of several cases, however, he cannot be denied bail, as a long criminal history cannot be the sole ground to deny an accused bail, if there is no evidence to suggest his involvement in commission of offence, for which he seeks bail. It is, therefore, submitted that the accused-applicant, who has been languishing in jail since 27.07.2022, should be enlarged on bail.

15. On the other hand, on behalf of the respondent - State, Mr. Mahesh Chandra Chaturvedi, learned Additional Advocate General, vehemently opposes the bail application and submits that co-accused, Rangesh Yadav is resident of district Jaunpur and, he is only a mask and, real face, behind liquor shop, manufacturing and selling of spurious liquor, is of the accused-applicant. It is further submitted that the accused-applicant whenever had been enlarged on bail in a case, had committed one after another offence and, had misused the liberty of bail granted to him. It is further submitted that after committing a heinous offence, he could secure acquittal as the witness for his terror, fear and influence turned hostile. It is, therefore, submitted that there is every likelihood of the accused-applicant influencing the witnesses or terrorizing them, if enlarged on bail, and such a criminal is not entitled to be enlarged on bail.

16. It is further submitted by Mr. Mahesh Chandra Chaturvedi, learned Additional Advocate General, that the accused-applicant could secure acquittal in several heinous offences as no witness would dare to depose against such a dreaded criminal, gangster and *mafia don*. He strikes unparallel terror and fear in the hearts and minds of the people of district Azamgarh, and nearby districts. The

witnesses would turn hostile or the trial would be dragged so that the witnesses get tired or eliminated.

17. I have considered the submissions advanced on behalf of the accused-applicant and the respondent - State.

18. Though the charge-sheets would disclose that the statements of the witnesses, who have taken name of the accused-applicant, could be recorded after five and a half months from the date of incident, but it appears to be true that opening mouth against such a dreaded criminal, *mafia don* and gangster could be to be peril of life and liberty of the witnesses and their families. Only when the witnesses could have been assured of their well-being, safety and security, they would have come forward to make statements against the accused-applicant.

- In the FIRs, it has specifically been mentioned that for the shop of co-accused, Rangesh Yadav, from-where the liquor was purchased by the deceased and, after its consumption, they became seriously ill and ultimately died. The witnesses have specifically said that shop in question is under the control of the accused-applicant and Rangesh is only a front-man but real person behind the scene is the accused-applicant. It was the accused-applicant who could secure the license for liquor shop in the name of Rangesh Yadav, who is grand-son of sister of the accused-applicant. Nine innocent persons had died by consuming poisonous liquor purchased from the shop allegedly under the control of the accused-applicant. The accuse-applicant has a long criminal history and, no one could have any sympathy for such a dreaded criminal of heinous offences. This Court should not take a lenient view in such a heinous offence. Nine persons had died because of greed and inhuman act of the accused. The criminals like present accused-applicant have accumulated mind-boggling wealth and properties by committing offences. Liquor is profitable business and is mostly controlled by *mafias*. Though, co-accused, Rangesh Yadav has been granted bail by a Coordinate Bench of this Court vide order dated 07.09.2022 passed in Criminal Misc. Bail Application No.26822 of 2022, however, in the said order merit, heinousness of the offence and its societal impact have not been considered, which reads as under:-

"Heard Ms. Tanisha Jahangir Monir, the learned counsel for the applicant, Sri Shashi Shekhar Tiwari, the learned A.G.A. for the State and perused the record.

2.The present bail application has been filed by the applicant with the prayer to enlarge him on bail in Case Crime No. 0039 of 2022, under Sections 272, 273, 34, 420, 467, 468, 471 I.P.C. and Section 60-A of Excise Act, P.S. Ahraula, District Azamgarh.

3.The aforesaid case has been registered on the basis of an F.I.R. dated 21.02.2022 lodged against the applicant Rangesh Yadav and four other named accused persons, alleging that on 20th February, 2022, the informant's father had purchased country liquor from the shop of the applicant, after consuming which the informant's father died. The other accused persons implicated in this case are said to be salesmen employed by the applicant.

4.In the affidavit filed in support of the bail application, it has been stated that the applicant is innocent and has been falsely implicated in the present case.

5.Learned counsel for the applicant has submitted that on the basis of

similar allegations, Case Crime No. 60 of 2022, under Sections 272, 273, 302, 34 IPC and Section 60(A) of UP Excise Act and Case Crime No. 40 of 2022, under Section 272, 273 IPC and Section 60(A) of UP Excise Act were lodged against the applicant and in both the aforesaid cases, the applicant has been granted bail by means of orders dated 29.06.2022 and 25.07.2022 passed by this Court in Criminal Misc. Bail Application Nos. 26819 of 2022 and 31534 of 2022, respectively. She has further submitted that besides the applicant all the other accused persons have been granted bail in the present case.

6.The learned A.G.A. has opposed the prayer for grant of bail to the applicant, but could not dispute the aforesaid facts.

7.Having considered the aforesaid facts and submissions and keeping in view the fact that applicant has been granted bail in two other cases involving similar allegations as also the fact that all the other co-accused have been granted bail, whereas the applicant is languishing in jail since 23.02.2022, I am of the view that the applicant is entitled to be released on bail on the ground of parity. The bail application is accordingly allowed.

8.Let the applicant - Rangesh Yadav be released on bail in Case Crime No. 0039 of 2022, under Sections 272, 273, 34, 420, 467, 468, 471 I.P.C. and Section 60-A of Excise Act, P.S. Ahraula, District Azamgarh on his furnishing a personal bond and two reliable sureties each of the like amount to the satisfaction of the court concerned subject to following conditions:-

(i) The applicant will not tamper with the evidence during the trial.

(ii) The applicant will not influence any witness.

(iii) The applicant will appear before the trial court on the date fixed, unless personal presence is exempted.

(iv) The applicant shall not directly or indirectly make inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court to any police officer or tamper with the evidence.

9.In case of breach of any of the above condition, the prosecution shall be at liberty to move an application bail before this Court seeking cancellation of bail."

19. Considering the aforesaid facts, this Court finds that the accused-applicant is not entitled to be enlarged on bail. Thus, these applications are hereby ***rejected at this stage.***

(2023) 3 ILRA 580
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.02.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Crl. Misc. Anticipatory Bail Application (U/S 438 Cr.P.C.) No. 11542 of 2022

X Juvenile ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Rakesh Pathak, Sri Shashank Shekhar Tiwari

Counsel for the Opposite Parties:
G.A., Sri Prem Shankar Pandey

A. Criminal Law - Code of Criminal Procedure, 1973-Section 438 -Indian Penal Code, 1860-Sections 307, 504 & 506-maintainability of-application filed on

behalf of minor through his guardian/father seeking anticipatory bail-Section 8(1) of the Juvenile Justice Act, 2015 that the Juvenile Justice Board has been given exclusive power to deal with all the proceedings under the Act relating to children in conflict with law-The Juvenile Justice Act has no where said that Section 438 Cr.P.C. shall have application to the children in conflict with law-Though Section 8(2) of the Juvenile Justice Act gives similar powers to the High Court or the Children Court but only when matter is brought before it in appeal or revision or otherwise-There is no express provision empowering Children Court or Sessions Court or High Court to assume jurisdiction on itself for grant of anticipatory bail by virtue of provisions of Section 8(2) of the Juvenile Justice Act-Section 12 of the Juvenile Justice Act, 2015 is equally applicable to bailable and non-bailable offences-no distinction has been maintained for applicability of provisions of bail on the lines as has been maintained under the provision of Section 436 to 439 of Cr.P.C.-Juvenile Justice Act is a comprehensive legislation containing all provisions with regard to children in conflict with law and the provisions of section 438 Cr.P.C. have no application being extraneous and incompatiable with the scheme as well as aim and objective sought to be achieved by the Act.(Para 1 to 19)

The application is dismissed. (E-6)

List of Cases cited:

1. Raman & ors. Vs St. of Mah. & anr. (2022) SCC OnLine Bom 1470
2. Shahaab Ali & anr.. Vs. St. of U.P. (2020) 2 ADJ 130

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

1. It appears that name of the applicant-juvenile has been disclosed in the memo of revision. This fault from the side of applicant escaped detection by the Registry. The concerned section of Registry is directed to remove the name of the applicant-minor from the title of the revision as fed and shown in the data on official website and represent him as **"Minor 'X' Through His Guardian/Father, District Prayagraj."**

2. Heard Sri Rakesh Pathak, learned counsel for the applicant and Sri O.P. Mishra, learned AGA for the State on the point of maintainability of this anticipatory bail application.

3. The present application has been filed on behalf of minor "X' through his guardian/father seeking anticipatory bail in F.I.R./Case Crime No. 0362 of 2022, under Sections 307, 504 and 506 IPC, Police Station Karchhana, District Prayagraj.

4. It is contended on behalf of the applicant (who admittedly is a minor) that a minor cannot be deprived of protection available under Section 438 Cr.P.C. just because he is not an adult. The contention is ardently opposed by the State.

5. Before coming into effect of the Juvenile Justice (Care and Protection of Children) Act, 2015, the Juvenile Justice (Care and Protection of Children) Act, 2000 was applicable. In the statement of objects and reasons for enactment of the new Act of 2015, it is mentioned that numerous changes were required in the existing Act of 2000 to address several issues. It was proposed that the existing Act of 2000 shall be repealed as the need for **comprehensive legislation** was felt intensely inter alia to provide for general principles of care and protection; the procedure to be applied; rehabilitation and social re-integration measures for such

children, adoption of orphan, abandoned and surrendered children, and offences committed against children. It was expected that the legislation would thus ensure proper care, protection, development, treatment and social re-integration of children in difficult circumstance by adopting a child-friendly approach keeping in view the best interest of the child. The statement of objects and reasons clearly indicate that the legislature intended to provide for exhaustive statutory provisions to deal with children involved in offences with certain far reaching object in mind while carefully treading a path illuminated by the principle of best interest of the child.

6. Section 1(4) of the Juvenile Justice Act, 2015 contains a non-obstante clause and is being reproduced for ready reference as below:-

"(4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all matters concerning children in need of care and protection and children in conflict with law, including -

(i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law;

(ii) procedures and decisions or orders relating to rehabilitation, adoption, re-integration, and restoration of children in need of care and protection."

Besides using the phrase "Notwithstanding anything contained in any other law", Section 1 (4) uses two more phrases which are meaningful in present context. They are **"all matters"** concerning the child in conflict with law and secondly the word "including" apprehension, detention, prosecution, penalty or imprisonment rehabilitation and social investigation of children in conflict with law. The provisions are clear, plain and free from obscurity. **The unmistakable conclusion which can be drawn is that this Act seeks to deal exhaustively with all matters concerning child offenders including their apprehension, detention and prosecution.** No doubt the broader objective of the Act is to bring back the child in main stream of the society while applying a reformative approach without forgetting the need to balance the demands of justice of the victim and the society at large. Lets briefly see how this objective is sought to be achieved by this Act.

7. Before jumping to any conclusion, it shall be useful to go through some provisions of this enactment which will shed light on the line of difference which has been scrupulously maintained by the legislature while giving a final shape to this law as compared to the provisions of Cr.P.C.

8. It may be noted that Section 4(2) of the Cr.P.C. says that all the offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions of Cr.P.C., but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. On the basis of above provisions, it can be said that the provisions of Cr.P.C. shall apply only where the special enactment is silent on a particular issue.

9. Now a question arises whether the applicability of Section 438 Cr.P.C. is ruled out by implication or otherwise in cases where the Juvenile Justice Act, 2015 is applicable?

First lets go through Section 438(1) Cr.P.C. which is as below:-

"Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:-

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,

either reject the application forthwith or issue an interim order for grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application"

Section 438 Cr.P.C. speaks of "apprehension of arrest".

10. Chapter V of the Cr.P.C. deals with the arrest of persons. There are number of provisions from Sections 41 to 60(A) dealing with arrest, who may arrest; how an arrest can be affected; the matters incidental thereto. The provisions of Juvenile Justice Act consciously, couspicously and deliberately avoided the use of word "**arrest**", instead the word "**apprehension**" has been used in relation to a child in conflict with law. And this replacement is not without reason.

11. **Chapter IV of the Juvenile Justice Act, 2015** deals with the procedure in relation to child in conflict with law; this Chapter also contains most important **Section 10 to Section 12** which inter-alia provide for **"first appearance"** before the Board (this word is being used in its comprehensive sense here).

Sections 10, 11 and 12 of the Juvenile Justice Act, 2015 are being reproduced herein below to give a clearer picture which has been envisaged in the Act in relation to children in conflict with law.

"Section 10. Apprehension of child alleged to be in conflict with law. (1) As soon as a child alleged to be in conflict with law is apprehended by the police, such child shall be placed under the charge of the special juvenile police unit or the designated child welfare police officer, who shall produce the child before the Board without any loss of time but within a period of twenty-four hours of apprehending the child excluding the time necessary for the journey, from the place where such child was apprehended:

Provided that in no case, a child alleged to be in conflict with law shall be placed in a police lockup or lodged in a jail.

(2) The State Government shall make rules consistent with this Act,--

(i) to provide for persons through whom (including registered voluntary or non-governmental organisations) any child alleged to be in

conflict with law may be produced before the Board;

(ii) to provide for the manner in which the child alleged to be in conflict with law may be sent to an observation home or place of safety, as the case may be.

Section 11. Role of person in whose charge child in conflict with law is placed. Any person in whose charge a child in conflict with law is placed, shall while the order is in force, have responsibility of the said child, as if the said person was the childs parent and responsible for the childs maintenance:

Provided that the child shall continue in such persons charge for the period stated by the Board, notwithstanding that the said child is claimed by the parents or any other person except when the Board is of the opinion that the parent or any other person are fit to exercise charge over such child.

Section 12. Bail to a person who is apparently a child alleged to be in conflict with law- (1) When any person, who is apparently a child and is alleged to have committed a abailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the persons release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under sub-section (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home 1[or a place of safety, as the case may be] in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

It is conspicuous that just after apprehension, he shall be put either in observation home or place of safety and neither in jail nor lockup and shall be treated with care.

This too is quite clear that this Chapter of the Act of 2015 contains all the provisions right from apprehension of child alleged to be in conflict with law; appearance of such child before the Board; grant of bail to him; how to deal with a child when bail is not granted; where to place the child allegedly in conflict with law before his production (without apprehension) or production after apprehension before the Board; before grant of bail or after grant of bail; the holding of an inquiry (which commences

from the very first production before the Board under Section 14); the manner and the time limit for completion of an inquiry; the orders which may be passed against him; the orders which cannot be passed against him; the places where he can be detained; and several other matters in relation to all the above. The word arrest is conspicuous by its absence.

12. It is quite apparent from reading of Section 8(1) of the Juvenile Justice Act 2015 that the Juvenile Justice Board has been given exclusive power to deal with all the proceedings under the Act relating to children in conflict with law.

Section 8(1) of Juvenile Justice Act is as below:-

"Notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, the Board constituted for any district shall have the power to deal exclusively with all the proceedings under this Act, relating to children in conflict with law, in the area of jurisdiction of such Board."

Section 8(2) of Juvenile Justice Act is as below:-

"The powers conferred on the Board by or under this Act may also be exercised by the High Court and the Children's Court, when the proceedings come before them under section 19 or in appeal, revision or otherwise."

On the one hand the powers given to the Board are exclusive unless saved by any express provisions in the Juvenile Justice Act, 2015 itself. On the other hand no window appears to have been left open for meddling with the affairs of juvenile offenders in terms of provisions of Section 438 Cr.P.C. The Juvenile Justice Act has no where said that Section 438 Cr.P.C. shall have application to the children in conflict with law. Though Section 8(2) of the Juvenile Justice Act gives similar powers to the High Court or the Children Court but only when matter is brought before it in appeal or revision or otherwise. There is no express provision empowering Children Court or Sessions Court or High Court to assume jurisdiction on itself for grant of anticipatory bail by virtue of provisions of Section 8(2) of the Juvenile Justice Act.

13. Under the scheme of adjudicating hierarchy under the Juvenile Justice Act, 2015 the Board functions as court of original jurisdiction, the Children Court functions at intermediary level and in certain cases also as a trial Court (for children who are tried as adult). The appeals shall ordinarily lie to Children Court (Section 101) and the revision to High Court (Section 102). It may also be usefully noticed that the Children's Court here is not equal to a Sessions Court or vice versa. The Children Court has been defined under Section 2(20) of the Juvenile Justice Act as a Court established under the Commissions for Protection Of Child Right's Act, 2005 or a Special Court under the POCSO Act, 2012 and where there are no such Courts, then only the Court of Sessions. While the powers under Section 438 Cr.P.C. are available to the High Court or to the Court of Sessions only. It does not stand to reason to assume that powers under Section 438 Cr.P.C. shall be exercisable by Children Court (or shall be exercisable by the Sessions Court) in relation to children in conflict with law just because the Section 438 Cr.P.C. mentions Sessions Court. If such an interpretation is done, it shall disturb the whole of the scheme of the "Courts' in Juvenile Justice Act, 2015.

14.(i). It may further be noted that while an adult can ordinarily be arrested for every offence which is cognizable by the police but in case of child in conflict with law, he cannot ordinarily be apprehended/arrested in a cognizable cases. It will be the narrowest interpretation possible to say that legislature replaced the word "arrest' with "apprehension' merely to sound child friendly. This replacement is purposeful in line with the objectives of the Act.

14(ii). The reasons/grounds enabling arrest of child offender as provided in Juvenile Justice Act, 2015 are qualitatively different from reasons/grounds of arrest of adults and a paradigm shift is quite discernible. It may simultaneously be noted that there is an express bar against registration of even an FIR except where the case is of heinous nature or where it is alleged to have been committed jointly with adults. Rule 8 of the Juvenile Justice (Care and Protection) Model Rules, 2016 speaks of registration of FIR and also of apprehension:-

"8. Pre-Production action of Police and other Agencies.- (1) No First Information Report shall beregistered except where a heinous offence is alleged to have been committed by the child, or when such offence is alleged to have been committed jointly with adults. In all other matters, the Special Juvenile Police Unit or the Child Welfare Police Officer shall record the information regarding the offence alleged to have been committed by the child in the general daily diary followed by a social background report of the child in Form 1 and circumstances under which the child was apprehended, wherever applicable, and forward it to the Board before the first hearing:

Provided that the power to apprehend shall only be exercised with regard to heinous offences, unless it is in the best interest of the child. For all other cases involving petty and serious offences and cases where apprehending the child is not necessary in the interest of the child, the police or Special Juvenile Police Unit or Child Welfare Police Officer shall forward the information regarding the nature of offence alleged to be committed by the child along with his social background report in Form 1 to the Board and intimate the parents or guardian of the child as to when the child is to be produced for hearing before the Board.

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(8).....
(9).....

14(iii). The reasons/cause of arrest/apprehension may not have much to do with the nature of the offence. The line of difference maintained between cognizable and non-cognizable offence is some what blurred in case of juveniles. He/she can only be apprehended (arrested) where offence is heinous in nature or where such a step is necessary for best interest of the child. The proviso to Section 8(1) thereafter adds a provision about apprehension in petty offences and serious offences. There is clear implication that power of apprehension is to be exercised in suitable cases only irrespective of its congnizability and rather it shall depend on other considerations. And in my view if we try to induct this provisions of Section 438 Cr.P.C. in the scheme of things, it will be

akin to forgetting correct path before reaching the destination.

15(i). An FIR cannot be registered where offence fell in the category of petty or serious offence. Here no distinction has been maintained on the lines as provided in Cr.P.C. The provisions do not say that FIR can be registered if the offence is cognizable. Moreover as discussed earlier a child allegedly in conflict with law cannot be apprehended unless it is in the best interest of the child or in a cases of heinous offence. He cannot ordinarily be legally apprehended in a case of petty and serious offence.

15(ii). Where the powers of apprehension are legally exercisable, the child is to be placed under the charge of the Special Juvenile Police Unit or the Child Welfare Police Officer. In no case the child can be lodged in a police lockup. Even before production of the child before the Board, if required, he shall be kept in an observation home not in a lockup. He cannot be hand-cuffed, chained or otherwise fettered. Even the Child Welfare Police Officer is required to be in plain clothes and not in uniform.

15(iii). All the provisions referred to above clearly point out that though there is some commonality between the term arrest and apprehension, however a milder term of apprehension has been preferred over the other to clinch the idea behind enactment of this special law and to bring home the essential difference with the term arrest in the sense used in other statutes. To summarise ordinary implications of an "arrest' are missing. The custody of a juvenile is not punitive in nature and is a protective one.

15(iv). Rule 9 of the Model Rules, 2016 becomes applicable only when a child in conflict with law is apprehended. When such apprehended child is produced before the Board, the Board may send him to an observation home or a place of safety or a fit facility or a fit person. He cannot be sent to jail.

16. After noting down the above provision, I come back to Section 12 of the Juvenile Justice Act, 2015. (It has been reproduced in Para-10).

As is very clear from the language of Section 12 that no distinction has been maintained for applicability of provisions of bail on the lines as has been maintained under the provision of Section 436 to 439 of Cr.P.C.; Section 12 of the Juvenile Justice Act, 2015 is equally applicable to bailable and non-bailable offences. Secondly, this provision of law speaks of three situations which are as below:-

(i) where a child allegedly in conflict with law is apprehended and detained by the police;

(ii) where he appears (definitely such a situations arises when he is not apprehended and the information is sent to his/her guardian for appearing before the Board as per proviso to Rule 8(1) of the Model Rules, 2016); and

(iii) when he brought before the Board (that situation arises when he has been put in charge of the Child Welfare Police Officer or the Special Juvenile Police Unit).

Section 12 again uses phrase in middle of sub-section (1) which says that "Notwithstanding anything contained in the Code of Criminal Procedure, 1973 for the time being in force' be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person. The natural and

literal meaning of this provision indicate that notwithstanding with the category of offences for which the child in conflict with law has been produced or brought before or appeared before the Board, he may be released on bail or he may not be so released and placed under the supervision of a probationary officer or under the care of any fit person. When he is not being released, he can only be kept in an observation home or a place of safety. The provisions as discussed above are fundamentally different from the provisions of bail under Cr.P.C. **The apprehension of arrest which is a necessary pre-requisite for applicability of Section 438 Cr.P.C. is altogether out of place in cases of juveniles.** In my view the word "**arrest**" is not replaceable by the word "**apprehension**" in the sense used under the provisions of the Juvenile Justice Act.

17. In my firm view, a distinct and special procedure with regard to a child offender has been put in place in the Juvenile Justice Act, 2015 so as to comprehensively deal with all the aspects which may arise where a criminal case, whether initiated by filing of FIR or not begins. There are many indicators which rule out forming of a view or an opinion that provisions of anticipatory bail shall apply to protect the liberty of a juvenile. The Act has a scheme which deals with such juveniles at pre-production and post-production stages. Some of the points have already been dealt with and some more points can be added. The factors which ought to be taken into consideration while dealing with the release of a child on bail, expressly include the likelihood of his coming into association with known criminals, likelihood of his exposure to physical, moral or psychological danger or otherwise defeating the ends of justice. Above factors are enough to deduce that the provisions of Section 12 have been enacted keeping in mind the best interest of a child. It may be noted that there may be circumstances where keeping a child in a child care institution may be the best option to serve the best interest of a child, a principle which finds place in the opening of this Act under Section 3. Chapter II of Section 3 enumerates 16 principles which are necessarily to be kept in mind by the Central Government or the State Government and other agencies, as the case may be including the Board while implementing the provisions of this Act. These principles, very importantly include the principle of safety which says that all measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or maltreatment while in contact with the care and protection system, and thereafter. In my view, a holistic machinery of law has been put in place to deal with the child in conflict with law. By implication, such gaps, if any, need to be excluded where a child can be dealt with under regular law of procedure. In case, the provisions of Section 438 Cr.P.C. are allowed to hold field in the matters of juvenile, the aim and object of the Act shall be defeated. The interpretation of law cannot be devised in a way, so as to put a hurdle in the broader and solemn aim which is sought to be achieved by this enactment.

18. The applicant, while stressing the point of maintainability of this anticipatory bail application has placed before me, the judgment of High Court of Bombay, Aurangabad Bench given in ***Raman and Others vs. State of Maharashtra and Another; 2022 SCC OnLine Bom 1470*** in

which the question of maintainability was considered and was answered by the Division Bench as below:-

"A "child' and a "child in conflict with law" as defined under the Juvenile Justice (Care and Protection of Children) Act, 2015 can file an application under Section 438 of the Code of Criminal Procedure, 1973."

19. In view of the discussion above, I respectfully disagree with the opinion of High Court of Bombay. My opinion finds ample support from the judgment of Allahabad High Court in ***Shahaab Ali and Another vs. State of U.P.; 2020 (2) ADJ 130.*** I am of the firm view that the Juvenile Justice Act is a comprehensive legislation containing all provisions with regard to children in conflict with law and that the provisions of Section 438 Cr.P.C. have no application being extraneous and incompatible with the scheme as well as aim and objective sought to be achieved by the Act.

20. The anticipatory bail application is **dismissed as not maintainable**.

(2023) 3 ILRA 589
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.01.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Crl. Misc. Anticipatory Bail Application (U/S 438 Cr.P.C.) No. 12334 of 2022

Rahees ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Vidit Narayan Mishra

Counsel for the Opposite Party:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 438 - Indian Penal Code-1860-Sections 380, 427 & 457-application-rejection-Rs. 17 lac was looted from the ATM-applicant's name is disclosed in the confessional statement-though a confession or a statement given by co-accused may not pass the test of credible evidence during trial but it definitely plays a very important role as far as investigation is concerned-Hence, Pre-arrest bail to the applicant shall not only hamper proper and effective investigation but may play role in defending the real culprits-More so, probability of recovery of rest of the amount is also ruled out in case anticipatory bail application is granted-Power u/s 438 Cr.P.C. cannot be utilized in a routine manner as a substitute for regular bail.(Para 1 to 8)

The bail application is rejected. (E-6)

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

1. Heard Sri Vidit Narayan Mishra, learned counsel for the applicant, Sri O.P. Mishra, learned AGA for the State and perused the papers on record.

2. The present application has been moved seeking anticipatory bail in Case Crime no.255 of 2021, under Sections 380, 427 and 457 I.P.C., P.S.Dankaur, District Gautam Budh Nagar.

3. As per prosecution case, an A.T.M. of Punjab National Bank standing at Bilaspur was ripped open by gas a cutter, in the night between 13.07.2021/14.07.2021 and cash was stolen from there. On the

basis of this information an F.I.R. was registered and investigated upon. Three persons namely, Nasir, Sahid and Imran were arrested and cash of about more than Rs. 80,000/- from each one of them was recovered by the police. The name of present applicant has been taken in the statement of one of the arrested person, recorded by the police as having been involved in this incident and the investigation against him is pending.

4. It is contended on behalf of the applicant that his name is disclosed in the statement given by one of the arrested persons on which legally no reliance can be placed as having a nil evidentiary value. It is further said that the present applicant has inimical relation with one of the arrested person Nasir, therefore, he has taken his name. He is absolutely innocent and his liberty deserves to be protected by grant of anticipatory bail application.

5. The application for anticipatory bail is opposed with vehemence by the State following facts and circumstances have been placed before me in this connection.

(i). A total of more than 17 Lakhs was looted from the A.T.M. in an organized manner by cutting the A.T.M. by a gas cutter. The evidence collected so far showed that a number of persons were involved and their names have been disclosed by the arrested ones.

(ii). It is also argued that though a confession or a statement given by co-accused may not pass the test of credible evidence during trial but it definitely plays a very important role as far as investigation is concerned.

(iii). It is further argued that the pre-arrest bail to the applicant shall not only hamper proper and effective investigation but may play role in defending the real culprits. The probability of recovery of rest of the amount is also ruled out in case anticipatory bail application is granted at this stage.

6. Prima facie it does not appear that he is entangled in this case with the purpose of bringing disgrace or cause humiliation to him by having him arrested in a mala fide manner. It may also be kept in mind that anticipatory bail is an extraordinary remedy to be exercised in suitable cases only. The powers under Section 438 Cr.P.C. cannot be utilized in a routine manner as a substitute for regular bail. This discretionary power calls for existence of facts of the kind where the court is satisfied that its interference is necessary to further the cause of justice and to prevent misuse of process of law. Further where an intense and skillful interrogation may have been required for unearthing the cash stolen and for effective opening of a case a pre-arrest bail may not be a conducive step.

7. In view of the facts and circumstances of the case I do not find it fit case to grant benefit of anticipatory bail.

8. Hence the anticipatory bail application is ***rejected***.

9. **It is made clear that observations made in rejecting anticipatory bail to the applicant shall not in any way affect the learned trial Judge in forming his independent opinion at any stage of the case based on material before him.**

(2023) 3 ILRA 591
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.02.2023

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Crl. Misc. Bail Application No. 12591 of 2022

Shiv Priya ...Applicant
Versus
Enforcement Directorate, Lucknow Zone ...Opposite Party

Counsel for the Applicant:
Mohd. Ghayasuddin Khan

Counsel for the Opposite Party:
Rohit Tripathi, Rohit Tripathi

A. Criminal Law -Code of Criminal Procedure, 1973-Section 439 - Prevention of Money Laundering Act, 2002-Sections 3 & 4-the case is relating to the offence of PMLA wherein the complaint has been filed by the ED-A some of Rs.k 28.95 crores have already been recovered from the applicant in furtherance of the proceed of crime-Rigour of Section 45 of PMLA are satisfied, the applicant has already served more than half of the punishment, has not misused the liberty of interim bail granted by the Apex Court-More so, there is no possibility or likelihood to conclude the trial with expedition inasmuch as there are total 150 prosecution witnesses and only two witnesses have been examined by now-Thus, the applicant may be given the benefit of dictum of Apex Court in K.A. Najeeb case.(Para 1 to 29)

B. The twin conditions provided u/s 45 of the 2002 Act, though restrict the right of the accused to grant of bail, but it cannot be said that the conditions provided u/s 45 impose absolute restraint on the grant of bail. The discretion vests in the Court which is not arbitrary or irrational but judicial, guided by the principles of law as provided u/s 45 of the 2002 Act. (Para 18)

The bail application is allowed. (E-6)

List of Cases cited:

1. U.O.I. Vs K.A. Najeeb (2021) 3 SCC 713
2. Ramchand Karunakaran Vs E.D. & anr.. CRLA No. 1650 of 2022 {SLP (Crl.) No 6061 of 2020}

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

1. Heard Sri I.B. Singh, learned Senior Advocate assisted by Sri Amit Sinha, Sri Aditya Vaibhav Singh and Sri M.G. Khan, learned counsel for the applicant and Sri Rohit Tripathi, learned counsel for the Enforcement Directorate (E.D.).

2. As per learned counsel for the applicant, the present applicant (Shiv Priya) is languishing in jail since 03.12.2019 in Sessions Case No.1266 of 2020 arising out of Crime/ ECIR No.06/PMLA/LKZO/ U/s 3/4 of Prevention of Money Laundering Act, 2002, Police Station-ED/Lucknow titled as Assistant Director Enforcement Directorate vs. Ajay Kumar & Ors., pending before the learned Special Judge-PMLA, Lucknow (U.P.).

3. As per Sri I.B. Singh, learned Senior Advocate for the applicant, the present applicant happens to be erstwhile Director in Amrapali Group of Companies (here-in-after referred to as "AGC") which was into real estate and allied business in Noida/ Greater Noida, Uttar Pradesh. The role of the present applicant being qualified Civil Engineer by qualification was limited to conceiving Architectural Planning and Engineering thereof and was not involved in financial planning of the Company. The

present applicant on account of being Director in Ultra-Home Construction Pvt. Ltd. i.e. flagship company of AGC was drawing salary and was receiving professional fee from other companies on account of rendering professional services related to their project being permissible under law. So many buyers of the said company feeling themselves aggrieved as they have not been provided the flats/ plots despite those buyers deposited their huge amount in the company, as many as 30 F.I.Rs. have been registered against the Directors of the Company including the present applicant under Sections 406, 420, 409 & 120-B I.P.C. in the year 2018 and the Economic Offences Wing, Delhi Police (in short EOW) has arrested the Directors of the Company including the present applicant. The present applicant was taken into custody by Noida Police on 11.10.2018. The aforesaid arrest was made pursuant to the order of Apex Court passed in Writ Petition (Civil) No.940 of 2017; Bikram Chaterjee vs. Union of India & others to assist / complete the Forensic Auditor's relating to the allegations of the F.I.Rs. On 26.02.2019 EOW, Delhi Police has taken custody of the present applicant.

4. On 01.07.2019, the E.D. has filed Enforcement Cases Information Report (here-in-after referred to as the "ECIR") No. ECIR/06/PMLA/LKZO/2019. The E.D. has taken custody of the present applicant on 03.12.2019.

5. On 16.03.2020, the Session Case No.1266 of 2020 was filed against the present applicant. On 13.08.2020 a Criminal Complaint / Session Case No.1234 of 2021 was filed against 04 co-accused persons. On 06.04.2022, 03 Criminal Complaint/ Session Case No.1266 of 2020, 1234 of 2021 and 1219 of 2022 were consolidated involving the present applicant. On 26.04.2022, the charges were framed against the present applicant.

6. Sri I.B. Singh, learned Senior Advocate for the applicant has submitted that with effect from 21.05.2022 till date as many as 15 dates have been fixed, and only two prosecution witnesses could be examined and the chief-examination of PW-3 has been completed on 01.02.2023 but he could not be cross-examined till date. Sri Singh has filed certified copy of the order-sheet to show that the examination of the prosecution witness/ witnesses could not be done properly on account of non-cooperation on the part of the prosecution inasmuch as the case is being regularly attended from the side of the present applicant/ defence.

7. Learned Senior Advocate has further submitted that there are 150 Prosecution Witnesses which are to be examined and if the progress of trail is seen with effect from 21.05.2022, wherein the prosecution witnesses are not co-operating, the trial in question cannot be completed in further five or six years. Further, if the total period of judicial custody of the present applicant is considered, it is about four years and four months with effect from his first date of custody i.e. 11.10.2018 and if the period of custody taken by the E.D. is considered, it is more than three years and three months and maximum punishment for the offence wherein the trial is going on is seven years. Therefore, in the first situation the present applicant has served much more than half of the sentence and in the second situation the present applicant has served about half of the sentence.

8. Learned Senior Advocate for the applicant has further submitted that the

present applicant is in judicial custody with effect from 11.10.2018 for the same allegations in the same issue, however, the agencies are different. Therefore, his total custody period may be considered as more than four years and four months. If the progress of trial remains the same, there is likelihood that the present applicant will have to serve the maximum period of punishment i.e. seven years.

9. Sri Singh has apprised that the present applicant was granted an interim bail by the Apex Court vide order dated 22.08.2022 passed in Writ Petition (Cril.) No.311 of 2022; Shiv Priya vs. N.C.T. Delhi and another and he remained on interim bail till 07.11.2022. Thereafter, he surrendered before the Court of C.M.M. East District, Karkardooma Court, Delhi. He did not misuse the the liberty of interim bail granted by the Apex Court. He is again under custody with effect from 07.11.2022. Sri Singh has referred Annexure No.RA-3 which is a custody certificate of the present applicant relating to his custody in the matter of E.D. from 03.12.2019 to 24.08.2022.

10. Sri I.B. Singh, learned Senior Advocate for the applicant has referred the dictum of Apex Court rendered in re:- ***Union of India vs. K.A. Najeeb reported in (2021) 3 SCC 713*** referring paras-14, 15 & 17 to submit that since there is no likelihood to conclude the trial with expedition and the applicant has suffered incarceration for a significant period of time, so he may be enlarged on bail. Paras-14, 15 & 17 read as under:-

"14. The facts of the instant case are more egregious than these two above cited instances. Not only has the respondent been in jail for much more than five years, but there are 276 witnesses left to be examined. Charges have been framed only on 27.11.2020. Still further, two opportunities were given to the appellant -NIA who has shown no inclination to screen its endless list of witnesses. It also deserves mention that of the thirteen co--accused who have been convicted, none have been given a sentence of more than eight years' rigorous imprisonment. It can therefore be legitimately expected that if found guilty, the respondent too would receive a sentence within the same ballpark. Given that two -third of such incarceration is already complete, it appears that the respondent has already paid heavily for his acts of fleeing from justice.

15. This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India15, it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, Courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, Courts would ordinarily be obligated to enlarge them on bail.

16. ...

17. It is thus clear to us that the presence of statutory restrictions like Section 43-D (5) of UAPA per -se does not oust the ability of the Constitutional Courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a Statue as well as the powers exercisable under Constitutional Jurisdiction can be well harmonised. Whereas at commencement of proceedings, Courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D (5) of UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial."

11. Sri I.B. Singh, learned Senior Advocate for the applicant has also referred the dictum of Apex Court rendered in re:- Ramchand Karunakaran vs. Directorate of Enforcement & anr. (Criminal Appeal No.1650 of 2022, arising out of SLP (Crl.) No.6061 of 2020) dated 23.09.2022 by submitting that in the aforesaid case the Apex Court granted bail to the said accused person noticing the fact that the said accused person has completed more than three years of actual custody in connection with the offence in respect of PMLA. The aforesaid accused person was however the Senior Citizen. In the present case, the applicant has completed more than three years of actual custody in connection with the offence relating to the PMLA. Therefore, he may be enlarged on bail. The relevant para-6 reads as under:-

"6. We are presently concerned with the proceedings arising out of the complaint filed under the provisions of PML Act. In the instant case, the appellant was taken in custody on 19.06.2019 and has remained in custody since then. Thus, the appellant has completed more than three years of actual custody in connection with the offence in respect of PML Act."

12. Sri I.B. Singh, learned Senior Advocate for the applicant has also submitted that the present applicant was granted an opportunity of hearing by the Apex Court in respect of the issue regularly vide order dated 21.02.2022, the Receiver was appointed by the Apex Court and the Receiver has prima-facie found discrepancy with respect to recovery relating to the present applicant. The amount was substantially reduced by the Forensic Auditors.

13. Sri Singh has submitted that the amount alleged by the E.D. was Rs.95.54 crores. The amount removed by the Forensic Auditors was 68.88 crores. Therefore, the actual remaining amount is Rs.26.66 crores. A sum of Rs.28.95 crores has already been recovered from the applicant. Therefore, the present applicant is very much hopeful that after the conclusion of trial, he may not only be acquitted from the charges but a sum of Rs.2.29 crores would be refunded to him. Therefore, in view of the above, no amount is recoverable from the present applicant.

14. Learned Senior Advocate has also submitted that the learned counsel for the E.D. has incorrectly mentioned that as many as 19 cases involving the scheduled offences have been registered against the present applicant on the basis of which investigation in the present matter was

undertaken and the applicant continuous to be in judicial custody in most of the cases. However, the present ECIR was registered on the basis of 14 cases i.e. FIR Nos. 336 of 2018, 273 of 2017, 561 of 2017, 563 of 2017, 565 of 2017, 566 of 2017, 118 of 2018, 70 of 2018, 219 of 2018, 783 of 2017, 44 of 2018, 213 of 2017, 767 of 2017 and 123 of 2018. The copy of the ECIR is already on record and filed as Annexure No.4 of the bail application. The applicant has not been arrested in any of the predicate offence as the chart to that effect is already on record and filed as Annexure No.20 of the bail application.

15. Per contra, Sri Rohit Tripathi, learned counsel for the E.D. has submitted that the applicant by means of the instant application has prayed for bail in Session Case No.1266 of 2020, arising out of ECIR/06/PMLA/LKZO/2019. He has also submitted that the inquiry/ investigation in the present matter was initiated/ monitored by the Hon'ble Supreme Court of India by means of Writ Petition (Civil)No.940 of 2017; Bikram Chaterjee vs. UOI and others. It has also been submitted that the bail application of the co-accused, namely, Anil Kumar Sharma has been rejected by this Hon'ble Court on three occasions despite the fact that the said applicant had extensively pleaded medical grounds. On that Sri I.B. Singh, learned Senior Advocate has submitted that his bail applications were rejected either during investigation or before framing of the charges but now the stage is altogether different as demonstrated above.

16. Sri Tripathi has further submitted that as per the complaint, as amount of Rs.5982.84 crores have been diverted by the various accused persons and the present applicant had a major role not only as a beneficiary of the loot of public money but also for being actively involved n the decision making exercise regarding diversion of funds raised as a consequence of deposits by thousands of prospective home buyers. The role of the present applicant in the process of diversion of funds and his consequent enrichment out of the laundered money have been convincingly established by the documentary and oral evidence collected by E.D. The modus operandi adopted by the accused persons including the present applicant and the proceeds of crime, the evidence is rather overwhelming. In this regard, Sri Tripathi has drawn attention of this Court towards paras-4.12 to 4.21 and paras-5.1.17, 5.1.24, 5.1.26, 5.1.50, 5.1.52, 5.1.54 & 5.1.55 to 5.1.65 of the memorandum of complaint (Annexure No.7).

17. Sri Tripathi has submitted that the above mentioned evidence is mostly in form of bank accounts and statements of the accused persons, which have not been disputed. In any case, in view of the reverse presumption stipulated in Section 24 of the PMLA, it is the applicant's duty to discharge the burden of proof regarding these documents. The applicant/ accused has miserably failed to place on record any cogent or reliable material which can even prima facie dislodge the presumption against him.

18. Sri Tripathi has further submitted that the present case is one where accused persons have been charged for various offences for having carried out mass loot of public money deposited by innocent prospective home buyers and have laundered the said money and have used it for their personal enrichment. Therefore, in view of the overwhelming and irrebutable

evidence against the present applicant, the present application does not pass the twin test stipulated in Section 45 (i) of the PMLA. This, coupled with the fact that the act complained of involves diversion of funds of thousands of innocent prospective home buyers dis-entitles the present applicant to be released on bail. Therefore, the present bail application deserves to be rejected.

19. Heard learned counsel for the parties and perused the material available on record.

20. At the very outset, it is clear that I am not entering into merits of the issue inasmuch as this is a domain of the learned trial court to look into the entire issue, contentions of the parties and perused the entire material and evidences available on the record. The consideration and observation of this order would only be confined to disposal of the bail application. Therefore, the learned trial court shall not influence from any observations or findings of this order and shall conduct and conclude the trial independently strictly in accordance with law with expedition without giving any unnecessary adjournment to any of the parties by fixing short dates and if any of the parties do not co-operate in the trial proceedings properly any appropriate coercive steps which are permissible under law may be taken.

21. In the present case, undoubtedly, the present applicant was taken into custody on 11.10.2018 for the same allegations for which the E.D. has filed ECIR in question. However, EOW of Delhi Police has taken custody of the present applicant on 26.10.2019 and the E.D. has taken custody on 03.12.2019. Therefore, for all practical purposes the present applicant is in judicial custody for more than four years and four months and if the period of judicial custody, so taken by the E.D. is considered, it is more than three years and three months. Undisputedly, the maximum punishment for the offence wherein the trial is going on is seven year. Therefore, in both the situations the present applicant has served half of the sentence.

22. The certified copy of the order-sheet of the learned trial court shows that charges were framed on 26.04.2022, thereafter with effect from 21.05.2022 the prosecution witness was to be examined. Notably, with effect from 21.05.2022 till date as many 15 dates have been fixed but only 02 prosecution witnesses could be examined and the chief examination of the prosecution witness No.3 has been completed on 01.02.2023 but he could not cross-examine in subsequent dates. The order-sheet reveals that the prosecution witnesses are not co-operating properly and there is no report to the effect that from the side of the applicant/ defence any adjournment has been sought. Notably, there are 150 prosecution witnesses, out of which, the examination of 02 prosecution witnesses have been completed. Therefore, if the progress of trial remains the same, there is no possibility or likelihood to conclude the trial with expedition, at least it may not likely be completed in further five or six years and in that case the present applicant will have to serve the maximum punishment of seven years even before completion of trial. In view of the aforesaid circumstances, I would like to refer the dictum of Apex Court in re: ***K.A. Najeeb*** (supra) wherein the Apex Court has held that once it is obvious that admittedly the trial would not be possible and the accused has suffered incarceration for a significant period of time, the court would ordinarily

be obligated to be enlarged him on bail. The case before the Apex Court in re: ***K.A. Najeeb*** (supra) was relating to the offence of Unlawful Activities (Prevention) Act, 1967 (in short UAPA) wherein the punishment is more severe than the punishment prescribed under PMLA.

23. In the present case, I find that admittedly trial would not be possible and the present applicant has suffered incarceration for a significant period of time, as considered above, therefore, the present applicant may be given the benefit of dictum of Apex Court in re: ***K.A. Najeeb*** (supra).

24. In the subsequent judgment of Apex Court rendered in re: ***Ramchand Karunakaran*** (supra) wherein the case is relating to the offence of PMLA wherein the complaint has been filed by the E.D. The Apex Court has granted bail to the accused persons considering the fact that the said accused persons have completed more than three years of actual custody in connection with offence of PMLA. One more fact may be considered that the present applicant was granted interim bail by the Apex Court and as soon as the period of interim bail expired, he immediately surrendered before the trial court and during the period of his interim bail he did not misuse the liberty of bail and has abide by all terms and conditions of bail order.

25. At this stage, I am not considering the arguments of learned Senior Advocate Sri I.B. Singh that more than actual amount has already been recovered from the applicant inasmuch as the said amount has been determined by the Forensic Auditor in compliance of order of Apex Court and those things shall remain subject matter of the trial proceedings. Therefore, what is the actual amount and what is to be recovered from the present applicant would be determined by the learned trial court by considering all the relevant evidences and material as well as appreciating the arguments of learned counsel for the parties. The opinion of the Forensic Auditor shall be tested by the learned trial court in the light of the strict principles of the Evidence Act, however, the opinion of the Forensic Auditor being an opinion of an expert, it shall be considered by the learned trial court carefully.

26. Learned counsel for the E.D., Sri Rohit Tripathi, has been asked as to whether there is any possibility to conclude the trial with expedition where there are total 150 prosecution witnesses are to be examined and only two prosecution witnesses have been examined with effect from 21.05.2022 till date, Sri Tripathi has stated that he shall instruct the learned counsel for E.D. who is conducting the case before the learned trial court to do the needful to expedite the trial however he has fairly stated that it will take some substantial time to examine total 150 prosecution witnesses. He has been further confronted as to whether the present applicant has misused the liberty of interim bail so granted by the Apex Court, he has submitted that there is no adverse information against the present applicant to that effect.

27. On being further confronted regarding the case of ***Ramchand Karunakaran*** (supra) where the Apex Court granted bail to the accused person for an offence of PMLA considering the fact that the said accused has completed more than three years of actual custody, Sri Tripathi has stated that since the Apex

Court has granted bail to the accused person, therefore, he has nothing to say on that but there was one more fact noticed by the Apex Court that the said accused person was a senior citizen.

28. Since the learned counsel for the E.D. has been heard at good length and a some of Rs.28.95 crores have already been recovered from the applicant in furtherance of the proceed of crime and considering the statement that nothing remains to be recovered from him now, I find it appropriate that the present applicant may be enlarged on bail as rigour of Section 45 of PMLA are satisfied, particularly in view of the fact that the present applicant has already served more than half of the punishment, has not misused the liberty of interim bail granted by the Apex Court and there is no possibility or likelihood to conclude the trial with expedition inasmuch as there are total 150 prosecution witnesses and only two prosecution witnesses have been examined by now. The Apex Court in para-86 of the dictum of ***Satender Kumar Antil vs. CBI and others, Special Leave to Appeal (Criminal) No.5191 of 2021*** has held as under:-

"Special Acts (Category C)

86. Now we shall come to Category C. We do not wish to deal with individual enactments as each special Act has got an objective behind it, followed by the rigour imposed. The general principle governing delay would apply to these categories also. To make it clear, the provision contained in Section 436-A of the Code would apply to the Special Acts also in the absence of any specific provision. For example, the rigour as provided under Section 37 of the NDPS Act would not come in the way in such a case as we are dealing with the liberty of a person. We do feel that more the rigour, the quicker the adjudication ought to be. After all, in these types of cases number of witnesses would be very less and there may not be any justification for prolonging the trial. Perhaps there is a need to comply with the directions of this Court to expedite the process and also a stricter compliance of Section 309 of the Code."

29. Accordingly, the bail application is ***allowed***.

30. Let the present applicant (Shiv Priya) be released on bail in the aforesaid case crime number on his furnishing a personal bond of Rs.2,00,000/- with two sureties each in the like amount to the satisfaction of the court concerned with the following conditions:-

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

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

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

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

(v) The applicant shall not leave the country without prior permission of the Court and shall surrender his passport to the court concerned.

(2023) 3 ILRA 599
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.02.2023

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Crl. Misc. Bail Application No. 22865 of 2020

Umakant Yadav ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Ram Pratap Yadav, Sri Devbratt Yadav, Sri Amrendra Nath Singh (Senior Adv.)

Counsel for the Opposite Party:
G.A., Sri Hanuman Deen Verma

A. Criminal Law - Code of Criminal Procedure, 1973-Section 439 - Indian Penal Code, 1860-Sections 120-B, 454, 380 & 447 - Prevention of Damage to Public Property Act, 1984-Sections 3(2)(ka)-accused-applicant, his sons and other co-accused, had taken forcible possession and occupied the said property of Gandhi Ashram-accused-applicant was two times MP and one time MLA of Uttar Pradesh-The people could not dare to complain against him because of his close proximity to the ruling elite, power , terror and fear-The rich but inglorious criminal history of the applicant of 80 cases shows his long and heinous journey in world of crime-Such a person is a constant threat to the civil society governed by the rule of law.(Para 1 to 12)

The bail application is rejected. (E-6)

List of Cases cited:

Public Interest Foundation & ors.. Vs U.O.I. & anr. (2019) 3 SCC 224

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

1. Heard Sri Amrendra Nath Singh, learned Senior Advocate assisted by Sri Ram Pratap Yadav, learned counsel for the applicant as well as Sri Hanuman Deen Verma, learned counsel for the complainant and Sri J.P.S. Chauhan, learned Additional Government Advocate for the State.

2. The present bail application under Section 439 Cr.P.C. has been filed seeking bail by the accused applicant in Case Crime No. 260 of 2019, under Sections 120-B, 454, 380, 447 I.P.C. and Section 3(2)(ka) of the Prevention of Damage to Public Property Act, 1984, Police Station - Phoolpur, District - Azamgarh.

3. The F.I.R. in question got registered on a written complaint of Lal Chand Yadav S/o Ram Bujharat on 04.10.2019 on the allegation that on 27.09.2019 at around 5-6 p.m. on exhortation of present accused applicant, his sons, namely, Ravikant Yadav and Dineshkant Yadav and several unknown accomplices broke open the locks of Gandhi Ashram and stolen the government property and documents. The said Gandhi

Ashram was constructed by funds given by the World Bank and mobilized by the Ashram itself. After looting the government property and the documents, the said Ashram was painted by the accused applicant in pink paint and the Ashram building got occupied by the accused applicant and his sons. At the time of incident, no one was present in the premises from the Ashram.

4. On the next day, when the complainant who was In-Charge of the Gandhi Ashram came to the office and only then he could know about the incident. On the basis of the said complaint the F.I.R. in question came to be registered.

5. The said Gandhi Ashram had been constructed on the land bearing Gata No. 113 which is a nazool land and said building had been in the possession of the Gandhi Ashram since 1963 when its construction got completed. The accused applicant, his sons and other co-accused, had taken forcible possession and occupied the said property of Gandhi Ashram.

6. The accused applicant is another Bahubali, gangster and dreaded criminal of Eastern Uttar Pradesh which is adjacent to State of Bihar and is known for having bahubali, mafia and gangster culture. The accused applicant is a dreaded criminal which is evident from his long, rich but inglorious criminal history of henious offences which would include 15 murder cases under Section 302 I.P.C. He had been convicted very recently in two cases. One case, for which he has been conviced, is an offence under Section 302 I.P.C., and the other one for which he has been convicted is an offence under Section 420 I.P.C.

7. The accused applicant was two times Member of Parliament and one time Member of Lagislative Assembly of Uttar Pradesh. The rich but inglorious criminal history of the accused applicant of henious offences would disclose that he had accumulated wealth and properties of several hundred crore from the proceeds of crime, using his political clout, muscle power, mafia and don image. He had been acquitted in several cases of henious offences as he would winover the witnesses or making the witnesses tired or got them eliminated, a phenomenon which was taken note of by the Supreme Court. The people could not dare to complain against him because of his close proximity to the ruling elite, power and terror and fear, which he strikes in the hearts and mind of the people of the area. The rich but inglorious criminal history of the accused applicant of 80 cases is extracted hereunder:

"1. उमाकान्त यादव पुत्र श्रीपति यादव सा० चकगंज अलीशाह (सरावाँ), थाना-दीदारगंज, आजमगढ

क्र० सं	मु० अ० सं	धारा	थाना	जनपद
1	29/21	3(1) उ० प्र० गैंगस्टर एक्ट	दीदारगंज	आजमगढ़
2	260/19	120बी, 454,38,447 भादवि व 3(2) क सार्व० सम्पत्ति क्षति नि० अधि०	फूलपुर	आजमगढ़
3	546/07	3 / 4 गुण्डा एक्ट	दीदा	आज

			रगंज	मगढ़
4	56/98	147,323,504,506,427 भादवि व 3(1)10 एससी/एसटी एक्ट	दीदा रगंज	आज मगढ़
5	127/97	3 / 4 गुण्डा एक्ट	दीदा रगंज	आज मगढ़
6	06/93	302भादवि	दीदा रगंज	आज मगढ़
7	194/92	364,506 भादवि	दीदा रगंज	आज मगढ़
8	108/91	147,148,149,364,302,201,452 भादवि	दीदा रगंज	आज मगढ़
9	16/88	147,148,149,323,324 भादवि	दीदा रगंज	आज मगढ़
10	24/84	147,148,353,307 भादवि	दीदा रगंज	आज मगढ़
11	94ए/83	302भादवि	दीदा रगंज	आज मगढ़
12	43/77	323, 325भादवि	दीदा रगंज	आज मगढ़
13	298/07	147,148,149,307,440,427,504,506, भादवि	फूल पुर	आज मगढ़
14	36/98	147,336,307,427 भादवि	फूल पुर	आज मगढ़
15	94/86	147,148,149,302 भादवि	फूल पुर	आज मगढ़
16	47ए/84	147,148,149,307 भादवि	फूल पुर	आज मगढ़
17	200/83	147,148,149,302,307 भादवि	फूल पुर	आज मगढ़
18	83/87	364 भादवि	अह रौला	आज मगढ़
19	87/8	3(1) उ०प्र० गैंगेस्टर	अह	आज
	7	एक्ट	रौला	मगढ़
20	49/83	325,323,332,504 भादवि	दीदा रगंज	आज मगढ़
21	111/83	307 भादवि	फूल पुर	आज मगढ़
22	200/83	147,148,149,307,302 भादवि	फूल पुर	आज मगढ़
23	86/94	147,148,149,302 भादवि	फूल पुर	आज मगढ़
24	62/86	364 भादवि	दीदा रगंज	आज मगढ़
25	141/90	147,148,323,504,506 भादवि	दीदा रगंज	आज मगढ़
26	62/95	3(1) उ०प्र० गैंगस्टर एक्ट	फूल पुर	आज मगढ़
27	135/94	420,467,468,471 भादवि	दीदा रगंज	आज मगढ़
28	137/94	25 आर्म्स एक्ट	दीदा रगंज	आज मगढ़
29	104/85	504,506 भादवि	दीदा रगंज	आज मगढ़
30	105/85	504,506 भादवि	दीदा रगंज	आज मगढ़
31	93/14	147,148,149,302,364,201 भादवि	दीदा रगंज	आज मगढ़
32	407/04	110 सीआरपीसी	दीदा रगंज	आज मगढ़
33	241/09	110 सीआरपीसी	दीदा रगंज	आज मगढ़
34	622/09	307,302 भादवि	फूल पुर	आज मगढ़
35	156/06	142,143,186,353,341 भादवि	दीदा रगंज	आज मगढ़

36	28/87	379 भादवि	दीदारगंज	आजमगढ़
37	132/15	147,148,323,352,506 भादवि	दीदारगंज	आजमगढ़
38	NCR-75/83	504,506 भादवि	दीदारगंज	आजमगढ़
39	NCR-118/84	323,504,506 भादवि	दीदारगंज	आजमगढ़
40	NCR-123/84	504,506 भादवि	दीदारगंज	आजमगढ़
41	NCR-168/86	323,504,506 भादवि	दीदारगंज	आजमगढ़
42	171/91	147,143,194,307 भादवि	फूलपुर	आजमगढ़
43	307/07	147,148,353,506 भादवि व 7 सीएलए एक्ट	फूलपुर	आजमगढ़
44	22/88	171,504,506 भादवि	दीदारगंज	आजमगढ़
45	10/92	382,506 भादवि	दीदारगंज	आजमगढ़
46	86/93	3(1) उ०प्र० गैंगेस्टर एक्ट	दीदारगंज	आजमगढ़
47	09/92	41,411 भादवि	दीदारगंज	आजमगढ़
48	121/97	3 /4 उ०प्र० गुण्डा एक्ट	दीदारगंज	आजमगढ़
49	NCR-57/86	323,504,506 भादवि	दीदारगंज	आजमगढ़
50	57/84	147,149,353,307	सरा	आजमगढ़
		भादवि	यमीर	मगढ़
51	85/89	420,467,471 भादवि	सरायमीर	आजमगढ़
52	86/89	3/25/27 आर्म्स एक्ट	सरायमीर	आजमगढ़
53	NCR-54/89	323,504,506 भादवि	सरायमीर	आजमगढ़

प्रभारी डीसीआरबी
आजमगढ़
प्रभारी डी०सी०आर०बी०
आजमगढ़।

उक्त संबंध में जनपद के समस्त थानों से जरिये आर० टी० सेट जानकारी की गयी तो उपरोक्त अभियुक्त के विरूद्ध जनपद जौनपुर में निम्न अभियोग पंजीकृत होना पाया गया।

क्र० सं	मु० अ० सं	धारा	थाना	जनपद
1	85/74	364,302,201 भादवि	शाहगंज	जौनपुर
2	87/92	27/25 ए एक्ट	शाहगंज	जौनपुर
3	36/90	302,120बी भादवि	शाहगंज	जौनपुर

4	71/1985	364/302 भादवि	शाहगंज	जौनपुर
5	469/1990	396/302 भादवि	शाहगंज	जौनपुर
6	96/1990	3/25ए एक्ट	शाहगंज	जौनपुर
7	NCR-NO 136/91	323/504/506 भादवि	शाहगंज	जौनपुर
8	109/1994	147/148/149/323/504/506/427/307	सिगरामऊ	जौनपुर
9	497/1997	504/506 भादवि	शाहगंज	जौनपुर
10	25/1998	504/506 भादवि	शाहगंज	जौनपुर
11	179/1995	3(1) उ०प्र० गिरोहबंद अधि०	शाहगंज	जौनपुर
12	82/1995	147/148/149/307/302/224/332/333/427 भादवि 7 CLA ACT	G.R.P. शाहगंज	जौनपुर
13	03/2000	419/420 भादवि	शाहगंज	जौनपुर
14	501/2002	3(1) उ०प्र० गुण्डा अधि०	शाहगंज	जौनपुर
15	648/2003	147/148/149/504/302 भादवि 7 CLA	शाहगंज	जौनपुर
16	652/2003	3(1) उ०प्र० गिरोहबंद अधि०	शाहगंज	जौनपुर
17	461/2014	420/467/468/471 भादवि	लाईन बाजार	जौनपुर
18	654/2015	147/148/323/506/363/307 भादवि 3(2)5 एससी०/एस०टी० एक्ट	शाहगंज	जौनपुर
19	355/2019	504/506/427 भादवि	शाहगंज	जौनपुर
20	74/85	364/302/201 भादवि	शाहगंज	जौनपुर
21	650/07	147/148/149/302/307/120बी भादवि	सरायख्वाजा	जौनपुर
22	968/14	174ए भादवि	लाईन बाजार	जौनपुर
23	2079/17	419/420/467/468 भादवि	लाईन बाजार	जौनपुर
24	158/06	347/323/506/147 भादवि	खुटहन	जौनपुर
25	NCR NO. 99/2	323,504 भादवि	खुटहन	जौनपुर

	000			
26	21/14	506 भादवि	खुटहन	जौनपुर
27	97/91	147,323,188 भादवि	खुटहन	जौनपुर

रिपोर्ट सेवा में प्रेषित है।

प्रभारी डीसीआरबी,

जौनपुर।"

8. The trial court has taken note of the long criminal antecedents of the accused applicant while rejecting the application for bail vide order dated 11.06.2020 passed in Bail Application No. 935 of 2020. The accused applicant is a land mafia besides a don, gangster and dreaded criminal. This Court while rejecting the bail application of another Bahubali and sitting Member of Parliament, namely, Atul Kumar Singh Alias Atul Rai S/o Shri Bharat Singh, vide order dated 07.06.2022 passed in Criminal Misc. Bail Application No. 5473 of 2022, had noted the greatest irony of the largest democracy of the world and said that 43% of the Members of Lok Sabha who got elected in 2019 General Elections, are having criminal cases including cases related to henious offences. The relevant paragraphs of the said judgment dated 07.06.2022 passed in Criminal Misc. Bail Application No. 5473 of 2022, are quoted hereinbelow:

"14. A constitution Bench of the Supreme Court in the case of **Public Interest Foundation & Ors vs. Union of India & Anr : (2019) 3 SCC 224** has taken note of 244th Law Commission report in which it was said that 30 per cent or 152 sitting M.P.s were having criminal cases pending against them, of which about half i.e. 76 were having serious criminal cases. This phenomenon has increased with every general election. In 2004, 24 per cent of Lok Sabha M.Ps. had criminal cases pending, which increased to 30 per cent in 2009 elections. In 2014, it went up to 34 per cent and in 2019 as mentioned above, 43 per cent Members of Parliament who got elected for Lok Sabha are having criminal cases pending against them. The Supreme Court has taken judicial notice of criminalization of politics and imperative needs of electoral reforms. There have been several instances of persons charged with serious and heinous offences like murder, rape, kidnapping and dacoity got tickets to contest election from political parties and even got elected in large number of cases.

15. The Supreme Court has said that this leads to a very undesirous and embarrassing situation of law breakers becoming law makers and moving around police protection. The Supreme Court in the said case has directed the Election Commission of India to take appropriate measures to curb criminalization in politics but unfortunately collective will of the Parliament has not moved in the said direction to protect the Indian Democracy going in the hands of criminals, thugs and law breakers. If the politicians are law breakers, citizens cannot expect accountable and transparent governance and the society governed by the rule of law be an utopian idea. After independence with every election, role of identities such as caste, community, ethnicity, gender, religion etc, has been becoming more and more prominent in giving tickets to winnable candidates. These identities coupled with money and muscle power has made entry of criminals in politics easy and every political party without exception

(may be with some difference in degree and extent) uses these criminals to win elections. Giving tickets to candidates with serious criminal charges would break the confidence and trust of the civil society, law abiding citizens of this country in the electoral politics and elections.

16. No one can dispute that the present day politics is caught in crime, identity, patronage, muscle and money network. Nexus between crime and politics is serious threat to democratic values and governance based on rule of law. Elections of Parliament and State Legislature and even for local bodies and panchayats are very expensive affairs. The record would show that the elected members of Lok Sabha with criminal records are extremely wealthier candidates. For example, in 2014 Lok Sabha election 16 out of 23 winners having criminal charges in their credit related to murder were multi-millionaire. After candidates get re-elected, their wealth and income grows manyfold which is evident from the fact that in 2014, 165 M.Ps. who got re-elected, their average wealth growth was Rs.7.5 Crores in 5 years.

17. Earlier, "Bahubalis' and other criminals used to provide support to candidates on various considerations including caste, religion and political shelter but now criminals themselves are entering into politics and getting elected as the political parties do not have any inhibition in giving tickets to candidates with criminal background including those having heinous offence(s) registered against them. Confirmed criminal history sheeters and even those who are behind bars are given tickets by different political parties and surprisingly some of them get elected as well.

18. It is the responsibility of the Parliament to show its collective will to restrain the criminals from entering into the politics, Parliament or legislature to save democracy and the country governed on democratic principles and rule of law.

19. There is responsibility of civil society as well to rise above the parochial and narrow considerations of caste, community etc and to ensure that a candidate with criminal background does not get elected. Criminalization of politics and corruption in public life have become the biggest threats to idea of India, its democratic polity and world's largest democracy. There is an unholy alliance between organized crime, the politicians and the bureaucrats and this nexus between them have become pervasive reality. This phenomenon has eroded the credibility, effectiveness, and impartiality of the law enforcement agencies and administration. This has resulted into lack of trust and confidence in administration and justice delivery system of the country as the accused such as the present accused-applicant win over the witnesses, influence investigation and tamper with the evidence by using their money, muscle and political power. Alarming number of criminals reaching Parliament and State Assembly is a wake up call for all. Parliament and Election Commission of India are required to take effective measures to wean away criminals from politics and break unholy nexus between criminal politicians and bureaucrats.

20. This unholy nexus and unmindfulness of political establishment is the result of reaching person like the accused-applicant, a gangster, hardened criminal and "Bahubali' to the Parliament and becoming a law maker. This Court, looking at the heinousness of offence, might of the accused, evidence available on record, impact on society, possibility of accused tampering with the evidence and

influencing/ winning over the witnesses by using his muscle and money power....."

9. The accused applicant had allegedly committed the first offence of murder in the year 1974 and in 48 years of his long and henious journey in world of crime, he could be convicted only in two cases recently in the year 2022. This phenomena is very perturbing and does not auger well for a democratic polity and a society which is governed by rule of law. All wings of the government i.e. executive, legislative and judiciary, must share the blame for allowing such a dreaded criminal to go scot-free in several henious offences which have been noted hereinabove. Such a criminal should not have any place in the society.

10. This Court, therefore, does not think that such a dreaded criminal should be allowed to be set free by enlarging him on bail. Such a person is a constant threat to the civil society governed by the rule of law. He is a threat to the society and peace living and law abiding citizens.

11. On an overall conspectus of the aforesaid facts, this Court does not find any ground to enlarge the accused applicant on bail.

12. Consequently, the bail application is hereby ***rejected***.

(2023) 3 ILRA 606
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.02.2023

BEFORE

THE HON'BLE MAYANK KUMAR JAIN, J.

Crl. Misc. Bail Application No. 46008 of 2022

Shashidhar Gaurav Mishra @ Shashidhar Mishra ...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Shailendra Singh, Ms. Kumudini Shukla

Counsel for the Opposite Party:
G.A., Arvind Kumar Mishra, Sri Arun Kumar Mishra, Sri R.K. Ojha (Senior Adv.)

A. Criminal Law - Code of Criminal Procedure, 1973-Section 439 - Indian Penal Code, 1860-Section 306-deceased committed suicide in his matrimonial home after 10 years of her marriage due to unwanted circumstances created by in-laws-false application was given to SSP and Magistrate against the deceased and divorce was also filed by the husband stating that the wife/deceased is a mental patient while she was qualified M.A. and was teaching for last ten years-applicant made false allegations against his wife publicly on facebook too, she was deeply hurt with the false allegations undermining her dignity, eventually the circumstances compelled her to commit suicide-More so, a false prescription of the Varanasi Mental Hospital is presented by the applicant while the deceased was never admitted in such hospital-When she was beaten she informed the police with a digital complaint and the contents of complaint itself shows the sound mental status of deceased.(Para 1 to 19)

B. 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.(Para 18)

The application is rejected. (E-6)

List of Cases cited:

1. Rajesh Vs St. of Har. (2020) 15 SCC 359

2. S.S. Cheena Vs Vijay Kumar Mahajan & anr..(2010) 12 SCC 190

3. Ude Singh Vs St. of Har. (2019) 17 SCC 301

4. M.Arjunan Vs St. (2019) 3 SCC 315

5. Amalendu Pal Vs St. of W.B. (2010) 1 SCC 707

(Delivered by Hon'ble Mayank Kumar Jain, J.)

1. Compliance affidavit filed by learned AGA is taken on record.

2. Heard Sri Shailendra Singh, learned counsel for the applicant, Sri S.K. Ojha, learned A.G.A. for the State and A.K. Mishra, learned counsel for the complainant and perused the record.

3. The present bail application has been filed on behalf of the applicant in Case Crime No. 119 of 2022, under Section 306 of IPC, Police Station Kotwali, Prayagraj with the prayer to enlarge the applicant on bail.

4. The brief facts of the case are that the informant Amarnath Tripathi, father of the deceased, lodged the first information report against the applicant and other family members stating therein that the marriage of his daughter Nisha Tripathi was solemnized with the applicant in the year 2011 according to the Hindu rituals. He spent Rs.14 lacs and gave one Hyundai i-10 car in the marriage. After one month of the marriage, mother-in-law of his daughter started quarrelling with the deceased and threatened her to break the marriage. His daughter was serving as a teacher in Jagat Taran Intermediate College, Prayagraj. The applicant was having illicit relations with another lady. This fact was narrated to the informant by his daughter but he asked her to have patience. Two years prior to the date of incident the applicant beat his daughter. A complaint was made to the police regarding this. Prior to the date of the incident, his daughter came to his house and at that time she was not keeping in good health. She was scared of ghosts. After one week, the applicant took her with him. The applicant switched off his own and her mobile. On 19.05.2022 at around 6.00 pm he got the information that his daughter has died. He rushed to the house of his daughter and found that the dead body of his daughter was lying on the floor. The Applicant was torturing his daughter and treating her with cruelty. The other family members of the applicant were also indulged in the same activities.

5. It has been argued by learned counsel for the applicant that the applicant is innocent and he has been falsely implicated in the present case. It is submitted that initially the first information report was lodged under Section 302 of IPC but on the basis of the post mortem report the matter was converted under Section 306 of IPC and the charge sheet had already been filed. The applicant is the husband of the deceased Nisha Tripathi. The marriage of the applicant was solemnized with the deceased in the year 2011. The allegations made in the first information report are false and concocted and have no substance. The deceased was never subjected to any cruelty. It is submitted that the mental condition of the deceased started deteriorating from the year 2019-20 and she was suffering from intermittent

explosive incidents involving repeated sudden episodes of impulsive, aggressive, violent behaviour and angry verbal outburst. The applicant was restrained by the informant himself from providing medical assistance on the ground that the deceased was highly qualified lady and she could not suffer from any kind of mental illness. Later on, the deceased started exhibiting prominent signs of mental illness which included but not limited to self smiling, self muttering, apprehension of continuously being watched, hallucinations seeing dead people and God, apprehension of phone and bank account being hacked etc. She used to abuse and physical assault the applicant and his family members on multiple occasions. The applicant preferred a complaint to the S.S.P. Prayagraj which was referred for mediation but the deceased did not appear before the Officer concerned. Since no action was taken by the police authorities, the applicant moved the application under Section 156(3) Cr.P.C. and thereafter another application in same manner was also moved. The applicant was forced to prefer a divorce petition before the competent Court. He got her examination done by a psychiatrist and preferred an application under Mental Health Act, 2017. The deceased was employed as a Teacher in Jagat Taran Girls Intermediate College, Prayagraj and she was forced to resign owning to her unfounded apprehensions. Around March-April, 2022, she started hallucinating and hearing voices. The deceased committed suicide on 19.04.2022 by hanging without any instigation, coercion or abetment by the applicant due to her medical condition. It is further submitted that out of the wedlock one child was born who is 10 years old now and living with the applicant. It is also submitted that the cause of the death of the deceased was ascertained to be asphyxia as a result of anti mortem hanging. No other injury was found on the person of the deceased. It is also submitted that the consultation made with the Psychiatrist and the posts on her Facebook Account are also brought on record through a rejoinder affidavit which also indicates mental status of the deceased. She was referred to a mental hospital by the Psychiatrist for treatment.

6. In support of his submission, learned counsel for the applicant relied upon the judgment of the Hon'ble Apex Court passed in **Rajesh Vs. State of Haryana, (2020) 15 SCC 359** wherein it is held that "the person who is stated to have abeted the commission of suicide must have played an active role by the act of instigation or doing certain act to facilitate the commission of suicide." It is argued that there is no evidence available on record which can substantiate that the applicant was even remotely involved in the commission of the alleged offence.

7. Learned counsel further placed reliance upon the judgement of the **Hon'ble Apex Court passed in S.S. Cheena Vs. Vijay Kumar Mahajan & Anr., (2010) 12 SCC 190, (ii) Ude Singh Vs. State of Haryana, (2019) 17 SCC 301, (iii) M.Arjunan Vs. State, (2019) 3 SCC 315 and (iv) Amalendu Pal Vs. State of West Bengal, (2010) 1 SCC 707.**

8. It is further submitted that the applicant is languishing in jail since 21.05.2022 having no criminal history and that in case he is released on bail, he will not misuse the liberty of bail and will cooperate in trial.

9. Per contra, the learned Additional Government Advocate as well as learned

counsel for the informant opposed the prayer for grant of bail and argued that the deceased was mentally and physically tortured by the applicant and his family members. All the developments which are narrated by the applicant with regard to alleged illness of the deceased, moving the applications under Sections 156(3) Cr.P.C. and filing of divorce petition, relate to the year 2021. The deceased was subjected to mental and physical cruelty soon after her marriage with the applicant. It is also submitted that the divorce petition was also filed in the year 2021. The alleged application moved under Mental Health Act, 2017 in the year 2021 which shows that all the proceedings were initiated by the applicant under a conspiracy at a particular period of time. The deceased was a highly qualified lady and she was a teacher in Jagat Taran Intermediate College, Prayagraj since last 10 years therefore, all the allegations with regard to her mental illness are false and concocted.

10. It is also submitted that so far as the prescription of the Psychiatrist is concerned, the meditation was advised in the absence of the patient. It is not possible that a Doctor can prescribe the meditation or refer to the higher centre in the absence of the patient therefore, the prescription is produced just to give a colour to the bail application. It is also vehemently submitted that such prescription was not filed before the trial Court when the bail application was moved by the applicant. Under the orders of the Court compliance counter affidavit was filed by the State wherein the statement of Doctor is filed in which Doctor stated that at the time of consultation the patient was not present before him, therefore, the entire exercise does not support the case of the applicant in any manner. It is also submitted that the informant, his wife and other witnesses have consistently corroborated the version of the first information report. The applicant and his family members created such circumstances which compelled Nisha Tripathi to commit suicide.

11. It is further submitted that none of the family members informed the complainant and his family about the death of his daughter. The information about the death of the deceased was given by the police. Her dead body was brought down in absence of the informant and his family members. Filing of divorce case by the applicant making false allegations against his wife was direct instigation and abatement to commit suicide. She was deeply hurt with the false allegations undermining her dignity. It is also argued that during the period of ten years of the marriage, no complaint was made by the applicant about her mental illness. She was a brilliant student having a degree in M.A. in Geography and she also qualified N.E.T. and C.T.E.T. examination and was teaching for the last ten years. The applicant and his family members were creating an atmosphere that something was wrong with her by putting her into fear of evils. The applicant fled away from the place of occurrence and was arrested on 20.05.2022 and other accused are still absconding. On 23.07.2021 the applicant mercilessly beat the deceased Nisha Tripathi and she informed concerned Chowki In-charge and a digital complaint was lodged by the deceased. The contents of that complaint indicate the sound mental status of deceased.

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

13. Abatement' and 'abatement of suicide' are defined under Section 107 and 306 of IPC respectively. It is deemed proper to reproduce section 107 and 306 of IPC, which reads thus:

"107. Abetment of a thing.

A person abets the doing of a thing, who--

First-- Instigates any person to do that thing; or

Secondly -- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly-- Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.--A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing

Explanation 2.--Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act.

306. Abetment of suicide.

If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall alsobe liable to fine."

14. The Hon'ble Apex Court in catena of cases has settled the factors to be kept in the mind while considering an application for bail such as page 25 of the judgment.

15. In the case in hand, it is admitted that the marriage of the applicant solemnized with the deceased 11 years ago and a male child was born out of their wedlock in the year 2014. For a long span of ten years of matrimonial life, there was no complaint against the deceased with regard to her behaviour and about her mental illness.

16. Learned counsel for the applicant placed reliance that an application was moved before the Senior Superintendent of Police, Prayagraj making certain description about the behaviour and conduct of the deceased and it was prayed that a report be lodged and the life of the applicant and his family members be protected. Thereafter, an application was given by Smt. Syama Mishra, the mother of the applicant to S.H.O., Kotwali, Prayagraj describing the behaviour of the deceased. Thereafter since no action was taken by the police, an application under Section 156 (3) Cr.P.C. was moved before the Court of Chief Judicial Magistrate, Allahabad and thereafter another application under same section was moved. Reliance has been placed on the report submitted by the concerned police station about the mental status of the deceased. Divorce petition No.193 of 2021 was also filed mentioning therein the behaviour and conduct of the deceased seeking divorce from her. Certain facebook posts were also placed on the record to indicate the language used by the deceased alleging that the language used in such posts also indicates her mental status.

17. Perusal of the record goes to show that the application given to S.S.P. Praygaraj, S.H.O. Kotwali, Prayagraj, the first and subsequent application under Section 156(3) Cr.P.C. were moved during the period February, 2021 to July, 2021.

The divorce petition under Section 13 of Hindu Marriage Act was filed by the applicant on 27.01.2021. Suffice to say that all the exercise was done during the year 2021. Earlier to this period since the date of the marriage it appears that everything was fine and was going smoothly. It is pertinent to mention here that the contents of the applications given to police authority and before the Court and also the grounds taken in the divorce petition are more or less identical. To show the *bona fide* of the applicant, he consulted a competent Psychiatrist for treatment of his wife-the deceased. Through a rejoinder affidavit, prescription was filed in which meditation was prescribed and the patient was referred to a Mental Hospital, Varanasi for evaluation and IPD management. It is important to note that the patient was not present before the doctor concerned. Through a compliance affidavit this information was brought on record by the learned AGA that the deceased was never admitted to the Mental Hospital, Varanasi. This also indicates that this exercise was done by the applicant just to give a colour to his bail application. At this juncture the argument of learned counsel for the informant is also to be taken into consideration that the aforesaid prescription was not filed before the trial court. It is also alleged that the applicant did not allow the deceased Nisha Tripathi to participate in the birth anniversary of her father on 15.05.2022 and her mobile was switched off. It appears that the allegations levelled against the deceased in various applications and divorce petition given by the applicant caused her mental torture and depression which abated her to commit suicide.

18. The Hon'ble Apex Court in ***Ude Singh and others VS. State of Haryana, (2019) 17 SCC 301*** observed that:

"16.1 For the purpose of finding out if a person has abetted commission of suicide by another, the consideration would be if the accused is guilty of the act of instigation of the act of suicide. As explained and reiterated by this Court in the decisions above-referred, instigation means to goad, urge forward, provoke, incite or encourage to do an act. If the persons who committed suicide had been hypersensitive and the action of accused is otherwise not ordinarily expected to induce a similarly circumstanced person to commit suicide, it may not be safe to hold the accused guilty of abetment of suicide. But, on the other hand, if the accused by his acts and by his continuous course of conduct creates a situation which leads the deceased perceiving no other option except to commit suicide, the case may fall within the four-corners of Section 306 IPC. If the accused plays an active role in tarnishing the self-esteem and self-respect of the victim, which eventually draws the victim to commit suicide, the accused may be held guilty of abetment of suicide. The question of mens rea on the part of the accused in such cases would be examined with reference to the actual acts and deeds of the accused and if the acts and deeds are only of such nature where the accused intended nothing more than harassment or snap show of anger, a particular case may fall short of the offence of abetment of suicide. However, if the accused kept on irritating or annoying the deceased by words or deeds until the deceased reacted or was provoked, a particular case may be that of abetment of suicide. Such being the matter of delicate analysis of human behaviour, each case is required to be examined on its own facts, while taking note of all the surrounding factors having bearing on the actions and psyche of the accused and the deceased.

16.2. 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."

19. Considering the entire facts and circumstances of the case, submissions of learned counsel for the parties, nature of evidence and gravity of the offence, without expressing any opinion on merits of the case, the Court is of the view that the applicant is not entitled for the bail, therefore, the bail application is rejected.

20. Any observation made above shall not be treated as any finding on the merit and shall not prejudice the trial.

(2023) 3 ILRA 612
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.03.2023

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Appeal No. 258 of 2018

Rishi Talwar ...Appellant

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Vijit Saxena, Sri Ataullah Mubarak Ahmad, Sri G.S. Chauhan, Sri Kuldeep Saxena, Sri Rajiv Lochan Shukla, Sri Ranjeet Singh, Sri Shashwat Kishore Chaturvedi, Sri Somesh Khare, Sri Vimlendu Tripathi, Sri Mohd. Amir, Sri Ashwini Kumar Ojha

Counsel for the Respondents:
G.A., Sri Amit Kumar Srivastava

Criminal Law - Indian Penal Code, 1860 - Section 302 – Murder - Arms Act, 1959 – Sections 25 & 27-A - Hindu Marriage Act, 1955 - Section 13B - Code of Criminal Procedure, 1973 - Sections 125, 128, 161, 293, 313 – Indian Evidence Act, 1872 – Sections 3(2), 6, 11, 32(1), 53, 59, 63, 65A, 65B, 73, 106 & 118 – Circumstantial evidence – Chain of circumstances complete – Murder of wife - Burden of proof always lies on prosecution - Concept of proof beyond shadow of doubt is to be applied in criminal trials - Doubts would be called reasonable if they are free from zest for abstract speculation or from an over-emotional response – If St.ment recorded by PW-11 is not considered, the information given by deceased would be sufficient evidence to convict accused - All chains of circumstantial evidence are attached with each other - Motive that there was no cordial relation between wife and husband and accused wanted to get decree of divorce, presence of accused admitted by him, proves that accused was present in house where deceased was killed - Deceased had communicated torture, beating and ill-treatment soon before her death to her parents - Extra judicial confession made by accused to his sisters and mother, recovery of weapon which has matched with empty cartridges found on spot - Presence of accused and deceased together in house, failure of accused to prove plea of alibi

are chains of circumstances which are intact and unbroken. (Para 73, 104, 106)

Appeal is dismissed. (E-13)

List of Cases cited:

1. Rohtash Vs St. of Raj., AIR 2007 SCW 44

2. Motilal & ors. Vs St. of U.P., AIR 2010 SC 281

3. Harbans Kaur & anr. Vs St. of Har., AIR 2005 SC 2989

4. Ravinder Kumar & anr. Vs St. of Punj., AIR 2001 SC 3570

5. C. Magesh Vs St. of Karn., AIR 2010 SCW 3194

6. Bhagwan Jagannath Markad Vs St. of Mah. (2016) 10 SCC 537

7. Charanpal Vs St. of U.P. (2006) 6 SCC 662

8. St. of Maharashtra Vs Tulsi Ram Bhanu Das Kambla AIR 2007 SC 3042

9. Sucha Singh Vs St. of Punj. (2003) 7 SCC 643

10. Pooja Pal Vs U.O.I. (2016) 3 SCC 135

11. Shyama Ghos Vs St. of W. B. AIR 2012 SC 3539

12. G. Parshwanath Vs St. of Karn., AIR 2010 SC 2914

13. Sandeep Vs St. of U.P., (2012) 6 SCC 107

14. Prithipal Singh Vs St. of Punj., 2012 (76) ACC 680 (SC)

15. Jagdish Vs St. of U.P., 2009 (67) ACC 295 (SC)

16. St. of Punj. Vs Karnail Singh, 2003 (47) ACC 654 (SC)

17. Joshinder Yadav Vs St. of Bihar, (2014) 4 SCC 42

18. Binay Kumar Singh Vs St. of Bihar, AIR 1997 SC 322

19. St. of U.P. Vs Bashisht Rai & ors., 2006 (5) ALJ (NOC) 902 (All)

20. Gentela Vijayavardhan Rao & anr. Vs St. Of Andhra Pradesh, AIR 1996 SC 2791

21. Mukesh Vs St. of NCT of Delhi & ors. AIR 2017 SC 2161

22. Om Prakash Vs St. of Raj. & anr.(2012) 5 SCC 201

23. Adalat Pandit Vs St. of Bihar, (2010) 6 SCC 469

24. Madan Vs St. of Mah., AIR 2018 SC 2007

25. Sharad Birdichand Sarda Vs St. of Mah., AIR 1984 SC 1622

26. Bhagirath Vs St. of Har. (1977) 1 SCC 481

27. Pakla Narayan Swami Vs Emperor AIR 1939 Privy Council 47

28. St. of M.P. Vs Dharkole, AIR 2005 SC 44

29. Paramjeet Singh Vs St. of Uttrakhand, AIR 2011 SC 200

30. Narain Singh Vs St. of Har. (2004) 13 SCC 264

31. Babulal Vs St. of M.P. (2003) 12 SCC 490

32. Sharda Vs St. of Raj. 2010 (68) ACC 274 (SC)

33. Laxman Vs St. of Mah. (2002) 6 SCC 710

34. Balvir Singh Vs St. of Punj. AIR 2006 SC 3221

35. Narendra Kumar Vs St. (NCT) of Delhi, AIR 2016 SC 150

36. Govindaraju @ Govinda Vs St. through Srirampuram P.S. & anr., AIR 2012 SC 1292

37. Nathiya Vs St. (2016) 10 SCC 298

38. Bhim Singh Vs St. of Uttarakhand (2015) 4 SCC 281 (para 23)

39. Sharad Birdhichand Sarda Vs St. of Mah., (1984) 4 SCC 116 (paras 120 and 121)

40. St. of W. B. Vs Dipak Halder, (2009) 7 SCC

41. St. of Goa Vs Pandurang Mohite, AIR 2009 SC 1066

42. St. of U.P. Vs Satish, (2005) 3 SCC 114

43. Rohtash Kumar Vs St. of Har., 2013 (82) ACC 401 (SC) (para 25)

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

45. Ashok Vs St. of Mah., (2015) 4 SCC 393

46. Jai Prakash Tiwari Vs St. of M. P., 2017 SCC Online MP 2329

47. Shivaji Chintappa Patil Vs St. of Mah., 2008 SCC Online Bom 1859

48. Pramila Vs The St. of U. P., Criminal Appeal No.700 of 2021

49. St. of MP Vs Ramesh, (2011) 4 SCC 786

50. Ravinder Singh @ Kuku Vs St. of Punj., 2022 Live Law (SC) 461

51. Vikram Singh @ Vicky Walia & anr. Vs St. of Punj. & anr., AIR 2017 SC 3227

52. St. of Maharashtra Vs Kamal Ahmad Mohammad Vakil Ansari & ors., 2013 CrLJ 2069

53. St. (NCT) of Delhi Vs Navjot Sandhu @ Afsan Guru (2005) SCC (Crl) 1715

54. Anvar P.VS Vs P.K. Basheer, (2014) 10 SCC 473 (three-Judge Bench)

55. St. of U.P. Vs Ajai Kumar Sharma, 2016 (92) ACC 981 (SC) (para 14)

56. R.M. Malkani Vs St. of Mah., AIR 1973 SC 157

57. Ram Singh & ors. Vs Col. Ram Singh, 1985 (Supp) SCC 616

58. Harpal Singh Vs St. of Punj., (2017) 1 SCC 734

59. Vikram Singh Vs St. of Punj., (2017) 8 SCC 518

60. St. by Karn. Lokayukt P.S. Bengaluru Vs M.R. Hiremath, 2019 0 Supreme 590 (SC)

61. Arjun Panditrao Kholkar Vs Kailash Kushanrao Gorantyal & ors., AIR 2020 SC 4908

62. Mohammad Arif @ Ashfaq Vs St. (NCT) of Delhi, 2022 0 Supreme (SC) 1113

63. Kalloo @ Kalyan Singh Vs St. of U.P. (Criminal Appeal No.1459 of 2009)

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

1. This appeal has been preferred by the convicted accused Rishi Talwar against the conviction and sentencing order dated 11.10.2017 in ST No.238 of 2014 (State of UP Vs. Rishi Talwar), under Section 302 IPC, Crime No.211 of 2014 and ST No.239 of 2014 (State of UP Vs. Rishi Talwar), under Section 25/27-A Arms Act, Crime No.212 of 2014 by which the appellant was convicted and sentenced under Section 302 IPC for life imprisonment and a fine of Rs.50,000/- and in case of non-payment of fine to undergo three months' additional imprisonment and also conviction and sentence under Section 27 of the Arms Act, 1959 for five years rigorous imprisonment and a fine of Rs.10,000/- and in case of non-payment of fine to undergo one month's additional imprisonment. It was also directed that both the sentences shall run concurrently.

2. In brief, facts of the case are that informant Manohar Lal Suri resident of

Narula Navi Mumbai, father of the deceased, Shweta and father-in-law of the accused, lodged an FIR on 30.04.2014 stating that the marriage of his daughter Shweta was solemnized as per social rituals and customs on 27.11.2003 with the accused Rishi Talwar son of Deepak Talwar resident of Mission Compound Sarva Nagar, Jhansi. After a few days of the marriage, Rishi Talwar started beating the informant's daughter. His daughter used to convey to the informant about beating and abuses by the accused over the phone. After the marriage the accused neither allowed the informant's daughter to meet the informant nor was she allowed to go anywhere in her kinship. He used to threaten her for divorce and used to demand money and said that she should take divorce otherwise he would kill her.

3. On 28.04.2014 at about 08:00 O'clock his daughter informed him over the telephone that Rishi had beaten her that day and had been doing so for 3-4 days. Again at about 11-12 O'clock she made a call where she said that Rishi was still beating her and she said that papa take away her and her children from here otherwise Rishi would kill them. On this, he told his daughter that he would come in the morning.

4. On 29.04.2014 at around 04:45 a.m. the accused's mother Smt. Asha Talwar made a missed call on the informant's mobile no.9821154419. When the informant called back, the phone was switched off. After that at around 11 O'clock, Smt. Charu Suri, daughter-in-law of the informant, also (who is accused's sister) called and informed that Rishi Talwar had shot and killed Shweta. The informant immediately informed Jhansi Police and his relative Kamal Raj at around 01:00 O'clock and requested that no action should be taken till he and his family reached Jhansi. He himself would take legal action after seeing the condition of his daughter. Accused's mother Smt. Asha and sister Charu Suri are also involved in the murder.

5. On the night of 30.04.2014 at about 01:00 a.m. the informant with his wife Smt. Shakti Suri, son-in-law Umesh Vishnu Shirke and daughter Monika Umesh Shirke reached the house of the daughter Shweta and saw that her dead body lying in the bathroom, whom Rishi Talwar had killed by a gun shot. The informant requested to take legal recourse.

6. On the basis of above *tahrir* a case at Crime No.211 of 2014, under Sections 302, 120-B IPC was registered on 30.04.2014 at 02:00 p.m. at Police Station Sipri Bazar, District Jhansi against Rishi Talwar, Asha Talwar (mother of the accused) and Charu Suri (sister of the accused).

7. The Investigating Officer started investigation and copied *tahrir* and chik FIR and recorded statements of the writer, informant and other witnesses and went in search of the accused. On the pointing of informant's wife he reached at the house of the accused where he was arrested at 07:30 a.m. while he was locking the gate of his house. Upon being asked he identified himself as Rishi Talwar. In personal search a pistol on which MADE IN USA No.405 with OMEY ARMY SUPPLY printed on its barrel, was recovered with two live cartridges of 32 bore from the left side of his pant. He confessed killing his wife, Shweta Talwar with the recovered pistol on the night of 29.04.2014. The accused was taken into custody and the recovered case

property was sealed on the spot and its specimen seal was also prepared. None came forward to be witness of the recovery except Kamal Raj and Azhar Khan. A recovery memo was prepared on the spot and its copy was provided to the accused. In this respect a case at Crime No.212 of 2014, under Section 25/27 Arms Act was registered on 01.05.2014 at 09:45 a.m. at Police Station Sipri Bazar against the accused.

8. In Crime No.211 of 2014, under Section 302 IPC charge-sheet was submitted against the accused-appellant, Rishi Talwar alone (exonerating his mother and sister). In Crime No.212 of 2014, under Section 25/27-A Arms Act after investigation charge-sheet was submitted against the accused under Section 25/27 Arms Act.

9. After taking cognizance Chief Judicial Magistrate, Jhansi submitted both the cases to the Court of Sessions on 23.07.2014 which were numbered as ST No.238 of 2014 and ST No.239 of 2014, respectively. On 17.04.2015 charges under Section 302 IPC and Section 25/27 Arms Act were framed, which the accused denied and sought trial.

10. Following witnesses have been examined by the prosecution:-

(i) PW-1, Manohar Lal Suri, informant, father of the deceased and father-in-law of the accused; (ii) PW-2, Kamal Raj, witness of recovery of the empty cartridges 32 bore, blood stained and plain floor and recovery memo of pistol and cartridges; (iii) PW-3, Azhar Khan, witness of recovery of pistol and cartridges and arrest; (iv) PW-4, Kumari Anchita, daughter of the deceased and accused; (v) PW-5, Monika Umesh Shirke, daughter of the informant; (vi) PW-6, Head Constable, writer, Satish Kumar Dwivedi who prepared chik FIR, *kaymi* GD (registration of the case GD); (vii) PW-7, Dr. Sushil Kumar Gupta, the doctor who prepared and proved the *post mortem* report Ex.Ka-8 and material Ex.1-5; (viii) PW-8, Umesh Vishnu Shirke, scribe of Ex.Ka-1 and witness of inquest Ex.Ka-2; (ix) PW-9, Smt. Shakti Suri, mother of the deceased; (x) PW-10, Ram Bhajan, Investigating Officer; (xi) PW-11, Sudhir Suri, brother of the deceased; (xii) PW-12, Ravindra Sharma, friend of the deceased's brother, Sudhir Suri; (xiii) PW-13, Smt. Charu Suri, sister-in-law (*bhabhi/nanad*) of the deceased; (xiv) PW-14 Lalaram Verma, notary advocate who proved Ex.Ka-18 and Ex.Ka-19, FSL Report, Paper No.86-A/3 and 89-A.

11. The oral evidence in ST No.239 of 2014 in Crime No.212 of 2014, under Section 25/27 Arms Act are;

(i) SI Dinesh Singh, Investigating Officer who proved map Ex.Ka-6, charge-sheet Ex.Ka-7 and chik FIR, Ex.Ka-8 by his secondary evidence; (ii) Photocopy GD 6-A, 7-A and prosecution sanction paper 9-A.

12. Statement of the accused has been recorded in which the accused has denied the allegations and stated that he himself reached police station at 04:30 a.m. after getting information from Anchita. He denied any conversation with Charu Suri. He stated that he remained at his house on 28.04.2014 upto 09:00 p.m. Thereafter, he had proceeded for Delhi. He further stated that one Ravi had killed his wife in his house but for blackmailing him, her father had lodged this case falsely. He stated that

Charu Suri is living in Jhansi and admitted that she was not living with her husband, Sudhir Suri. He expressed ignorance about any friendship or animosity with advocate Sri Janardan Vyas and notary advocate Sri Lalaram Verma.

13. According to the accused-appellant, prosecution sanction is forged and wrong and had been made for extorting money and blackmailing him. According to him he had not killed his wife. At the time of incident he was not at home but had left his house for going to Delhi.

14. Accused-appellant has examined following witnesses in defence:-

(i) DW-1, Mahendra Dubey; (ii) DW-2, Anil Kumar Singh.

15. Following documentary evidences have been produced by the prosecution in ST No.238 of 2014, under Section 302 IPC:-

(i) Ex.Ka-1, *tehrir*; (ii) Ex.Ka-2, inquest; (iii) Ex.Ka-3, recovery memo regarding two empty cartridges 32 bore; (iv) Ex.Ka-4, recovery memo regarding taking sample of pieces of blood stained and plain floor; (v) Ex.Ka-5, recovery memo regarding recovery of pistol and cartridges from the accused; (vi) Ex.Ka-6, chik FIR; (vii) Ex.Ka-7, carbon copy of *kaymi* GD (lodging of FIR); (viii) Ex.Ka-8, *post mortem* report; (ix) Ex.ka-9, photonash; (x) Ex.Ka-10, police form-13; (xi) Ex.Ka-11, letter to CMO; (xii) Ex.Ka-12, specimen seal; (xiii) Ex.Ka-13, map of place of occurrence; (xiv) Ex.Ka-14, map regarding recovery of pistol and cartridges; (xv) Ex.Ka-15, charge-sheet under Section 302 IPC; (xvi) Ex.Ka-16, CD of conversation between Charu Suri and the accused, Rishi Talawr; (xvii) Ex.Ka-17, application no.114-B; (xix) Ex.Ka-18, signature and seal of advocate Janardan Vyas, swearer, Charu Suri and signature of her advocate; (xx) Ex.Ka-19, photocopy of register of notary; (i) FSL report 86-A/3 regarding country-made pistol with magazine, two empty and two live cartridges 32 bore, two pieces of metal of used bullet; (ii) 89-A FSL report regarding clothes of deceased, blood stained and plain pieces of floor etc.

16. **Material Exhibits**:-

(i) Material Exs.1 to 3, two metal pieces and bullet recovered from the dead body; (ii) Material Ex.4, match box; (iii) Truss (bundle); (iv) Material Exs.6 and 7, pieces of blood stained and plain floor; (v) Material Ex.8, pistol; (vi) Material Exs.9 and 10, two live cartridges of 32 bore; (vii) Material Exs.11 and 12, two empty cartridges of 32 bore; and (viii) Material Exs.13 and 14, two trusses.

17. In S.T. No.239 of 2014, Crime No.212 of 2014, under Section 25/27 Arms Act the evidence consists of Ex.Ka-6, map of the recovery, Ex.Ka-7, charge-sheet, Ex.Ka-8, chik FIR, 6-A and 7-A return of lodging of FIR GD, paper no.9-A prosecution sanction.

18. In brief, evidence of witnesses is reproduced herein below:-

(I) PW-1, Manohar Lal Suri, father of the deceased and father-in-law of the accused deposed that on 27.11 2003 his daughter Shweta Talwar was married with Rishi Talwar resident of Jhansi as per social rituals. His daughter used to inform him by phone that Rishi Talwar frequently beats her and quarrelled over minor issues

hurling abuses and stating that if she did not give him money, he would divorce her. Two daughters were born to his daughter Shweta. Rishi used to tell Shweta that she had some affair with Ravi who used to visit his house in his absence. On 29.04.2014, Rishi Talwar's mother made a call which got disconnected. When he called back, the phone was switched off. At 11:00 a.m. he received a call from his son's wife, Charu Suri, sister of Rishi Talwar informing that Shweta has been shot. He called Jhansi Police and relatives and instructed that no action be taken till he reached Jhansi. He further deposed that at 08:00 O'clock, on the night of 28.04.2014 Shweta made a call and said that Rishi was beating her for last 3-4 days. He told her to go to upper portion of the house and to not talk. Then at 11:30 p.m. she called again and said that Rishi was beating her due to which she was bleeding from her nose. Further, she asked him to come and take her away with her children or else Rishi would kill her. He consoled that he would come and taken them away in the morning. He came to Jhansi on the night of 29.04.2014. He stayed at Rishabh Hotel. He had dictated an application to his son-in-law, Umesh Shirke and after signing it went to the police station Sipri Bazar and filed the application.

(II) PW-2, Kamal Raj deposed that on 29.04.2014 informant had informed him over phone about the death of his daughter. On the night of 29/30.04.2014 at 01:00 - 01:30 a.m. informant and his family reached his hotel i.e. Rishabh Hotel and had gone to police station Sipri Bazar at 02:00 - 02:30 a.m. At 03:00 a.m. he was rung up and informed that informant and Nisar Khan went to the house of Rishi Talwar where they saw the dead body of Shweta lying in the bathroom. Investigating Officer sent the dead body for *post mortem* after the inquest which was signed by him and Nisar Khan. The witness identified his signature on inquest Ex.Ka-2, *fard* Ex.Ka-3 and Ex.Ka-4. On 01.05.2014 at about 09:00 a.m. Investigating Officer had called him to the house of Rishi Talwar, wherefrom, he with Rishi Talwar and Azhar came to police station Sipri Bazar where he and Azhar signed some documents. The witness identified his signature on paper no.15A, Ex.Ka-5. This witness denied that accused Rishi Talwar had confessed of the crime before him or that Investigating Officer had recovered one country made pistol and two live cartridges from Rishi Talwar.

(III) The witness was declared hostile and was cross-examined by ADGC (Criminal). He denied his statement recorded under Section 161 CrPC and also preparation of *panchayatnama* and recovery of empty cartridges 32 bore and signing Ex.Ka-4 on the spot. After reading he also denied arrest of the accused on 01.05.2014 at about 07:30 a.m. before him and recovery of country-made pistol and two live cartridges from his possession and preparation of recovery memo and the accused's confession of crime. In cross-examination by the accused he deposed that police had not arrested Rishi Talwar in his presence. When he reached on receiving a call from the police, Rishi Talwar was already in the custody at the police station.

(IV) PW-3, Azhar Khan has also deposed against the prosecution and was declared hostile. He deposed that on 01.05.2015 Rishi Talwar was not arrested from his door in his presence. He had reached with his employer Kamal Raj at 09:00 a.m. and found Rishi Talwar already in police custody. Some papers were signed at the police station. No pistol or cartridges were recovered before him. Rishi Talwar had not confessed killing his wife, Shweta. The witness identified his signature on

Ex.A-5. The witness was declared hostile. During cross-examination by ADGC (Criminal) the witness disowned his statement recorded under Section 161 CrPC and stated that he could not explain why investigating officer recorded the same. This witness also denied the recovery and arrest of the accused, Rishi Talwar from his door at 07:30 a.m. on 01.05.2014. He also denied that the accused had confessed his guilt before him. This witness has simply identified his signature but had said that it is wrong to say that police had prepared the recovery memo before him and the case property was sealed before him. In cross-examination by accused's counsel this witness has deposed that Investigating Officer got his signature on plain paper and nothing was written on it. Kamal had also signed it along with him. He denied seeing any pistol or cartridge anywhere.

(V) PW-4, is Kumari Anchita Talwar aged about 11 years, is daughter of the deceased and the accused. She was tested under Section 118 of Indian Evidence Act, 1872 and after concluding that the witness understood the nature and importance of the questions and could properly answer and knew the meaning of oath, her evidence was recorded. During her deposition, this witness recognised her father and said that her mother was Shweta Talwar. They are two sisters and one brother. Her younger sister is Jaanvi Talwar and her younger brother is Rudranksh Suri who is her aunt's (buwa) son. According to her, the incident occurred on 29.04.2014 at about 09:00 O'clock. She along with her younger sister was with her parents and after sometime her father went to Delhi by train. Half an hour later, Ravi uncle had come and had rung the bell. Her mother opened the door, he sat in the drawing room. She was watching TV inside the house. They both were talking and after sometime she heard that they were quarrelling then she lowered the volume of TV and heard what they were saying. Ravi said to her mother to go with him. Her mother refused to go with him because her husband was not in the house and her children were alone there. Ravi started to force; her mother said to get out from the house then he took a small gun from his pocket. Her mother got scared and started running towards bathroom to save her life and started closing the door of the bathroom but before that Ravi opened fire and her mother fell down. When she started crying and shouting loudly, he threatened and said not to say anything about him being there. After going to the upper portion of the house got up to her sister and told that Ravi uncle has killed their mother. When she went out with her only Anil Singh and Sanjeev Pandey uncle had come there and she had narrated all the facts to them. They said that they were calling the police. When she was nervous to stay alone at her house, she stayed for sometime in the house of Anil Singh and for sometime at Sanjeev Pandey's house. Next day when her maternal grandfather came, she told him about this. He said to go to police station. On 01.05.2014 at 04:00 a.m. when her father arrived, she narrated everything about her mother. Her father stated that he was going to the police station but he did not return.

(VI) This witness was declared hostile and was cross-examined by ADGC (Criminal) but she did not support the prosecution version and disowned the evidence recorded under Section 161 CrPC. She deposed that at present she was living with her grandmother, aunt (*bua*), brother and sister. She had come that day with her aunt (*bua*), Smt. Charu Suri. This witness has said that her parents had good relations. They never fought or quarrelled.

(VII) PW-5, Monika Umesh Sirke wife of Umesh Vishnu Sirke, sister of the deceased deposed that her younger sister Shweta had been married to Rishi Talwar on 27.11.2003. Whenever Shweta came to Bombay, she used to tell that her husband Rishi Talwar used to beat and abuse her, and always demanded money. On 28.04.2014 in the evening Shweta Talwar called her mother on her mobile and informed that Rishi Talwar was beating and quarrelling with her and that even 4-5 days ago Rishi Talwar had beaten her. At that time she (the witness) was at her mother's house and she took the phone/mobile from her mother and talked to Shweta and asked her to keep calm and informed Shweta that mummy and papa have talked with each other and will go to get her.

(VIII) On 29.04.2014 Charu Suri called on the mobile of her mother, Smt. Shanti Manohar Lal Suri, whose mobile number she could not recollect; informing that Rishi Talwar shot Shweta and asked that they should all leave for Jhansi. It was 11:30 a.m. or 12:00 O'clock in the day. She was going to school. Her husband came to take her to go to Jhansi then they left Mumbai and travelled to Jhansi. They came to Rishabh Hotel and stayed there and called the police from there and went to Shweta's house. There in the bathroom the dead body of her sister was lying in pool of blood. After this her mother started crying. Charu who was her sister-in-law (*bhabhi*) had a recording system in her mobile in which all the calls were recorded from which she came to know that Rishi had called Charu Suri after the shooting and confessed his crime and said that he had shot two bullets at Shweta. The dead body is lying in the bathroom. She had got prepared a CD of the recordings of that mobile and the same CD got installed in the Court. She had submitted that CD on which basis bail application of Rishi Talwar was rejected from the Court of District Judge and the Hon'ble High Court. In cross-examination this witness admitted that accused did not shoot in her presence as she was in Mumbai at that time. The Investigating Officer had recorded her statement on 02.05.2014. Except the fact regarding recording in CD rest of the things narrated by her in court had also been conveyed to the Investigating Officer. She admitted that the date and time of giving information by the deceased about the beating and abusing by the accused is neither in her remembrance nor had been reported in police station at Mumbai as its proceedings could be drawn only in Jhansi. She and her father had neither reported the matter through mobile nor informed the police. She herself said that Charu Suri, sister-in-law (*bhabhi*) used to settle the matter and used to explain and make conciliation pointing out the girls.

(IX) She deposed that this marriage took place in her relation. Rishi Talwar's mother Smt. Asha Talwar was their real aunt (*mausi*) who is her mother's real elder sister. Shweta used to go back to her in-law's house for the sake of their elder's apology. She further deposed that they came to know about the facts that recording of conversation was done one week after the last rites. Funeral took place in the evening at 04:30 p.m. on 30.04.2014. She does not remember the exact date she came to know about the recording. She admitted that she had not informed the Investigating Officer about the call recording on CD as due to litigation she had gone to Mumbai after the last rites. She did not think that it was necessary to tell this to the Investigating Officer, even by mobile. She refused the suggestion that there is no such recording of Charu's mobile. Her aunt (*mausi*) used to get

reconciliation by apologizing over the phone. She could not remember phone number of her aunt but had deposed that she used to apologize over the mobile phone to her parents but could not remember the phone numbers of her parents' mobile either. She herself stated that it was not known that how the situation could come to murder. She used to live in her marital house and she came to know about the incident after talking to her parents. Charu *bhabhi* also used to tell her, she had no personal information. She had told the Investigating Officer that accused always made demands for money, if the same is not written in her statement, she cannot tell the reason. She told the Investigating Officer that she was at the house of her mother that day. She had talked to Shweta on her mother's phone and had told her to keep calm, she and her father will come to Jhansi to get her. If it was not written by the Investigating Officer, she cannot tell the reason. She stated that because she lived near her parental house, therefore, she had come there several times in the year of 2013 and 2014 although she cannot tell the exact number of times. She deposed that when Shweta used to go to Mumbai, she used to inform the matter, she cannot tell the day, date, month or the year when the deceased had said so before her. She could not tell the day, date and month when Charu had reconciled the matter. She could not remember the day, date and month when Asha Talwar had apologized. She further deposed that on 29.04.2014 at about 11:30 to 12:00 O'clock Charu had rung her mother but she does not remember the mobile number of Charu or her mother (of the witness). She admitted that this conversation was not recorded, only mobile statement is available but the same is not on record. She admitted that on 29.04.2014 she had reached Jhansi with her parents and husband at about 11:30 to 12:00 O'clock and had gone to Rishabh Hotel via Atarkesh. After reaching there her father had rung the police and using the vehicle of Kamal Raj, they reached the house of Rishi Talwar between 12:30 to 01:00 a.m. where police had also reached and a hawaldar was already there. Since her mother was not well, they came back to Rishabh Hotel where they stayed for the next four days. She deposed that the fact that Charu asked them over phone to go to Jhansi, was conveyed by her to the Investigating Officer, if the same was not recorded by him, she cannot tell the reason.

(X) This witness admitted that she knew Ravi. Her husband Umesh had gone to the house of the accused for further police action. She, her parents and her husband had gone to police station together. She denied that on 29.04.2014 at about 11:30 - 12:00 O'clock Charu had not rung up her mother to inform that Rishi Talwar had shot Shweta.

(XI) PW-6, Satish Kumar Dwivedi, HCP, had deposed that on 30.04.2014 on the basis of *tahrir* of the informant, Manohar Lal Suri, he had prepared chik no.120 of 2014 at 02:00 a.m. and had lodged an FIR at Crime No.211 of 2014, under Sections 302, 120-B IPC against the accused Rishi Talwar and others. This witness had proved the chik FIR Ex.Ka-6. This witness had also proved carbon copy GD Ex.Ka-7 regarding institution of the case. In cross-examination this witness had answered that Umesh Vishnu Sirke had also come with the informant. He deposed that the date of sending the chik FIR from the police station was not noted in the concerned column but rather it was marked in the outgoing column "through post office'. The date is not mentioned below the signature

of C.O. He also admits that there was no signature of the CJM on it. This witness denied that the chik report and GD were prepared anti-timed.

(XII) PW-7, Dr. Sushil Kumar Gupta who performed the *post mortem*, deposed that on 30.04.2014 at about 12:30 p.m. he had conducted the *post mortem* of the dead body of the deceased. In external examinations he found rigour mortis in the whole body of the deceased. This witness found following injuries on the body of the deceased:-

"(i) Gunshot punctured wound on the left parietal bone, 1 x 1 cm size scorching present in inverted wound 3 cm above left pinna, wound goes deep puncturing pellet recovered 2 cm behind the eye-wall, no exit wound. Side of left parietal and frontal bone were broken.

(ii) Gunshot punctured wound 1 x 1 cm size, 5 cm above navel scorching present, inverted wound and gun powder was present in wound, no exit wound present in X-Ray. Pellets seen deep in left side 3 cm lateral to sacrum whose possible effect could not be found out."

(XIII) In internal examination, brain was found congested. A metal cap was recovered from the molar tooth. Oesophagus was reddish. Right and left lungs were of 380 g.m. and 320 g.m, respectively. Heart was empty. There was 50 g.m. of semi-digested food in the stomach. In small intestine and appendix there were chyme and gases present. In large intestine and mesentery vessels there were faecal matters and gases. Spleen was congested and it weighed 150 g.m. Kidney were congested, both were of 200 g.m. Urinary bladder was empty. Genital organs and uterus were non-gravid.

(XIV) According to this witness, the deceased died due to shock and haemorrhage on account of *ante mortem* gunshot injuries. This witness has proved *post mortem* report Ex.Ka-8 and has also proved recovery of one bullet of yellow metal and two pieces of metal. This witness has proved bullet as material Ex.-1. Piece of metal material Ex.-2 and piece of recovered two molar tooth cap material Ex.-3, matchbox material Ex.-4 and truss of the match material Ex.-5. In cross-examination, this witness has opined that there could be variation of 06 hours in the timing of death. There is possibility of death having occurred in the night at about 10:00 - 11:00 p.m.

(XV) PW-8, Umesh Vishnu Sirke, brother-in-law (*bahnoi/jija*), deposed that the deceased was married with the accused 10-11 years ago. When deceased went to Mumbai, he knew that she was beaten in Jhansi. He could not know the reason. On 29.04.2014 at about 12:00 noon his mother-in-law Smt. Shakti Devi Suri rang him and asked him to come to her house as Charu Suri had informed her over the phone that Rishi Talwar had shot Shweta. Manohar Lal Suri informed SSP, Jhansi, Smt. Aparna Ganguli and his relative Kamal Raj that no action should be taken till their arrival at Jhansi. On 29.04.2014 at about 11:45 to 12:00 O'clock they reached Rishabh Hotel, Jhansi from where they reached the police station with Kamal Raj. Therefrom they went to the house of Rishi Talwar where a policeman was stationed. After a while a police car with 2-3 policemen reached there and went inside and showed the bathroom where Shweta's dead body was lying. Seeing the dead body, Smt. Shakti Devi Suri, Manohar Lal Suri and Smt. Monika Sirke started weeping loudly. Due to the deteriorating health of Smt. Shakti Devi Suri, they took her back to Rishabh Hotel and then proceeded to police station at the behest of Manohar Lal Suri. He had written a *tahrir*

Ex.Ka-1, inquest Ex.Ka-2 was prepared on the spot. This witness identified his signature on both the papers.

(XVI) This witness further deposed that at his house in Mumbai he heard about mar-peet with Shweta by her in-laws. He admits the writing of written complaint at police station in presence of police and the SHO. The SHO did not help in writing the report. Manohar Lal went on speaking and he was writing the complaint. He has a little remembrance of the writing. He signed inquest at Shweta's house. He further deposed that in inquest he has noted where the dead body was found and blood sample was taken. The position of the clothes and the corpse was also written. Recovery of an empty cartridge from the bathroom is also written in it. Investigating Officer had asked him about the incident. He signed the inquest between 04:00 to 04:30 O'clock. He said that he had given statement to the Investigating Officer that they went to the police station at about 12:00 O'clock leaving Nisha Sirke. He denied the suggestion that on 29.04.2014 his mother-in-law had not rung him and had not said that Charu Suri informed through phone that Rishi Talwar had killed Shweta. This witness denied all the suggestions of the defence.

(XVII) PW-9, Shakti Suri, mother of the deceased deposed that her daughter Shweta Talwar was married to the accused Rishi Talwar about 11-12 years ago. After few days, accused started beating and abusing her daughter which she used to inform by phone. Two daughters were born to her daughter. Accused, Rishi Talwar always used to send her daughter after beating her. On 28.04.2014 her daughter Shweta rang at 08:00 p.m. that the accused was seriously beating her. She asked to take her and her daughters from there and then she consoled that next morning she was coming to take her. In the night at 11:00 O'Clock she got a call of her daughter on her husband's phone stating that Rishi was abusing a lot and threatening that he would kill her. Her husband said that he with her mother were coming. At around 05:00 O'clock a missed call came on her husband's phone. She called back but no one picked up the call. Thereafter on 29.04.2014 at 11:00 a.m. her daughter-in-law Charu Suri made a call on her husband's phone and said that they all have not left yet, there Rishi Talwar shot Shweta then she took the phone from her husband and talked to her. She also told her the same thing then her husband rang Kamal Raj, owner of Rishabh Hotel, and asked to get information about the matter. He rang SP, Jhansi and informed about the incident and also told him not to take any action till they reach there. On 30.04.2014 at 01:00 a.m. they reached Jhansi and went to Rishi Talwar's house where Shweta's dead body was lying in the bathroom. Incident was reported by her husband.

(XVIII) In cross-examination this witness deposed that her daughter used to tell about the beatings on the phone, she cannot tell the date. She could not tell that how many times in 10 years the accused had beaten her daughter. Whenever her daughter came to her house after marpeet, she did not get her medically examined but there were marks of injuries in her hands, feet and nose too. On 28.04.2014 at about 08:00 O'clock a call came on her phone. She could not remember mobile number of her deceased daughter. When she got a call on her husband's phone at 11:00 p.m, it was not recorded. On 29.04.2014 at 05:00 a.m. at her husband's phone from which number missed call was made, she did not know but it was saved in the name of Asha Talwar whose phone number is 8454840444. She had told this number to the Inspector. She

took the phone from her husband's hand then her daughter-in-law had also said that Rishi Talwar had shot Shweta, if it was not recorded by the Investigating Officer, she cannot tell the reason. She reached Jhansi by train at about 12:00 to 12:15 O'clock in the night of 30.04.2014. They all four directly reached the house of Rishi Talwar and saw the dead body of Shweta lying in the bathroom. Her husband went to report the matter to the police station. When she saw her daughter's dead body, she became nervous and very angry. Even today she feels that the corpse is in front of her eyes. When she reached Rishi Talwar was not there. She became unconscious and regained consciousness after one hour upon sprinkling and taking water. The dead body was upside down in the bathroom in red printed *kurta* and white *payjama*. She was prevented, therefore, she could not weep clinging with her daughter's corpse. Thereafter she returned to Mumbai on 03.05.2014. This witness denied all the suggestions of the defence and denied that while being angry, sentimental in a fit of rage she was giving evidence against the accused.

(XIX) PW-10, Ram Bhajan Singh, Investigating Officer deposed that on 30.04.2014 he was posted as SHO, Police Staton Sipari Bazar, Jhansi. On that day a case at Crime No.211 of 2014, under Sections 302, 120-B IPC against Rishi Talwar was lodged which was investigated by him. He prepared paper no.1 of the CD, copied written complaint and chik FIR and recorded the statement of HCP, Satish Chandra Dwivedi and informant Manohar Lal Suri and reached on the spot, conducted the inquest, prepared inquest report in the writing of SI Ahmad Rajab and got prepared papers i.e. *photonash*, *challannash*, letter to CMO and RI, specimen seals and had sent them. This witness proved the inquest report Ex.Ka-2, *photonash* Ex.Ka-9, *challannash* Ex.Ka-10, letter to CMO Ex.Ka-11 and specimen seal Ex.Ka-12. He inspected the place of occurrence on the pointing out of the informant and prepared map Ex.Ka-13 and proved it. He recovered two empty cartridges of 32 bore from the place of occurrence, prepared recovery memo Ex.Ka-3, prepared specimen seal, took blood stained and plain pieces of floor, prepared recovery memo of it, sealed it and proved it as Ex.Ka-4. On 01.05.2014 when he was in search of the accused, on the pointing of the informer the accused was arrested while locking the gate of his house. In his personal search a pistol of 32 bore and two live cartridges were recovered. He arrested the accused at 07:30 a.m. The witness has proved the arrest memo, recovery of weapons and cartridges as Ex.Ka-5. He sealed the recovered pistol and cartridges on the spot and prepared specimen seal and after coming to the police station lodged the FIR. On 02.05.2014 he recorded the contents of *post mortem* in case diary, recorded the statement of Smt. Monika Sirke, Umesh Vishnu Sirke, Smt. Shakti Suri and the informant Manohar Lal Suri. He recorded the statement of Dr. Sushil Kumar who did the autopsy and copied the inquest on 17.05.2014. He recorded the statement of Constable, Mohammad Ahmad, Lady Constable Smt. Geeta Devi and SI, Ahmad Khan in CD. He mentioned the contents of the affidavit of Smt. Charu Suri on 23.05.2014 in case diary, recorded the statement of Kamal Raj, supplementary statement of the informant - Manohar Lal Suri and the witness Azhar. On 25.05.2014 he prepared Ex.Ka-14 map of the place of recovery of weapon used in commission of crime and recorded the statement of Smt. Asha Talwar, Smt. Charu Suri, Kumari

Anita, Kumari Janhvi and Constable Jitendra Singh. On 05.06.2014 he recorded the statement of Irshad and Nisar, witnesses of inquest and omitted Section 120-B IPC. After finding sufficient evidence he submitted the charge-sheet No.168 of 2014 (Ex.Ka-15), under Section 302 IPC against the accused. Before the witnesses blood stained and plain pieces of floor were produced which he proved as material Exs.6 and 7. He proved the recovery memo with regard to the country-made pistol material Ex.8 and two live cartridges of 32 bore as material Ex.9 and 10, empty cartridges as material Ex.11 and 12 and the truss as material Ex.13.

(XX) In cross-examination this witness had admitted that on the truss of the pistol neither signature of witnesses of recovery from accused are visible nor there is any sheet of paper pasted on the truss. Date is also not mentioned. Seal are not legible. Boxes in which pieces of the floor were kept were not present before the witness but pieces were present. In recovery memo no sign of identification was mentioned. In recovery memo of empty cartridges no time is mentioned. He admitted that after taking the pistol into possession, it was neither kept in cotton nor finger prints of the accused were taken because sufficient evidence was already available. He had gone to the Magistrate to take remand of the accused. This fact is mentioned only in the GD. He had submitted the pistol before the remand Magistrate and produced copy and case diary to make the entry. After minutely observing, the witness said that on the case diary and the truss, signature of the CJM, Jhansi dated 01.05.2014 is visible.

(XXI) He admitted that he had not written that the informant directly came to Rishabh Hotel and got a written complaint prepared and thereafter lodged the FIR. From there he went to the house of the accused and for the first time saw the dead body of his daughter. He admits that it is not written that after receiving the phone of his daughter informant consoled her and said to go to the upper portion of the house. He said that small details are not written, only beating is mentioned. It is not written that there was bleeding from the nose of the deceased. He said that it is noted in the case diary that the accused used to demand money and used to beat and ask for divorce. This witness admits that though giving divorce was not written but it was written that the accused used to say that take divorce otherwise he would kill her. He admits that informant - Manohar Suri had deposed that after the murder of Shweta, his daughter-in-law, Charu Suri had not returned back to Mumbai with his son.

(XXII) PW-11, Sudhir Suri son of the informant Manohar Lal Suri has been testified by the court even though he was not mentioned as a witness in the charge-sheet. In the open court this witness played the CD on a laptop and deposed that he has downloaded contents from google account in which the call recordings of his wife Charu Suri and her SMSs are saved. In April, 2012 he had purchased admin software. He also filed purchase bill Ex.Ka-16 and proved it. According to him, using this software, all conversations of his wife Charu Suri were recorded and saved in a google account which are still saved in his E-mail account. There was an admin control in his phone and whenever he wanted to hear the recording, he used to download it from google account. He also deposed that he had not done any tampering with this CD. The conversation which he played in the court is the same as in his google account. This witness deposed and produced description of recordings which are as under:

"(i) In the first recording there is a conversation between Charu Suri and her

brother Rishi Talwar about murder of Shweta Talwar. In this conversation Rishi Talwar is confessing to his sister that he had killed his wife Shweta Talwar and her dead body was at the house. He told her to not convey this fact to others as he wanted time to hide the dead body. Hearing this, Charu Suri, in the state of weeping, cried as to why he killed her and why he felt no pity. Now everything is ruined. She also asked where are the children, in response he said that they were in the upper portion of the house.

(ii) The second recording is the conversation between his wife Charu Suri and Neeru Sahay, his sister-in-law and Asha Talwar, his mother-in-law in which his wife calls and tells Neeru that our brother Rishi Talwar has shot and killed Shweta Talwar. He also told that this information should not be spread as brother needs a few hours time. Either he would leave the house or would surrender with gun. Apart from this, Asha Talwar has also confirmed the same thing again with Neeru that Rishi had shot and killed Shweta. He informed the court that the mobile number of his wife was 8454840444. He also deposed that this mobile number was in the name of his father Manohar Lal Suri whose bill he used to pay. On this number he has also installed admin control software. He pays the bill amount. Because of doubts about his wife, he had installed the software. On 28.04.2014 he had gone to meet his mother-in-law at about 05:00 to 06:00 p.m. with his wife and son but due to bad situation in the house at night, he went to the nearest hotel and stayed there for the night. On the second day at around 04:00 a.m. on 29.04.2014 he again came back to his in-law's house and called his wife many times but his wife, mother-in-law and son were not there. Then as he wanted to know the facts, he rang his wife but she did not provide him any information. On this, he downloaded it in his google account, and after listening the recording, he came to know that at 05:45 a.m. Rishi Talwar had contacted his sister on phone and had informed this fact. After hearing the recording he asked his wife as to why she did not tell him all these things. From Dharmshala he came to Delhi by taxi. Second recording was done on his sister-in-law, Neeru Sahay's mobile no.9915702175. He recognises all voices of this recording very well and confirmed that these voices were of Rishi Talwar, Charu, Neeru Sahay and Asha Talwar."

(XXIII) In cross-examination he admitted that he had no degree or diploma to recognise the voices nor does he do the work of recognising voices but he and Neeru Sahay, his sister-in-law both have been talking with each other for 10-12 years, therefore, he recognises their voice. Similarly, he cannot say as to when and on which date he talked with Rishi Talwar but for 10-12 years he is also in conversation with him. He admitted that apart from the recording played in court, he has also all the recordings in which his wife has talked with Rishi Talwar. The witness was not sure as to whether such recording was available or not. He deposed that he had not recorded the conversation between him and Asha Talwar separately. After 01/02.05.2014 the mobile phone of Charu Suri was not in use. He cannot say what his wife did with that phone. He got this phone number switch off after about one month. His wife Charu Suri had refused to come to him. He did not turn off this phone immediately because he was expecting his wife to come to him. After one month he had filed divorce petition.

(XXIV) He had provided this CD to the Investigating Officer during the investigation. His father had submitted this

CD but he cannot say what was the result of that. He has admitted that he never met the Investigating Officer and the fact deposed in the court had not been informed to the court and the police. Neither the police called him nor did he go automatically. He admitted that the CD has not been signed by him or by his father or by the court but himself said that his advocate Arun Kumar Dixit, engaged by his father, has signed the CD. It is true that there is no date on it. He deposed that the first recording of the CD had become available at 6:00 a.m. on 29.04.2014. The second recording is about a half an hour later. At this juncture advocate Arun Kumar Dixit identified his signature on the CD in question and informed the court that this CD was given by his client on 12.08.2014. The witness denied the suggestions of the defence counsel.

(XXV) PW-12, Ravinder Sharma deposed that he knows Manohar Lal Suri and his family members and also his daughter Shweta who has died; there are family terms between both the families. He used to visit the house of the informant's family. He knows that Shweta Suri deceased was married in Jhansi with Rishi Talwar. He had never visited Jhansi. On the information of the court he came to Jhansi for evidence.

(XXVI) In cross-examination this witness deposed that he had not been questioned by the police regarding this case. He has not come with the informant Manohar Lal Suri but has come separately. The court's summon was forwarded to him. Upon being questioned by the court this witness answered that he had met Shweta Suri in Mumbai. He never met her husband. He knows him only by name. He has no personal information regarding this case. Sudhir Suri told him over phone that his sister has been murdered. He has no hand in Shweta Suri's Murder. If any witness has named him, he has done so wrongly. He has seen photo of the accused, therefore, he recognises him. He never had any conversation with him on the phone or face to face. His relationship with Shweta Suri was because of her being sister of his friend and there were family terms.

(XXVII) PW-13, Charu Suri, sister-in-law of the deceased deposed that the accused is her younger brother and the deceased was her sister-in-law (*bhabhi*), informant Manohar Lal Suri is her father-in-law. Her brother accused Rishi Talwar was married to Shweta daughter of his father-in-law Manohar Lal Suri. From this wedlock two daughters Ankita Talwar aged about 12 years and Janhvi Talwar aged about 08 years were born. After the marriage neither any quarrel took place between her brother and sister-in-law Swetha before her nor it is in her knowledge. After marriage she used to live with her husband,father-in-law and mother-in-law in Narula, Mumbai. On 28.04.2014 she was at the house of his mother Asha Talwar in Dharmshala, Himachal with her husband, Sudhir Suri and children. She could not remember the mobile number used by her but refused that it was 8454840444. On 28.04.2014 and 29.04.2014 neither her brother Rishi nor her sister-in-law Swetha had called her. She could not remember mobile number of her mother.

(XXVIII) According to this witness mobile number 9805489464 was not with her mother. At 05:00 to 06:00 p.m. on 29.04.2014 her brother Rishi had not called her and had not said that he had shot her wife Shweta. After marriage Shweta remained with Rishi Talwar in Jhansi. Her brother Rishi never harassed her. It is wrong to say that her brother wanted to get rid of Shweta in any way. She expressed

ignorance about the petition of divorce by his brother against Shweta, if it was so, her sister-in-law used to live with her brother even after divorce and remained till death with her children. It is true that Shweta was killed in the house of Rishi Talwar and her dead body was found there. It is also true that her father-in-law Manohar Lal Suri had lodged an FIR against her brother Rishi, mother Asha and against her for committing murder of Shweta. She denied that in this respect she had moved an application and affidavit to SSP, Jhansi on 05.05.2014.

(XXIX) This witness was declared hostile and prosecution has cross-examined her in which she deposed that at the time of incident she used to live with her husband but after the incident she was not living with him. There is no divorce between them but an order has been passed under Section 125 CrPC and proceedings of Section 128 CrPC were going on. In the month of June, 2014 she had moved an application saying that application paper no.15-A/4 and affidavit 15-A/12/224 were not signed by her. She was aware that after 05.05.2014 she and her mother were exonerated from the case. This witness disowned the statement recorded by Investigating Officer and also expressed ignorance about advocate Janardan Vyas and notary advocate Lala Ram Verma. This witness recognised the signature on application no.114-B Ex.Ka-17 prepared by her advocate Ramesh Chandra Agrawal and also admitted that she has come to the court from his chamber. She admitted that even after knowing that on application and affidavit 15-A her signatures are verified by advocate Janardan Vyas and certified by notary advocate Lala Ram Verma, she had not made any complaint.

(XXX) On the request of public prosecutor and with the consent of accused counsel Ex.Ka.-7 was compared with paper no.15-A-1/14 and court observed that both the documents were bearing the signature of Charu Suri. The signatures were mostly similar but this witness refused that on 05.05.2014 she prepared the application and affidavit and after signing the same produced before the SSP, Jhansi. The witness also denied the suggestions of the prosecution counsel.

(XXXI) In cross-examination by the accused, the witness deposed that in Ex.Ka-17 the advocate had written the facts which she had narrated. In the night of 29.04.2014 between 11:00 to 12:00 p.m. someone informed that one Ravi had shot Shweta when Rishi was in Delhi but this fact was not told by her to any court or any officer. She deposed that she had informed the officer orally. She deposed that on the day of occurrence when she was in Himachal, all the conversations were made from her husband's phone. After this incident her relations with her husband became sour. She had no idea that her husband was tapping her phone. Her father-in-law does not like her and her husband's relation was bad (with her).

(XXXII) PW-14, Lala Ram Verma, notary advocate, Civil Court, Jhansi deposed that he was a notary advocate. This witness recognised paper no.11-A2 to 11-A4 and deposed that Charu Suri had come to him with the papers on which her signature was identified by advocate Janardan Vyas. The affidavit was read out to Charu Suri. He put his seal and signature; the witness certified his signature and seal on the affidavit. In notary register the said affidavit was entered at serial no.2866 on 05.05.2014 which is signed by Smt. Charu Suri. The witness also filed photocopy of that page of the register attested by him and proved it as Ex.Ka-19.

(XXXIII) In cross-examination this witness admitted that it is true that there was no photograph on the affidavit.

There is neither any photo on the affidavit nor the age of Charu Suri was mentioned. He also admitted that the "word verified to be correct" was not written in his seal. According to this witness, he did not know the deponent personally. The affidavit had come to him already prepared. It was neither typed nor signed by Charu Suri before him. Charu Suri and the advocate had come with this affidavit. It is true that seal of Janardan Vyas advocate and date of his registration was not written on it. The witness denied the suggestions.

19. After closure of the prosecution evidence, statement of the accused has been recorded under Section 313 CrPC in which he denied all the questions saying it to be wrong. In addition to it he, with regard to arrest and recovery of firearm pistol, magazine and live cartridges, stated that he had already reached the police station by 04.30 a.m. after getting information from Anchita - his daughter. On the day of occurrence he had not talked to Charu Suri and also said that Charu Suri had not condemned him. He further answered that the deceased remained at the house upto 09:00 p.m. on 29.04.2014. Thereafter he had gone to Delhi. Ravi had killed the deceased but the father of the deceased has lodged false complaint to blackmail him. He admitted that Charu Suri is living in a separate house in Jhansi. The prosecution sanction, is forged and wrong and he had not killed his wife. At the time of the occurrence he was not present at the house but had gone out of the house to Delhi. He has been falsely implicated.

20. In defence three witnesses have been examined which are as under:-

(I) DW-1, Mahendra Dubey deposed that his shop, Prakash Traders is in Sadar Bazar, Jhansi. He is an A-Class Government Contractor and General Order Supplier. He knows the accused Rishi Talwar who is also an A-Class Government Contractor and Army Supplier. Motor parts are sold by him. He purchases articles from Kashmiri Gate, Delhi. Rishi Talwar also used to purchase articles from Delhi. On 29.04.2014 he had gone to Delhi and had left the house at 08:30 p.m. He reached Jhansi Railway Station where Rishi Talwar was in the queue and asked him to purchase a ticket for Delhi and for that he had also provided money. He purchased two window tickets. Thereafter he waited for the train. He had gone to Delhi by Southern Express which departs from Jhansi in the night at 09:30 p.m. They reached Nizamuddin Railway Station at 05:00-05:30 a.m. Thereafter he sat in the waiting room and had breakfast. At 09:30 a.m. they went to Kashmiri Gate and purchased motor parts. Rishi Talwar said to take his articles also from the dealers and for that he provided receipt and said that there is a meeting, so book his articles. He booked the articles on 01.05.2014 and returned to Jhansi on 02.05.2014.

(II) When he went to provide the bill, accused's shop was closed and a staff was standing out side the shop to whom he handed over the receipt. The staff informed that Rishi Talwar had been sent to jail in connection of the murder of his wife.

(III) In cross-examination he deposed that his shop is 40-50 meters away from that of Rishi Talwar. It is wrong to say that he looks after the business of Rishi Talwar. He recognised Charu Talwar present in the court and admitted that he had not received any summons for testifying. He had come for deposing upon being asked by Charu. He has had good business relations with Rishi Talwar and Charu Talwar for about 25 years. It is

wrong to say that he comes to the court to pursue the case. This witness admitted that he had moved adjournment application paper no.138-B and 137-B1 in his signature written by Sri Ramesh Agrawal, advocate for the accused Rishi. He had not given information in writing to any police officer that on the day of occurrence he and Rishi Talwar were in Delhi. The witness himself said that he had told the SO, Ram Bhajan Singh. He had not provided this information in writing to any of the police officers. He had not complained to any higher officer that the fact informed by him was not considered by SO, Ram Bhajan Singh. He further deposed that once he had gone to SSP, Jhansi, however he was not present. He neither submitted this information in writing there nor did he send through post.

(IV) On being asked by the court, the witness deposed that it is true that he used to pursue the case and used to come to the court due to business contact with the accused Rishi Talwar as there is no senior family member to pursue his case. In Delhi on 30.04.2014 at about 11:00 - 12:00 O'clock both were separated, till then they had not received information about the incident. He further deposed that certainly this fact is surprising that husband was not informed even on mobile phone about murder of his wife but he cannot tell the reason.

(V) DW-2, Anil Kumar Singh deposed that Rishi Talwar is his neighbour and lives in front of his house with his wife and two daughters, Ankita and Janhvi. He never saw them fighting with each other besides they were living peacefully. Rishi Talwar has a business of motor parts and used to go to Delhi for purchasing. On 29.04.2014 he was at his house. At about 10:30 p.m. he heard scream of a girl, he came out of the house and found Ankita and Janhvi there and asked the reason for screaming then they informed that Ravi uncle had shot her mother Shweta and her father had gone to Delhi. When he entered in the house, he found dead body of Shweta there, then he rang Rishi Talwar. Several other persons also gathered there who informed the police. The police reached after half an hour, he informed the police about the incident.

(VI) In cross-examination the witness deposed that he did not go to Rishi Talwar's house daily. He cannot say that there used to be quarrel between the wife and husband inside the house. He used to contract in PWD/RES. Their houses are opposite to each other. He neither went to inform any police officer and also did not give it in writing to any police officer on the spot nor did he go to tell any senior officer. Today for the first time he was telling the court. He had not even given an affidavit to any court or anywhere. It is true that on the next day of the incident accused had left the house saying that he was going to the police station. Next day Rishi Talwar was sent to jail. He had rung Rishi Talwar from his mobile no.8853202916. Daughters had given his number. It was informed to him that on the day of incident at about 08:00-09:00 p.m. he had gone to Delhi. Both the daughters had knocked the door of his house. Police came after half an hour till then he remained standing out of the house. Leaving a constable there, the police returned. After 01:00 a.m. he also went to sleep. Police had said that as per need they will call him. The dead body was near a water tap. Shweta was in salwar-suit. He could not say the colour. He had not rung the police. Neighbourers - Sanjiv Pandey, Manish Agrawal, Bablu Agrawal and Saxena Ji had come. He informed the police that daughters had informed him that Ravi uncle had shot their mother. He did

not ask about Ravi uncle. Rishi Talwar had informed him at about 07:00-08:00 a.m. to go to police station. After knowing that Rishi Talwar has been sent to jail for the charge of murder of his wife, he did not inform the fact to any police officer. After getting summon from the constable he had come to testify himself. The witness denied that being neighbourer he was giving false evidence.

(VII) Upon being asked by the court the witness answered that he had not heard the sound of firing as the TV was on. He had come out when the daughters came screaming out of the house.

21. **Grounds of Appeal**:-

(I) The appellant has taken the ground that informant, PW-1 is not an eye-witness and his evidence is wholly unreliable. The only eye-witness is PW-4, Kumari Anchita. The trial court had failed to appreciate her evidence. She had stated that Ravi is the real culprit and the appellant was out of city. Non-prosecution of Ravi is no ground to fasten the guilt upon the appellant and to punish him. The time of occurrence has not been established. The *post mortem* was conducted after 32 hours but no rigor mortis was found. No credible evidence has been brought on record about a strained relationship to the extent to cause murder. There was no motive on the part of the appellant. The trial court was not justified in relying upon the CD containing the conversation between the appellant and Smt. Charu Suri, PW-13.

(II) The evidence in the form of CD is hit by Section 65-B of the Indian Evidence Act. No licence of the software was produced in the trial. The trial court had simply relied on the CD on the ground that PW-13 has not claimed the voice test. It is established law in criminal justice that prosecution has to prove its case on its own evidence and not on the weakness of the investigation or the defence. The affidavit sworn on 05.05.2014 was executed after one week of the occurrence and PW-13 was also a named accused but she was not charge-sheeted. This affidavit was disowned by PW-13 but in any case there is a possibility that it might have been obtained under coercion.

(III) Recovery has been shown from the appellant by PW-10 on 01.05.2014 at 07:30 a.m. while according to the prosecution, the FIR was lodged on 30.04.2014 according to which occurrence took place on 29.04.2014 at 04:45 p.m. It is beyond contemplation that in such circumstances the appellant would carry the weapon with him. The trial court has wrongly shifted the burden of proof upon the accused as to who has committed the murder while there is sufficient evidence that the appellant on 29.04.2014 in the night left his residence for Delhi by Southern Express at 09:30 p.m. The trial court has completely failed to consider this aspect. The impugned judgment and order is bad in law and wholly unwarranted. The prosecution has utterly failed to prove its case beyond the shadow of reasonable doubt. It is based on misleading evidence. The sentence and fine imposed by the trial court are wholly illegal, excessive and unwarranted. Conviction and sentence is against the weight of evidence on record. Hence, the appeal be allowed and the impugned judgment and order passed by the trial court be set aside.

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

23. **The appeal is decided as under**:-

(I) In this case, according to the informant and other witnesses before being killed, the deceased informed her parents about the maltreatment by the accused via telephone at 08:00 p.m. on 28.04.2014 and she also informed that the accused was beating her since last 3-4 days. The deceased again rang at 11:00 - 12:00 p.m. that accused was still beating her. She requested her father to take her away with her children otherwise the accused Rishi would kill her. The informant assured her that he would come in the morning. PW-1, informant again deposed that on 29.04.2014 at 04:55 a.m. Smt. Asha Talwar, mother of the accused made a missed call at his mobile no.9821154419 and when he called back, her phone was switched off. At about 11:00 a.m. his daughter-in-law, Charu Suri, rang and informed that Rishi Talwar has killed Shweta by shooting her. Thereafter the informant after informing SSP, Jhansi and his relative, Kamalraj departed from Mumbai and in the night of 29/30.04.2014 at about 01:00 a.m. he with his wife, son-in-law and daughter reached Jhansi and found that the dead body of his daughter Shweta Talwar was lying in bathroom whom Rishi Talwar had killed by shooting.

(II) The FIR was lodged by the informant at 02:00 a.m. on 30.04.2014 just an hour after reaching the place of occurrence. Why the delay was caused is properly explained by the informant PW-1. PW-5, Monika, elder sister of the deceased and the remaining witnesses have also admitted that informant reached Jhansi in the night of 29/30.04.2014. Thus, there is no delay in lodging the FIR. In the written complaint all necessary facts have been mentioned. FIR is not an encyclopedia. It is not necessary to mention all the facts relating to the commission of the crime.

24. In **Rohtash Vs. State of Rajasthan, AIR 2007 SCW 44** it was held that FIR is not an encyclopedia of entire case and need not contain all details.

25. It is a case based on circumstantial evidence. The informant and other witnesses of fact were not present on the spot. Only PW-4, Kumari Anchita is said to be present who has not supported the prosecution version.

26 . In **Motilal and others Vs. State of UP, AIR 2010 SC 281** it was held that FIR need not contain every minute details about the occurrence. It is not necessary that the name of every individual present at the scene of occurrence must be stated in the FIR.

27. In **Harbans Kaur and another Vs. State of Haryana, AIR 2005 SC 2989** it was held that even a long delay in lodging the FIR can be ignored if witnesses have no motive of implicating accused and have given plausible reason for delay.

28. In **Ravinder Kumar and another Vs. State of Punjab, AIR 2001 SC 3570** it was held that when there is a criticism on ground that FIR in a case was delayed, court has to look at reason why there was such a delay. Instances causing delay have to be looked into. If causes are not attributable to any fault to concoct a version made, delay cannot be a ground to treat the FIR vitiated.

29. In **C. Magesh Vs. State of Karnataka, AIR 2010 SCW 3194** it was held that the FIR is not substantive evidence it can only be used to corroborate its maker.

30. In this case death of informant's daughter by his son-in-law has been caused. There is no proof that the informant had any enmity or immediate or remote cause of false implication. From the evidence it is established that the family life of the accused and deceased was not good and either divorce petition was going on or a decree of divorce had been passed between them. Even then for the sake of minor daughters, the deceased was living in the house of the accused husband. Thus, the defence argument that the FIR are ante-dated or ante-timed is not proved and the argument advanced in this respect is rejected.

Motive

31. As per the written complaint, the motive behind the commission of crime is that accused used to beat the deceased soon after the marriage. The deceased used to inform her family members and parents about beating and abuses hurled by the accused. He often threatened for divorce, demanded money and threatened to kill her if the deceased did not get divorce. These facts have been proved by the informant PW-1, Manohar Lal Suri.

32. PW-4, Kumari Anchita, daughter of the deceased, has deposed in cross-examination by the accused that relations between his parents were good and no quarrel ever took place. But this evidence of PW-4 is not corroborated by the other evidence on record.

33. PW-5, Monika Umesh Sirke, elder sister of the deceased, deposed in favour of the prosecution and has proved the facts regarding maltreatment by the accused alleged in the written compliant. According to this witness, Smt. Asha Talwar, mother of the accused Rishi Talwar is her real aunt (*mausi*) and elder sister of her mother. She used to make excuses about her son's conduct, therefore, considering her apologies, Shweta used to go back to her husband's house. She again deposed that Charu Suri her sister-in-law (*bhabhi*) used to make reconciliation by giving them reference of the girls then Shweta used to go back in her husband's house.

34. PW-8, Umesh Vishnu Sirke, brother-in-law of the deceased has also deposed in favour of the prosecution. PW-9, Smt. Shakti Suri, mother of the deceased has deposed in support of the prosecution that the accused would frequently beat and abuse the deceased and even before the killing, she was physically and mentally tortured.

35. PW-11, Sudhir Suri, brother of the deceased has also deposed in favour of the prosecution and has produced and proved the call recording of the accused, his sister, Charu Suri and his mother regarding his confession.

36. PW-13, Charu Suri, sister-in-law (*bhabhi/nanad*) of the deceased has not supported the prosecution version and has been declared hostile, although earlier an application with affidavit on 05.05.2014 was given to SSP, Jhansi by her through his advocate, Janardan Vyas notarised by PW-14, notary advocate, Lala Ram Verma. Though the witness tried to deny the execution of the aforesaid application and affidavit but she could not succeed in it.

37. It has also come in evidence that the marriage between the accused and the deceased had broken down and a Divorce Petition No.740 of 2013, under Section 13-B of Hindu Marriage Act, 1955 was

registered on 17.12.2013 in which address of the deceased is shown as **Nerula**, Navi Mumbai with the contention that both were living separately since 18th September, 2011 but the deceased was continuing to live in the same house with her children till the date of incident as six months statutory period prescribed under Section 13-B of Hindu Marriage Act had not elapsed.

38. The deceased has met with an unnatural death in the house of the accused, therefore, if alibi of the accused is not proved then the burden under Section 106 of the Indian Evidence Act would be upon the accused to explain the circumstances leading to the unnatural death of the deceased.

39. In this case inquest was conducted after lodging the FIR by the Investigating Officer on 30.04.2014 from 02:00 to 02:25 a.m. in which the witnesses have opined that the deceased has died due to gunshot injury. There were blood stained injury above the left ear and three fingers above the navel. In the inquest crime number and sections are mentioned. The witnesses opined that the deceased had died due to gunshot which is also corroborated from the *post mortem* report. Inquest is not a substantive piece of evidence. The purpose of inquest is to ascertain prima facie, immediate cause of death. There is no need to mention the name of the accused or weapon used in commission of crime or name of the witnesses etc. Thus in this case it is found that the inquest has been done in accordance with rules.

40. On 30.04.2014 at 12:30 p.m. the *post mortem* commenced. In the evidence of PW-7 the description of the *post mortem* report has been mentioned. It is found that inquest report, *post mortem* report and the oral evidence corroborate each other. Hence, there is no need to discuss the *post mortem* report any further.

Witnesses

41. In this case PW-1, informant - Manohar Lal Suri is the father; PW-5, Monika Umesh Sirke is the elder sister; PW-8, Umesh Vishnu Sirke is brother-in-law; PW-9, Smt. Shakti Suri is the mother and PW-11, Sudhir Suri is brother of the deceased. Thus, they are the family members and relative of the deceased and informant. They all have supported the prosecution version and have adduced evidence regarding the maltreatment of the accused upon the deceased and killing by the accused using firearm. Except for the children of the deceased and accused, none else was present in the house. If the witnesses are the family members or relatives of the informant or the deceased and their evidence is cogent, truthful, reliable and free from any bias it can be relied upon after a careful and cautious scrutiny.

42. Apart from the above witnesses, PW-4, Kumari Anchita, daughter of the deceased and the accused and PW-13, Smt. Charu Suri, sister-in-law (*bhabhi/nanad*) of the deceased have also been examined. Evidence of these witnesses also has to be scrutinised as they are related to the accused and the deceased. It is admitted by both the parties that PW-4, Kumari Anchita, daughter of the deceased and accused was present in the house at the time of commission of crime. First of all, she was tested under Section 118 of the Indian Evidence Act and was declared to be competent witness and thereafter she was testified on oath. According to this witness the occurrence took place at 09:00 p.m. on

29.04.2014, half an hour after her father left for Delhi, Ravi uncle came and rang the bell; his mother opened the door; he sat in the drawing room; she was watching TV inside the house. They were talking and after sometime she heard that they were quarrelling. She turned down the volume of TV and heard Ravi uncle pressurising her mother to go with him. Her mother refused on the pretext that her husband was not in the house and children were alone. Thereafter, Ravi uncle started to use force. When her mother asked him to leave, he took out a small gun; frightened her mother started running towards bathroom and tried to close the door but before she could succeed, Ravi uncle fired at her and she fell down. She started weeping and crying. He threatened her not to inform anyone regarding his coming there. She went to the upper portion of the house and informed his younger sister that Ravi uncle had killed their mother. She went out of the house where Anil Singh and Sanjeev Pandey uncle met with her, she had informed all the things to them. They said that they were calling to the police station. As she was getting nervous by herself in the house, she remained sometime at the house of Anil Singh and Sanjeev Pandey. Next day when her maternal grandfather came, she told him the facts when he said that he was going to the police station. On 01.05.2014 at 04:00 a.m. her father came and she told all these things about her mother. Her father said that he was going to the police station but did not return.

43. The witness was declared hostile and was cross-examined by the prosecution but she remained intact and did not support the prosecution version. The lower court has not found this witness credible and has not accepted her evidence. This witness has admitted that she had come to court with her aunt (*bua*), Smt. Charu Suri, PW-13 and was living with her and her cousin brother, Rudransh. Thus, it is proved that she was under the pressure and command of Charu Suri who has also deposed against the prosecution and in support of her accused brother. It appears that this witness was persuaded that her mother had died and her father was alive but in jail, so if she did not give hostile statement, her life would be ruined and his father would be punished and there would be no one to look after and maintain her.

44. PW-13, Charu Suri, elder sister of the accused, has not supported the prosecution version. This witness has not accepted that accused used to torture and harass the deceased and would have wanted to get rid of her. She expressed ignorance that her brother had filed a petition for divorce. Further, she admitted that if it was so, even then her sister-in-law (*bhabhi*) used to live with her brother and children till the last moment. It is prosecution case that this witness had moved paper no.15-A/1 dated 05.05.2014 and affidavit of the same date before the SSP, Jhansi which are paper no.15-A/2 to 15-A/4. This witness had denied her signature on the application and the affidavit. This witness has been declared hostile and has been cross-examined by the prosecution. The aforesaid application and affidavit were prepared and signed by advocate, Janardan Vyas who has also identified this witness. The affidavit was notarised by advocate, Lala Ram Verma. This witness admits that there was no enmity or animosity with these two advocates. This witness admitted her signature on the application no.114-B Ex.Ka-17. This witness also accepted that she had come from the chamber of advocate, Ramesh Chandra Agrawal, the advocate of her brother (accused). Thus, it

is proved that this witness has been supported by the counsel for the accused. This witness also admitted that some adjournment applications moved on her behalf were prepared and moved by the same advocate, Ramesh Chandra Agrawal. This witness admits that she had not made any complaint against the advocates regarding preparation of forged affidavit but she further deposed that only an application was moved in the court though no such application has been filed by this witness.

45. Under Section 73 of Indian Evidence Act the court has power to compare the signature, writing or seal with other admitted or proved signatures, writing or seal. The trial court compared the signatures available on paper no.15-A/4 with Ex.Ka-17 and observed that both the signatures have maximum similarity.

46. Thus, the lower court has concluded that paper nos.15-A/1 to 15-A/4 were prepared, signed and moved by this witness in which she admits that her brother had committed the offence.

47. In **Bhagwan Jagannath Markad Vs. State of Maharashtra (2016) 10 SCC 537, Charanpal Vs. State of UP (2006) 6 SCC 662, State of Maharashtra Vs. Tulsi Ram Bhanu Das Kambla AIR 2007 SC 3042, Sucha Singh Vs. State of Punjab (2003) 7 SCC 643** and in so many other cases it is held that the testimony of a witness in a criminal case cannot be discarded merely because the witness is a relative or family member of the victim of the offence. In such cases the court has to adopt a careful and cautious approach in scrutinising the evidence of such witness and if the testimony of related witness is otherwise found credible, accused can be convicted on the basis of testimony of such related witness. Therefore, the evidence of father, mother, sister and brother of the deceased cannot be discarded on account of them being relatives of the deceased.

48. In **Sucha Singh** (supra) and **Pooja Pal Vs. Union of India (2016) 3 SCC 135, Shyama Ghos Vs. State of West Bengal AIR 2012 SC 3539, G. Parshwanath Vs. State of Karnataka, AIR 2010 SC 2914** and in several other cases it is held that evidence of a hostile witness cannot be rejected outrightly. Both the parties are entitled to rely on such parts of his evidence which assists their cases. In this case, PW-4, Kumari Anchita, daughter of the deceased and the accused and PW-13, Smt. Charu Suri, sister of the accused have become hostile and have not supported the prosecution version. This witness has deposed at page-2 that on 29.04.2014 at 09:00 p.m. at the time of incident her father, mother, sister - Janhvi and she herself were present though after sometime her father went to Delhi by train. According to her, after half an hour Ravi uncle came and killed the deceased but no other person had seen Ravi before or after the incident, entering or exiting in the house of the accused. Those days CCTV cameras were often installed by several persons but no such video clip has been produced to establish the presence of Ravi before or after or at the time of incident at the relevant places. It is admitted fact that Ravi lives in Mumbai. Brother of the deceased namely Sudhir Suri and Ravi both are friends. Accused has not produced copy of the divorce petition to show that due to illicit relation of the deceased with Ravi, he had moved the petition for divorce. No submission of such ground nullifies the defence. Hence the ground taken by the accused and the hostile witnesses i.e.

Kumari Anchita and Charu Suri. Statement in this regard under Section 313 CrPC is also not reliable. An independent police agency has investigated the case and has not found arrival of Ravi at Jhansi from Mumbai at the relevant date and time of the incidence.

49. At the time of deposition, PW-4, Kumari Anchita Talwar was living with her aunt (*bua*) - PW-13, Charu Suri, therefore, she had deposed in such manner. Being a child of tender age she could easily be convinced to give evidence in favour of her accused father. The conclusion is that the evidence of this witness cannot be read in favour of the defence but from the evidence of this witness it is established that the deceased was killed by gun shot at the alleged date and time and at the alleged place of occurrence, in the house of the accused.

50. PW-13, Charu Suri was not present on the place of occurrence and has denied that the accused rang her and informed her about killing of the deceased upon which she scolded him and informed her in-laws. From the evidence of her husband, PW-11, Sudhir Suri and from the recording produced in court it is established that the accused made a confessional statement on mobile to her and she had also conveyed this confessional statement of the accused to her in-laws. This witness had also moved an application paper no.15-A/2, 15-A/4 before the SSP, Jhansi in which she has admitted that the accused had killed the deceased. Later on she tried to retract but from the evidence of PW-14, Lala Ram Verma, notary advocate it is established that the alleged affidavit was executed by her with the help of advocate Sri Janardan Vyas and after signing the affidavit Ex.A-18/A19 produced before him by deponent Smt. Charu Suri she had sworn before him which was duly certified by him.

51. This witness has not produced the evidence independently but she was in contact of Sri Ramesh Chandra Agrawal, advocate for the accused. She used to visit his chamber and had come to court to adduce evidence from his chamber. Counsel for the accused had moved adjournment applications on different dates for her. Thus deposition against the prosecution and in favour of the accused is quite natural. More so, she left her husband and started living separately in Jhansi. In the changed circumstances this witness has not deposed in favour of the prosecution. Hence, her statement is not reliable, admissible and acceptable in favour of the defence.

52. In this case the deceased was the wife of the accused who was living in his house with her children. The incident had taken place inside the house. Therefore, Section 106 of Evidence Act is applicable. For ready reference Section 106 is reproduced 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."

53. This section is an exception to the burden of proving the fact by the prosecution.

54. In **Sandeep Vs. State of UP, (2012) 6 SCC 107, Prithipal Singh Vs.**

State of Punjab, 2012 (76) ACC 680 (SC), Jagdish Vs. State of UP, 2009 (67) ACC 295 (SC) and **State of Punjab Vs. Karnail Singh, 2003 (47) ACC 654 (SC)** it was held that the law casts a duty on prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on prosecution is to lead such evidence which is capable of leading having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be comparatively of a lighter character. In view of Section 106 of Evidence Act, there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its lies entirely upon the prosecution to offer any explanation.

55. In **Joshinder Yadav Vs. State of Bihar, (2014) 4 SCC 42** it is held that where cruelty and harassment by husband or his relative eventually led to murder of bride by poisoning, circumstantial evidence established murder by poisoning even though viscera report from FSL was not brought on record but corroborative evidence of father and brother of deceased was found credible, it has been held by the Hon'ble Supreme Court that the attending circumstances led to irresistible conclusion of guilt of the accused persons as to how the body of the deceased was found in the river was within their special and personal knowledge but burden under Section 106 of the Evidence Act was not discharged by the accused persons and false explanation was given by them under Section 313 CrPC drawing adverse inference, the Hon'ble Supreme Court confirmed the conviction of the accused persons for the offences under Sections 302/149, 498-A, 201 IPC.

56. All the above judicial precedents and findings would be of no avail if accused succeeds in proving his alibi that he was not present on the spot at the alleged date and time of the occurrence. This fact is decided separately as under:-

(I) The accused has taken plea of alibi that on 29.04.2014 he had gone to Delhi for purchase of articles for his shop. The accused has examined two witnesses to prove his plea of alibi.

(II) DW-1, Mahendra Dubey has deposed that he has a shop in the name and style of Prakash Traders in Sadar Bazar, Jhansi. He is an A-Class Government Contractor and General Order Supplier. According to him, the accused is also an A-Class Government Contractor and Army Supplier. He sells motor parts in his shop. According to him on 29.04.2014 he had gone to Delhi and had left his house at 08:30 p.m. When he reached railway station and stood in the queue, Rishi Talwar came and provided money to purchase a ticket for Delhi. Hence, he purchased two tickets for Delhi. They both reached Nizamuddin Railway Station, Delhi by Southern Express and had breakfast in the waiting room, thereafter

they left for Kashmiri Gate at around 09:30 a.m. There they both bought motor parts. Thereafter Rishi Talwar provided receipt and said that he had a meeting and requested to book his goods as well. Then he booked the articles on 01.05.2014 and returned Jhansi on 02.05.2014 where he came to know that Rishi Talwar has been sent to jail with regard to the murder of his wife. This witness has denied that he also looks after the business of the accused, but admitted that in the court room Charu Talwar was standing behind. He did not get any summon. He had come to testify at the behest of Charu. This witness admitted that he has had good business relations with Rishi and Charu for about 25 years. This witness had moved two adjournment applications written by Sri Ramesh Agrawal, advocate for the accused Rishi. Therefore, the prosecution argued that this witness was not deposing independently but was testifying in favour of the accused at the behest of the accused and his sister, Charu Suri with the help of his advocate. This witness admits that on 02.05.2014 he came to know that Rishi Talwar is in jail for the murder of his wife, Shweta. Even then he did not inform any police officer in writing that at the time of incident Rishi Talwar was with him in Delhi. After such deposition this witness himself said that he had told the S.O. Ram Bhajan Singh. This witness further deposed that after that, till date, he had not given in writing to any police officer that Rishi Talwar was with him that day. He had also not complained to higher authorities about the S.O. not taking cognizance. He had not given this information in writing or by post or personally to SSP, Jhansi.

(IV) The trial court has also cross-examined the witness in which he admitted that it is true that he used to come to the advocate for the accused due to business relation with the accused. On 30.04.2014 between 11:00 to 12:00 O'clock he and Rishi Talwar separated from each other till then neither of them had received information about the incident over phone. But this witness has further deposed that it seems strange that the husband was not even informed on the phone about the wife's murder but he cannot tell the reason for it. The accused had the opportunity to produce the shopkeeper from whose shop he had bought the goods but it was not done.

(V) DW-2, Anil Kumar Singh is the neighbour of the accused who has given evidence of good behaviour of the accused and that the accused and the deceased were living peacefully and they had not been seen fighting and quarrelling.

(VI) According to Section 53 of the Evidence Act in criminal proceedings, the fact that the accused is of a good character is relevant but if evidence of his good character is adduced then according to Section 54 of the Evidence Act, the evidence regarding bad character becomes relevant. From the evidence of prosecution witnesses it is proved that their matrimonial life was not good. Even on the day of occurrence the deceased was badly beaten several times by the accused, whereupon she had sought help from her parents. According to this witness on 29.04.2014 at about 10:30 p.m. he heard the scream of a girl. When he came out of his house Anchita and Janhvi met him and informed that Ravi uncle had shot their mother and also informed that their father had gone to Delhi. When he entered the house, the dead body of Shweta was lying there. Thereafter he rang Rishi Talwar.

(VII) If for the sake of argument the evidence of this witness is accepted, the accused was informed about the murder of his wife at about 10:30 p.m. Though in the

cross-examination this witness tried to handle his point and said that he did not succeed in contacting the accused on mobile, if it was so, why it was not deposed in the examination-in-chief, is relevant. If accused was out of station and such incident had been caused by another person, this witness and the daughters were competent enough to inform the accused by telephone, mobile or from the telephone booth. It appears that in this regard evidence in cross-examination of the witness is not true. According to him, after half an hour police had reached on the spot. If the children had provided mobile number of the accused to this witness, the police was also competent enough to take the mobile phone from the children and would have talked with the accused. It means the children were also aware that the accused is the real culprit, hence there was no reason for them to inform him.

(VIII) This witness has also not seen Ravi at or nearby the place of occurrence. This witness also admits that one Sanjiv Pandey had also rung up the accused. Sanjiv Pandey has not been examined. Thus, if for the sake of argument it is accepted that on the date and time of occurrence the accused was on the way to Delhi then after coming to know such fact any husband would return to home immediately and would not go for business purposes. This all show that the evidence of this witness is also a bundle of lies. Thus, this Court is of the opinion that from the evidence of these two witnesses it is not established that at the time of occurrence the accused was out of station and was not in the house.

(IX) Both the defence witnesses are either worker in same trade or neighbours of the accused but their evidence did not succeed in passing the prescribed criteria of litmus test.

57. The learned trial court had pointed out the fact of the bail application in which the accused has confessed that in the night of 29.04.2014 he was at the house. In the night some unknown person entered his house and killed his wife. Thus, the accused has accepted his presence at the time of the incident. In paragraph 10 of the bail application he has mentioned that he was at his house at the time of incident and after lodging the FIR on 30.04.2014, he was arrested showing false arrest on 01.05.2014, fake revolver and cartridges were shown to be recovered from his possession. The accused has also tried to falsely implicate Ravi in commission of murder of the deceased. If really he would have gone to Delhi, the plea of alibi would have been mentioned in the bail application.

58. Thus, from the averments of the bail application it is crystal clear that later on after taking legal assistance, the accused created a concocted story that before the murder of the deceased he had left Jhansi and had gone to Delhi. In this regard, his unnatural and unexpectable behaviour has already been discussed and it has been concluded that he had not gone to Delhi. From such written confession it is also established that PW-4 Kumari Anchita Talwar, PW-13, Smt. Charu Suri and DW-1 and DW-2 have given a false statement knowing it to be false and tried their best to misguide the court for which they should have been tried for giving false evidence under Chapter X and XI of the IPC.

59. Under Section 11 of the Evidence Act the plea of alibi is enumerated. Section 11 reads as under:-

"11. When facts not otherwise relevant become relevant.--Facts not

otherwise relevant are relevant--*(1) if they are inconsistent with any fact in issue or relevant fact;*

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations

(a) The question is, whether A committed a crime at Calcutta on a certain day. The fact that, on that day, A was at Lahore is relevant. The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(b) The question is, whether A committed a crime. The circumstances are such that the crime must have been committed either by A, B, C or D, every fact which shows that the crime could have been committed by no one else and that it was not committed by either B, C or D, is relevant."

60. In **Binay Kumar Singh Vs. State of Bihar, AIR 1997 SC 322** it was held that when the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the Court would be slow to believe any counter evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the Court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. In such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi.

61. The question arises as to whether the statement of the deceased to her parents on phone/mobile is admissible under Sections 6 and 32(i) of the Evidence Act or not. For ready reference Section 6 reads as under:-

*"**6. Relevancy of facts forming part of same transaction.--**Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.*

Illustrations

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact."

62. In **State of UP Vs. Bashisht Rai and others, 2006 (5) ALJ (NOC) 902 (All)** it was held that for application of Section 6, it is necessary that fact must not be too remote but a part of single transaction. Whatever is stated by eye-witness to murder immediately after incident as to participation of accused would be res gastae evidence, same would be admissible in evidence under Section 6.

63. In **Gentela Vijayavardhan Rao and another Vs State Of Andhra Pradesh, AIR 1996 SC 2791** it was held that the essence of the doctrine of res gestae is that the fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. This rule is, roughly speaking, an exception to the

general rule that hearsay evidence is not admissible under Section 6 is on account of the spontaneity and immediacy of such statement or fact in relation to fact in issue. But it is necessary that such fact or statement must be a part of the same transaction. In other words, such statement must have been made contemporaneous with acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication of the statement is not a part of *res gestae.*

64. In **Mukesh Vs. State of NCT of Delhi and others, AIR 2017 SC 2161 (Three Judge Bench)** and **Sandeep Vs. State of UP, (2012) 6 SCC 107** it was held that the burden of proving the plea of alibi lies upon the accused. If the accused has not adequately discharged the burden, the prosecution version which was otherwise plausible as, therefore, is to be believed.

65. In **Om Prakash Vs. State of Rajasthan and another (2012) 5 SCC 201** it was held that plea of alibi has to be raised at the first instance and is subject to strict proof of evidence and cannot be allowed lightly, in spite of lack of evidence merely with the aid of principle that an innocent man may not have to suffer injustice by recording conviction in accordance of his plea of alibi. On similar facts in **Adalat Pandit Vs. State of Bihar, (2010) 6 SCC 469** it was held that where in a murder trial, the place of alibi not being far, witnesses being colleagues and there being no proper documentary evidence regarding alleged levy work during time of commission of crime, it has been held that the plea of alibi was rightly rejected.

66. Earlier the prosecution witnesses, PW-1, informant father of the deceased, PW-5, Monika, PW-8, Umesh, PW-9, Smt. Shakti Suri and PW-11, Sudhir Suri have successfully proved that before the incident, the deceased was badly beaten by the accused therefore she contacted her parents through mobile/telephone on which they assured to come and get her with her children.

67. According to this Court, such statement was part of the same transaction, therefore, the conversation made by the deceased before the incident and conversation made by PW-13, Charu Suri after the murder of the deceased are relevant and admissible in evidence.

68. According to this Court, the conversation of the deceased with the aforesaid witnesses is also relevant under Section 32(1) of the Evidence Act. Section 32(1) reads as under:-

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

1. when it relates to cause of death.--When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and

whatever may be the nature of the proceeding in which the cause of his death comes into question.

x x x x x

Illustrations

(a) The question is, whether A was murdered by B; or A dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by B; or The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow. Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts."

69. In **Madan Vs. State of Maharashtra, AIR 2018 SC 2007** it was held that dying declaration is an exception to rule against admissibility of hearsay evidence.

70. Though hearsay evidence is not admissible in evidence but in the event the victim dies, his previous statements to any living person become relevant and admissible in evidence under Section 32(1) of The Indian Evidence Act if it relates to the cause of his death. If he had made any statement in this regard the same can be taken into consideration. The statement would be relevant in every case or proceeding in which the cause of death of that person is in issue. In Indian Law it is not necessary that the person who made any declaration was actually expecting an assault which would kill him. It is, therefore, unlike the English Law (see **Sharad Birdichand Sarda Vs. State of Maharastra, AIR 1984 SC 1622).** In **Bhagirath Vs. State of Haryana (1977) 1 SCC 481,** Supreme Court held that if the declarant has in fact died and the statement explains the circumstances surrounding his death, the statement will be relevant even if no cause of death was stated at the time of the making of the statement.

71. In **Pakla Narayan Swami Vs. Emperor AIR 1939 Privy Council 47,** the accused appealed to the Privy Council on the ground that the statement of the deceased to his wife that "he was going to the accused' was wrongly admitted under Section 32(1) and that the statement of the accused to the police that the deceased arrived at his place was admittedly in violation of Section 162 CrPC. Lord Etkin and other Lordships were of the opinion that the natural meaning of the word "used' do not convey any of these limitations. The statement may be made before the cause of death had arisen or before the deceased had any reason to anticipate his murder. The circumstances must be circumstances of the same transaction; general expression including fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death would not be admissible. But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or any such statement which might give reasons for so proceeding, would be "circumstances" in the same transaction and would be so whether the person was known or was unknown to the accused. "Circumstances of the same transaction" is a phrase which no doubt conveys some limitation. It cannot be analogous to the term "circumstantial evidence", which includes evidence of all relevant facts. It is on the other hand narrower than "res gestae." Circumstances must have proximate relations to the actual occurrence.

72. If we compare the fact of the case in hand with the facts of the case of **Pakla Naraya Swami** (supra) we find many number of similarities. In this case it is

proved from the evidence of PW-1, PW-5, PW-8, PW-9 and PW-11 that on 28.04.2014 at about 08:00 p.m. deceased informed on the telephone that Rishi had beaten her badly and it was continuing for 3-4 days. Again at about 11-12 p.m. she made a call and told that Rishi was still beating her and she said that "papa take her away and her children from there otherwise Rishi would kill them". On this, he told the deceased to come in the morning. In this case such statement of the deceased in the aforementioned circumstances are also admissible under Section 32(1) of the Indian Evidence Act and on this score also the accused is liable to be convicted and sentenced.

73. Burden of proof always lies on the prosecution: The concept of proof beyond the shadow of doubt is to be applied in criminal trials. Doubts would be called reasonable if they are free from zest for abstract speculation or free from an over-emotional response. Doubts must be actual and substantial as to the guilt of the accused persons arsing from the evidence from the lack of it as opposed to mere vague apprehension. A reasonable doubt is not an imaginary, trivial or a mere possible doubt, but a fair doubt based on reason and common sense. It must grow out of the evidence (vide **State of M.P. Vs. Dharkole, AIR 2005 SC 44.**)

74. In criminal cases burden of proof lies on the prosecution to prove that the accused is guilty of the crime with which he is charged. The prosecution asserts the affirmative of the issue and, therefore, has to prove its case. The Court starts with the presumption that the accused is innocent. The innocence of the accused means nothing more than this that burden lies on the prosecution to prove the case beyond reasonable doubt, it is not the accused who has to satisfy the Court that he is innocent. If there is reasonable doubt as to whether the accused killed the deceased the prosecution has not made out the case, the accused is entitled to an acquittal. More serious the crime more strict proof is required. **(Refer: Paramjeet Singh Vs. State of Uttrakhand, AIR 2011 SC 200).**

75. In **Narain Singh Vs. State of Haryana (2004) 13 SCC 264, Babulal Vs. State of MP (2003) 12 SCC 490** and **Sharda Vs. State of Rajasthan 2010 (68) ACC 274 (SC)** it was held that a dying declaration made by a person on the verge of his death has a special sanctity as at that solemn moment a person is most unlikely to make any untrue statement. The shadow of impending death is by itself guarantee of the truth of the statement of the deceased regarding the circumstances leading to his death. But at the same time the dying declaration like any other evidence has to be tested on the touchstone of credibility to be acceptable. It is more so, as the accused does not get an opportunity of questioning veracity of the statement by cross-examination. The dying declaration, if found reliable can form the base of conviction. A person who is facing imminent death, with even a shadow of continuing in this world practically non-existent, every motive of falsehood is obliterated. The mind gets altered by most powerful ethical reasons to speak only the truth. Great solemnity and sanctity is attached to the words of a dying person because a person on the verge of death of not likely to tell lies or to concoct a case so as to implicate an innocent person. *The maxim is "a man will not meet his Maker with a lie in his mount" (nemo moriturus praesumitur mentire). Matthew Arnold said, "truth sits on the lips of a dying man".*

The general principle on whch the species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced and mind induced by the most powerful consideration to speak the truth; situation so solemn that law considers the same as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice.

76. Though in this case there is no formal dying declaration as no dying declaration of the deceased has been recorded by any of the persons or the authorities but when she was beaten badly by the accused and was seriously injured and when she rang to her parents who advised her to go to the upper portion of the house to save her life and they would come tomorrow and will take her back, such conversation which was made by the deceased in fear of her life can be very well treated as dying declaration to her parents. This finding finds support from the principle laid down by the Supreme Court in **Mukesh Vs. State (NCT) of Delhi and others, AIR 2017 SC 2161 (Three Judge Bench)** in which it was held that dying declaration by gestures and writing is admissible. Such dying declaration is not only admissible but possesses evidentiary value. Further, in **Laxman Vs. State of Maharashtra (2002) 6 SCC 710 (Five Judge Bench)** and in **Balvir Singh Vs. State of Punjab AIR 2006 SC 3221** it was held that recording of dying declaration by Magistrate is not mandatory and the same can be recorded by any of the persons. In Laxman Vs. State of Maharashtra (supra) it was held that no statutory form for recording dying declaration is necessary. A dying declaration can be made verbally or in writing and by any method of communication like signs, words or otherwise provided, indication is positive and definite. A dying declaration can be made by the declarant even verbally. Reducing the dying declaration to writing is not mandatory.

77. In **Narendra Kumar Vs. State (NCT) of Delhi, AIR 2016 SC 150** it was held that where dying declaration recorded under Section 32 of the Evidence Act did not contain signature or thumb impression of the deceased and alleged to be in violation of the guidelines issued by the Delhi High Court, it has been held that defect in following guidelines is of trivial in nature. Whole of dying declaration otherwise proved by ample evidence cannot be rejected.

78. Thus, the information given by the deceased before her death about the offensive conduct of the accused would be treated as dying declaration as just after delivery of such information she was killed by the accused.

79. According to prosecution, after commission of crime the accused informed his sister PW-13, Charu Suri and narrated the whole story as to how he killed the deceased. It was conveyed by PW-13, Charu Suri to her in-laws and they were insisted to go to Jhansi and in this regard following evidences are again discussed:-

(I) In written complaint it is mentioned that on 29.04.2014 at 04:45 a.m. Smt. Asha Talwar, mother of the accused made a missed call on his mobile and after sometime when he called back, her phone was switched off. At 11:00 a.m. his daughter-in-law, Charu Suri (PW-13), sister of the accused rang and informed that

Rishi Talwar has killed Shweta by shooting her. Though PW-13, Charu Suri has refused and accused Rishi Talwar has also refused to have made such extra judicial confession to Charu Suri but from the electronic evidence and from the evidence of PW-11, Sudhir Suri it is proved that in first recording Rishi Talwar told his sister, Charu Suri that he had killed his wife, Shweta Talwar by shooting her and her dead body was in the house. Second recording proves that Charu Suri and her sister, Neeru Sahai and mother-in-law of the witness Asha Talwar had a conversation about the murder of the deceased in which Charu Suri informs Neeru that their brother Rishi Talwar had shot Shweta Talwar dead. In this conversation Asha Talwar had also confirmed this fact to Neeru. The extra judicial confession made by the accused to her sister and mother is being confirmed by the electronic evidence. The defence was free to get the electronic evidence and device tested by any of the recognized institute if they had doubts about concoction of the false evidence by PW-11, Sudhir Suri but it has not been done and the court has accepted the evidence under Section 65-B of the Evidence Act. Electronic evidence and the oral evidence produced by PW-11, Sudhir Suri is admissible in evidence and it has also been established that the accused has made an extra judicial confession of his guilt to her sisters and mother.

(II) In this case there is no variation in ocular and medical evidence though there is no eye-witness of the evidence. PW-4, Kumari Anchita Talwar who is said to have been present on the place of occurrence has not supported the prosecution but the electronic evidence produced by PW-11, circumstantial evidence and confessional statement made by the accused establishes that the deceased was killed by gun-shot which has also been confirmed in *post mortem* report and the inquest as well. Therefore, there is no contradiction or variation between the medical evidence and the other evidence. Even the defence also admits that the deceased was killed by gun-shot.

(III) According to learned counsel for the appellant no true recovery of the alleged weapon has been made from the accused and his arrest is false. When he went to the police station to lodge the FIR, he was arrested and was shown to be arrested while locking the gate.

(IV) As per Ex.Ka-5, chik FIR Ex.Ka-8 and statement of the I.O, on 01.05.2014 the accused was arrested when he was locking the gate of the house at about 07:30 a.m. and a country-made pistol of 32 bore upon which "MADE IN USA No.405" and on the barrel "OMEY ARMY SUPPLY" was written, alongwith two live cartridges were recovered. On being asked by the I.O. the accused admitted that he had killed his wife on the night of 29.04.2014 from this pistol. It was sealed on spot. The recovery memo was properly prepared and signed by the witnesses.

(V) Ex.Ka-3, recovery memo of two empty cartridges of 32 bore were also recovered from the spot. In this regard FSL Report 86-A/3 is admissible in evidence under Section 293 CrPC from which it is established that the two empty cartridges recovered from the place of occurrence were executed by the country-made pistol recovered from the possession of the accused. In this regard witnesses PW-2, Kamal Raj and PW-3, Azhar Khan have been declared hostile but in this regard the trial court has relied on the case in **Govindaraju @ Govinda Vs. State through Srirampuram P.S. and another, AIR 2012 SC 1292** in which it was held

that any recovery by the police personnel would not be taken as doubtful in absence of gross infirmity in the evidence of such police personnel.

(VI) The Investigating Officer, PW-10, Ram Bhajan Singh has proved the recovery. He had no enmity with the accused and the FSL Report has also proved that the empty cartridges found on the place of occurrence were shot from the country-made pistol recovered from the possession of the accused. Defence witnesses have admitted that the accused was an A-class army material supplier hence such a fire-arm could be easily available to him. Thus, there is no doubt that the fire arm and live cartridges were not recovered from the possession of the accused or it would have been planted with the accused to falsely implicate him.

(VII) On the basis of the above discussion it is concluded that the relations between the accused and the deceased were not cordial but the deceased was living with the accused for the sake of the future of her children. The deceased was always subjected to cruelty by the accused about which she used to inform her parents. Before this fateful incident she was badly beaten by the accused and was advised by her parents to go to the upper portion of the house to save her life but she could not succeed in it and was killed by the accused. If the deceased would have been killed by another person then the accused could have also received some injuries in the course of firing or saving the life of the deceased as it has been established that he was not out of the house on the date and time of the incident. Further, the empty cartridges fallen on the floor also matched with the fire-arm recovered from the possession of the accused. If the police would have falsely implicated him, certainly there would have been some variation in matching of the cartridges with the recovered fire-arm. Further the accused made an extra judicial confession to his sister Charu Suri and his mother which was recorded with the assistance of electronic device by PW-11, Sudhir Suri. Not making any hue and cry, not lodging any FIR, not informing the in-laws about the murder of the deceased by the accused are also some important points which indicate that none else except the accused had committed the offence and he was thinking to disappear and hide the dead body of the deceased and other incriminating materials from the spot in which he could not succeed.

(VIII) When it is proved that testimony of PW-4, Kumari Anchita Talwar is not correct and she had not supported the prosecution, therefore, this case remains a case based on the circumstantial evidence.

80. It is a case based on **circumstantial evidence**. None else has seen the commission of crime but the witnesses are not inimical to the accused persons.

81. In cases **Nathiya Vs. State (2016) 10 SCC 298, Bhim Singh Vs. State of Uttarakhand (2015) 4 SCC 281 (para 23), Sharad Birdhichand Sarda Vs. State of Maharashtra, (1984) 4 SCC 116 (paras 120 and 121), State of West Bengal Vs. Dipak Halder, (2009) 7 SCC (Three Judge Bench)** the Supreme Court has laid down the following principles regarding cases based on circumstantial evidence:

(i) The circumstance from which the conclusion of guilt is to be drawn must or should be and not merely "may be" fully established;

(ii) 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;

(iii) the circumstances should conclusive in nature and tendency;

(iv) they should exclude every possible hypothesis except the one to be proved; and

(v) 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 be so that in all human probability the act must have been done by the accused.

82. In **Bhim Singh** (supra) it was held that when the conclusion is to be based on circumstantial evidence solely, then there should not be any snap in the chain of circumstances.

83. In **State of Goa Vs. Pandurang Mohite, AIR 2009 SC 1066** and in **State of U.P. Vs. Satish, (2005) 3 SCC 114** the Supreme Court held that circumstances of "last seen together" do not by themselves and necessarily lead to the inference that it was accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. The time gap between last seen alive and the recovery of dead body must be so small that the possibility of any person other than the accused being the author of the crime becomes impossible.

84. In **Rohtash Kumar Vs. State of Haryana, 2013 (82) ACC 401 (SC) (para 25)** and in **Prithipal Singh Vs. State of Punjab, (2012) 1 SCC 10** the Supreme Court held that if it is established that victim and the accused were lastly seen together then the burden of proof shifts on the accused requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard would give rise to a very strong presumption against him.

85. In **Ashok Vs. State of Maharashtra, (2015) 4 SCC 393** the Supreme Court held that initial burden of proof is on the prosecution to adduce sufficient evidence pointing towards the guilt of the accused. However, in case it is established that accused was last seen together with the deceased, prosecution is exempted to prove exactly as to what happened in the incident as the accused himself would have special knowledge of the incident and would have the burden of proof on himself as per Section 106 of the Evidence Act. But last seen together itself is not a conclusive proof. Along with other circumstances surrounding the incident like relations between accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from accused etc, non-explanation of death of deceased, etc. may lead to a presumption of guilt of the accused.

86. Learned counsel for the appellant has relied upon the following judicial precedents:-

(I) In **Jai Prakash Tiwari Vs. State of Madhya Pradesh, 2017 SCC Online MP 2329** there was no firearm injury caused to the victim. Her mother was not found to be eye-witness of the incident. There was no ballistic report to clearly connect the seized weapon in the alleged incident. The complaint had already been registered in another criminal case against the accused appellant in which he had already been acquitted. The defence was dealt with by the trial court in cursory manner. Hence the order of conviction and

sentence was set aside. Facts of above noted case are quite different from the facts of the case in hand. Hence the principle laid down by the learned counsel for the appellant does not apply in favour of the appellant.

(II) In **Shivaji Chintappa Patil Vs. State of Maharashtra, 2008 SCC Online Bom 1859** it was held that the cause of death was cardiac respiratory arrest due to asphyxia as a result of hanging. The *post mortem* report was signed with inordinate delay by almost three months. Motive was not proved and the chain of events was not found intact. Facts of the cited case and evidence adduced by the prosecution are totally different from the case in hand. Hence the principle laid down in the aforesaid case cannot be applied in favour of the appellant.

(III) In **Pramila Vs. The State of Uttar Pradesh, Criminal Appeal No.700 of 2021, decided on 28.07.2021** it was held that the PW-2 child witness was relied on and the conviction was held but in this case PW-4, Anchita Talwar has not supported the prosecution version. The Supreme Court here had referred the case of **State of MP Vs. Ramesh, (2011) 4 SCC 786** in which it was held that the evidence of a child witness must be evaluated more carefully with the greater circumspection because he is susceptible to tutoring. In the case at hand it is proved that the child witness PW-4, Anchita Talwar was living with her aunt (*bua*) who had also left the house of the husband and was living in her *maika* at Jhansi with the children of the accused, therefore, there was a high possibility that the PW-4 would have been tutored and in that case the court can reject such statement partly or fully. In the cited case the appellant was not directly connected with the deceased as she was the wife of another brother of the husband of the deceased. It is not a case in which facts like stuffed cloth would have to be in the mouth of the deceased but it was a murder caused by two gun-shots. The *post mortem* report was not found in consonance with the prosecution case and story. Hence giving benefit of doubt the appellant was acquitted. Comparing from the facts and evidences adduced in both the cases it is concluded that due to several variation on account of facts and evidences in both the cases the principle laid down in the aforesaid case cannot be applied in the instant case.

(IV) In **Ravinder Singh @ Kuku Vs. State of Punjab, 2022 Live Law (SC) 461** it was held that the certificate under Section 65-B(4) is a mandatory requirement for production of electronic evidence. It was also held that oral evidence in place of such certificate cannot be possibly suffixed. It was also held that in cases based on circumstantial evidence from the circumstances and inference as to the guilt of the accused have to be proved beyond reasonable doubt and have to be shown to be closely related with the principal facts sought to be inferred from those circumstances. In the present case a CD was kept in safe custody of the court which was played by the witness PW-11, Sudhir Suri in laptop about which he deposed that he had uploaded the CD from google account in which phone and SMS of his wife Charu Suri are recorded and saved. He also provided the bill of purchase of admin software. It is true that no such certificate has been obtained. More so, if the electronic evidence produced by PW-11 is thrown away even then the sufficient material is available on the record to prove the chain of the circumstantial evidence against the accused appellant beyond all

reasonable doubts. Section 65-B(4) of the Indian Evidence Act is as under:-

"65B. Admissibility of electronic records.

(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."

87. In this regard the trial court has concluded that PW-11, Sudhir Suri purchased the software in April, 2012. A copy of the bill regarding purchase of said software has been filed by this witness as Ex.Ka-16 from which it is clear that the software was licenced. Thereafter all the conversations made in the phone of Smt. Charu Suri were saved in google account as call recording, which according to this witness are still saved in his Email ID. The witness has clarified that he had made CD by downloading it from the google account and the CD was played in the court. The conversation that took place is the same conversation which he had heard on his google account.

88. Raising a question mark on the admissibility of this electronic evidence, it has been argued that in compliance of Section 65-B of the Act, no certificate has been obtained from the producer of the CD regarding the process of its making and its genuineness. This aspect has been noticed by the court. The conversation saved in the CD automatically available in the form of recording in google account under the effect of an admin software by the witness PW-11, Sudhir Suri may be treated as primary evidence and in that case the requirement of certificate under Section 65-B of the Act does not remain.

89. The trial court has relied on **Vikram Singh @ Vicky Walia and another Vs. State of Punjab and another, AIR 2017 SC 3227** in which while interpreting Section 65-B in a case related to kidnapping and extortion, the Apex Court had determined that tape recorded conversation is not a secondary evidence and for that the desired certificate is not required under Section 65-B and there is no need to comply with Section 65-B when an electronic evidence is produced in the court as primary evidence. Further, the trial court was also of the opinion that since the CD pertains to such a conversation which has been downloaded through a licenced software, there is not even an *iota* of doubt about the genuineness of the conversation present in this CD.

90. It is also noteworthy that Smt. Charu Suri, sister of the accused examined as PW-13, has admitted in her evidence that on the day when the statement of her

husband i.e. Sudhir Suri, PW-11 was recorded, she had also come to the court and she has no doubt that her husband used to tape her phone. Thus, it is evident that the genuineness of the above CD played in the Court in presence of Smt. Charu Suri was not denied at any stage either in her evidence or by giving any application. No demand of voice test to match her voice was made either by her or by the accused in the defence. Thus, the conversation present in the said CD is admissible in evidence.

91. The trial court further concluded that considering the relevance of this first recording in evidence, the position is clear before the court that this conversation can be considered as extra judicial confession of the accused, the alleged confession of the accused has taken place before Charu Suri, would have formally proved it in the court by her own evidence. But the court is of the opinion that since the conversation between the accused and his sister after the incident in question has happened in the form of natural expression of the incident, this conversation would certainly be considered relevant in evidence under Section 6 of the Indian Evidence Act. In this respect the learned trial court has relied on **State of Maharashtra Vs. Kamal Ahmad Mohammad Vakil Ansari and others, 2013 CrLJ 2069.**

92. The trial court has referred the citation **State (NCT) of Delhi Vs. Navjot Sandhu @ Afsan Guru (2005) SCC (Crl) 1715 (known as parliament attack case)** which has been overruled by the judgment in **Anvar P.V. Vs. P.K. Basheer, (2014) 10 SCC 473 (three-Judge Bench)** in which it has been ruled that under Section 65B(4) certificate is necessary for admissibility of the secondary evidence. In this case PW-13 has accepted that she had no doubt that her husband was taping her phone. This statement confirms that her statement was recorded by her husband, Sudhir Suri, PW-11.

93. At this stage it is necessary to describe the relevant law in relation to the electronic records. Section 65B(4) of the Evidence Act is as under:-

"(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."

94. In **State of UP Vs. Ajai Kumar Sharma, 2016 (92) ACC 981 (SC) (para 14)** it is laid down that a "Compact Disk" is a "document" on which admission and denial may be made by both the parties or their advocates.

95. In **Mukesh Vs. State (NCT) of Delhi and others, AIR 2017 SC 2161 (three-Judge Bench)** Computer Cell

Expert revealed no tampering or editing of the CCTV footage. It was held to be admissible under Section 65B of the Evidence Act.

96. Under Section 3(2) of the Evidence Act electronic records are the documents and they are relevant and admissible under Sections 17, 22A, 34, 35, 39, 45A, 47-A, 59, 65-A, 65-B, 67-A, 73-A, 81-A, 85-A, 85-B, 85-C, 88, 88-A, 90-A and 131 of the Evidence Act.

97. In **R.M. Malkani Vs. State of Maharashtra, AIR 1973 SC 157** and in **Ram Singh and others Vs. Col. Ram Singh, 1985 (Supp) SCC 616 and the State (NCT) of Delhi (supra)** it is held that the relevant conversation recorded in the tape recorder is admissible in evidence.

98. In **Anvar** (supra) and **Harpal Singh Vs. State of Punjab, (2017) 1 SCC 734** the Apex Court held that proof of electronic record is a special proviso introduced under the Evidence Act. The very caption of Section 65A of the Evidence Act, read with Sections 59 and 65B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65B of the Evidence Act. That is a complete Code in itself. Being a special law, the general law on secondary evidence under Sections 63 and 65 has to yield. An electronic record by way of secondary evidence therefore shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc. the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which the secondary evidence pertaining to that electronic record, is inadmissible.

99. In **Vikram Singh Vs. State of Punjab, (2017) 8 SCC 518,** the original tape recorded conversation of ransom calls was handed over to the police, it has been held that the original tape record was primary evidence, therefore certificate under Section 65B of the Evidence Act was not required for its admissibility. Such certificate is mandatory only for secondary evidence and not for the primary evidence.

100. In S**tate by Karnataka Lokayukt P.S. Bengaluru Vs. M.R. Hiremath, 2019 0 Supreme 590 (SC)** it is held that the certificate under Section 65B is sought to be produced in evidence at the trial, not at the stage of framing of charge.

101. In **Arjun Panditrao Kholkar Vs. Kailash Kushanrao Gorantyal and others, AIR 2020 SC 4908 (three-Judge Bench)** it has been held that certificate required under Section 65B(4) is a condition precedent to the admissibility of evidence by way of electronic record. Oral evidence in the place of such certificate cannot possibly suffice as Section 65B(4) is a mandatory requirement of the law. Section 65B(4) clearly states that secondary evidence is admissible only if lead in the manner stated and not otherwise. To hold otherwise would render Section 65B(4) otiose. The requisite certificate in sub-section (4) of Sections 65B is unncessary if the original document itself is produced. This can be done by the owner of a laptop computer, a computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device on which the original information is first stored, is owned and/or operated by him. In cases where "the computer', as defined

happens to be a part of a "computer system' or "computer network' and it becomes impossible to physically bring such network or system to the Court, then the only means of proving information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate under Section 65B(4).

102. In **Mohammad Arif @ Ashfaq Vs. State (NCT) of Delhi, 2022 0 Supreme (SC) 1113 (three-Judge Bench)** the Apex Court discussed the judgment of **Navjot Sandhu (supra) and Anvar (supra)** and other pronouncements and held that "it must now be taken to have been settled that the decision of this Court in **Anvar P.V. (supra)** as clarified in **Arjun Panditrao** (supra) is the law declared on Section 65B of the Evidence Act. In para 22, the reference of the judgment of **Arjun Panditrao** (supra) has been given which is as under:-

"73. The reference is thus answered by stating that:

73.1. Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473, 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 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 v. State of H.P., (2018) 2 SCC 801 and the judgment dated 3-4-2018 reported as Shafhi Mohd. v. State of H.P., (2018) 5 SCC 311s, do not lay down the law correctly and are therefore overruled.

73.2. 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). The last sentence in para 24 in Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 which reads as "... if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act ..." is thus clarified; it is to be read without the words "under Section 62 of the Evidence Act,...". With this clarification, the law stated in para 24 of Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 does not need to be revisited.

73.3. The general directions issued in para 64 (supra) shall hereafter be followed by courts that deal with electronic evidence, to ensure their preservation, and production of certificate at the appropriate stage. These directions shall apply in all proceedings, till rules and directions under Section 67-C of the Information Technology Act and data retention conditions are formulated for compliance by telecom and internet service providers."

103. On the basis of above whether it cannot be said that the evidence produced by PW-11, Sudhir Suri is the original and primary document for which no certificate under Section 65B(4) was necessary.

104. Reaching of deceased's parents, brother, sister and brother-in-law immediately after the incident from the

different parts of India proves that the deceased had given all the alleged information over the phone to her parents before her death. Neither it is the case of the prosecution nor of the defence that someone else had given this information to the parents of the deceased. Thus the information given by the deceased to her parents soon before her death would be deemed to have been admitted under Section 6 and Section 32(1) of the Evidence Act. Therefore, even if the statement recorded by PW-11, Sudhir Suri is not considered, the information given by the deceased would be considered to be sufficient evidence to convict the accused.

105. In **Kalloo @ Kalyan Singh Vs. State of UP, Criminal Appeal No.1459 of 2009 (AHC, DB) decided on 11.07.2022** it was held that where the accused husband had gone to see Ramleela along with his two children when he came back he found his wife dead. In the cited case PW-1, PW-2, PW-6, PW-7, PW-8, PW-9 and PW-13 were declared hostile. The chain of the circumstantial evidence was not found intact and unbroken but in the case in hand it is not so. Hence, the principle laid down is not applicable in the present case.

106. In this case all the chains of the circumstantial evidence are attached with each other. Motive that there was no cordial relation between the wife and the husband and the accused wanted to get a decree of divorce, presence of the accused admitted by him in his bail application, proof that accused was present in the house where deceased was killed, that the deceased had communicated the torture, beating and ill-treatment soon before her death to her parents, extra judicial confession made by the accused to his sisters and mother, recovery of weapon which has matched with the empty cartridges found on the spot, presence of the accused and the deceased together in the house, failure of the accused to prove the plea of alibi are the chains of the circumstances which are intact and unbroken. Thus, the evidence adduced in this case also meets the criteria propounded in the cases based on circumstantial evidence.

107. On the basis of above discussion, this Court is also of the opinion that the impugned judgment and order of conviction and sentence passed by the ASJ/FTC, Court No.2 Jhansi dated 11.10.2017 is factually and legally correct and lawful and is not liable to be interfered.

108. The appeal has no force and is liable to be dismissed. Accordingly, the appeal is **dismissed**.

109. Let the record of the lower court be sent back to the court concerned along with a copy of this judgment.

(2023) 3 ILRA 654
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.02.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJIT SINGH, J.

Jail Appeal No. 323 of 2017

Ram Awatar @ Ganesh ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Brij Raj

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

Criminal Law - Indian Penal Code, 1860 – Sections 300, 302 & 304 Part II - Murder-Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3(2)(v) - The Code of Criminal Procedure, 1973 – Sections 161,313,329 - Constitution of India - Article 21 – Appeal against conviction - As per FIR - on 19.12.2013, wife of informant was weeding in Garlic field outside village - At about 1:00 p.m. accused, who is the resident of same village reached there and started assaulting her with 'kudal' - Complainant along with another person reached and seen them, the accused ran away - Complainant found that his injured wife succumbed to the injuries at the spot - Upon hearing the noise raised by complainant other villagers reached - Sessions Judge framed charges under aforesaid Sections – Sentenced to life imprisonment – Held, there was hostility and criminal litigation between accused and deceased - Attack on the deceased was not premeditated and preplanned and it happened at the spur of moment - Only one injury was on the vital part, which proved fatal - Offender must not have taken any undue advantage or acted in a cruel or unusual manner - Entitled to the benefit of exception provided in Section 300 of I.P.C - Accused was of unsound mind - It was not intentionally but homicidal death without intention - Conviction is altered from Section 302 I.P.C. to 304 Part-II I.P.C and offence under Section SC/ST Act is not made out. (Para 3, 5, 14, 15, 18, 19)

The appeal is partly allowed. (E-13)

List of Cases cited:

1. St. of Gujarat Vs Manjuben (R/Criminal Confirmation Case No. 1 of 2018 with R/Criminal Appeal No. 474 of 2019)

2. Vishnu Vs St. of U.P (Criminal Appeal No. 204 of 2021)

3. Pintu Gupta Vs St. of U.P(Criminal Appeal No. 4083 of 2017)

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Ajit Singh, J.)

1. This jail appeal has been preferred against the judgment dated 22.11.2016 passed by the Addl. District & Sessions Judge/SC/ST (P.A.) Act, Ghazipur S.S.T. No. 12 of 2014 (State vs. Ram Awatar @ Ganesh), under section 302 I.P.C. and section 3(2)V SC/ST Act, arising out of Case Crime no. 468 of 2013, P.S. Elhapur, district-Ghazipur, by which he has been convicted under section 302 I.P.C. and sentenced to undergo life imprisonment and a fine of Rs. 10,000/- and life imprisonment a fine of Rs. 10,000/- under section 3(2)V SC/ST Act and in default of payment of fine the accused shall further undergo three months additional imprisonment. Both the sentences shall run concurrently.

2. Heard Sri Brij Raj, learned Amicus Curiae appearing on behalf of the appellant and learned A. G. A. for the State.

3. Brief facts as culled out from the record are that a First Information Report was lodged being Case Crime No. 468 of 2013, under section 302 I.P.C. and section 3(2)V SC/ST Act at P.S. Dulhpur, district-Ghazipur. In the FIR, it was alleged that on 19.12.2013 the wife of the informant namely, Lalti Devi was weeding in Garlic field outside village. At about 1:00 p.m. Ram Awatar alias Ganesh, who is the resident of same village reached there and started assaulting the wife of the informant with *'kudal'*. At that very time the

complainant along with Bhallu Ram son of Mukhram also reached and seen them, the accused Ram Awatar alias Ganesh ran away from the scene with *'kudal'*. When the complainant along with other reached at the spot he found that his injured wife succumbed to the injuries at the spot. Upon hearing the noise raised by complainant other villagers reached at the place of occurrence and after leaving the dead body of his wife the complainant reported the matter to the police.

4. On investigation being put into motion, the investigating officer inspected the place of occurrence, recorded the statements of witnesses, prepared the site plan and after completion of investigation submitted charge-sheet to the learned Magistrate under section 302 I.P.C. and section 3(2)V SC/ST Act. The learned Magistrate summoned the accused and committed him to Court of Sessions as prima facie charges were for offences under Section 302 I.P.C. and 3(2)V SC/ST Act.

5. On being summoned, the accused-appellant pleaded not guilty and claimed to be tried. The learned Sessions Judge framed charges under Section 302 I.P.C. and 3(2)V SC/ST Act.

6. The Trial started and the prosecution examined 8 witnesses who are as follows:

1	Rajendra Ram	PW1
2	Gullu Ram	PW2
3	Ramadhar	PW3
4	Dr. Tarkeshwar	PW4
5	Head contable Heera Ram	PW5
6	Ram Singh	PW6
7	Dr. Prabhakar	PW7
	Ram	
8	Khalikujma	PW8

7. In support of ocular version following documents were filed and proved:

1	Written Report	Ex.Ka-1
2	Panchayatnama	Ex.Ka-2
2	Postmortem Report	Ex.Ka-3
3	Chik FIR	Ex.Ka-4
4	Copy of G.D.	Ex.Ka-5
5	Bloodstain and simple soil from place of occurrence	Ex. Ka-6
6	Site Plan	Ex.Ka-7
7	Chargesheet	Ex.Ka-8
8	Letter to C.M.O.	Ex.Ka-9
9	Pratisaar Inspector	Ex. Ka-10
10	Chalan lash	Ex. Ka-11
11	Police Form 379	Ex. Ka-12
12	Specimen stamp	Ex. Ka-13

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

9. Learned counsel for the accused-appellant submits that he had never moved application for bail either before the trial court or before this Court. He next submits that the accused was of unsound mind and he is going under treatment since 2014 at mental hospital Varanasi for mental illness. The incident was neither preplanned nor premeditated and it occurred at the spur of moment. The accused was not having any

intention to commit the murder of the deceased. He also submits that the Investigating Officer in his statement has deposed that the accused belonged to 'Kushwaha' caste, not belonged to Scheduled Caste/Scheduled Tribes category. He recorded the statement of PW1 Ramadhar son of Mosfir, under section 161 Cr.P.C., in which he has categorically stated that he he had seen the accused running away with *'kudal'*. He tried to catch hold of him but the accused succeeded to ran away. He also deposed that he has not seen the accused committing the murder of the deceased. PW2 Gullu Ram has deposed that neither he had seen the accused committing the murder nor heard slang words used by the accused.

10. It is submitted by the counsel for the appellant that as far as commission of offence under Section 3(2)(v) of S.C./S.T. Act, 1989 is concerned, the learned Sessions Judge convicted the accused due to the fact that the victim was a person belonging to Scheduled Caste Community, though there were no allegations as regard the offence being committed due to the caste of the deceased and there were no allegations of commission of offence which would attract the provision of Section 3(2)(v) of SC/ST Act.

11. It is submitted by learned counsel for the State that deceased belongs to Scheduled Caste community and the judgment of learned Trial Judge cannot be found fault with just because there is silence on the part of the informant about atrocity committed. It is submitted that the incident occurred because of the caste of the deceased. It is further submitted that any incident on person belonging to a particular caste would be an offence. It is further submitted by learned counsel for the State that the accused killed the deceased as she was belonging to lower strata of life and hence conviction under section 3(2)V SC/ST Act is justified.

12. Learned counsel for the accused-appellant further submits that with regard to nature of mental illness the trial court owed an obligation to undertake an inquiry under section 329 of the Code so as to ascertain whether the accused-appellant was capable of making his defence. Section 329 Cr.P.C. is mandatory. The trial court should have undertake an inquiry under section 329 Cr.P.C. and only thereafter could have proceeded further with the framing of the charge and recording of the evidence. In terms of Section 329 (I) Cr.P.C. the duty of the Court is to try such fact of unsoundness of mind and incapacity of the accused to defend himself. If on the basis of the material brought on record the Court is so satisfied, it should record the finding accordingly and in such case the trial shall have to be postponed. The provisions contained in Section 329 Cr.P.C. serve an important purpose of not proceeding a trial against a person, who on account of his unsoundness of mind is unable to defend himself. It is not difficult to appreciate that such requirement would be mandatory in nature. The proceeding against a person of unsound mind and holding him guilty of criminal offence would be clearly violative of the guarantee contained under Article 21 of the Constitution of India, that no person shall be deprived of his life or liberty without following the procedure established by law.

13. Learned counsel for the accused-appellant further submits that even if the accused had not raised such a plea and even if the defence counsel had not bothered to look into it, still if the materials on record

in the form of the documents disclose something about the mental condition of the appellant-accused, then it is the duty of the trial court to look into the materials and ascertain the capacity of the accused to enter the defence in accordance with the provisions of Section 329 Cr.P.C. The satisfaction of the trial court should be recorded in so may words. The provisions of Section 329 do not embrace an idle formality but are calculated to ensure to an accused person a fair trial which cannot obviously be afforded to an insane person and the non-observance of those provisions must be held to convert a trial into a farce. The courts must, therefore, guard against dealing with the matter of suspected sanity of an appellant/accused.

14. This Court after having gone through the facts and circumstances of the instant case, fact is that which is evident from the material on record that there was hostility between accused and the deceased and criminal litigation had taken place between the deceased and the accused. It also emerges from the material evidence on record that the attack on the deceased by the accused person was not premeditated and preplanned and it happened at the spur of moment in sudden altercation between the deceased and the accused person and there was no intention of the accused person to kill the deceased. Whether the injury inflicted by the accused person was sufficient in the ordinary course of nature to cause death or not, must be determined on the basis of the facts and circumstances of the case. In the instant case, only one injury was on the vital part, which proved fatal. The injury caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel or unusual manner. Where, on a sudden quarrel, a person in the heat of the moment picks up an instrument which acts as a weapon and causes injuries, one of which proves fatal, he would be entitled to the benefit of exception provided in section 300 of I.P.C.

15. After considering the rival submissions made by learned counsel for the appellant, We concur the finding of Sessions Judge regarding mental status of the accused-appellant, as we do not find any reliable evidence that the accused was of unsound mind. We are fortified in our view by the decision of Gujarat High Court in the case of State of Gujarat vs. Manjuben in R/Criminal Confirmation Case No. 1 of 2018 with R/Criminal Appeal No. 474 of 2019.

16. Facts before us to prove that the appellant had no preintention to commit the murder of the deceased. The injuries come to show that it was not intentionally but it was homicidal death without intention. It has been pointed out by learned counsel for the accused-appellant that the accused-appellant has been in jail for more than 10 yeas.

17. From the above discussion, it is evident that appellant was not having any intention to cause death of the deceased. However, he had knowledge that death would be likely caused by the use of the alleged weapon and he has caused with knowledge bodily injuries as were likely to cause death and in view of the above, a case against the appellant under Part-II to Section 304 I.P.C. is made out and he is not found guilty of the offence punishable under Section 302 I.P.C.

18. Offence under Section 3(2)V SC/ST Act is not made out against the accused-appellants as there was no evidence for commission of offence under section 3(2)V of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Neither the First Information Report nor the oral testimony of prosecution witnesses even remotely suggest that the offence has been committed only on the ground that the deceased belongs to a particular community. The decision in the case of **Vishnu vs. State of U.P.** decided on 28.1.2021 in Criminal Appeal No. 204 of 2021 and in the case of **Pintu Gupta vs. State of U.P.** decided on 28.7.2022 in Criminal Appeal No. 4083 of 2017 will also come to the aid of accused-appellants.

19. In view of the matter, the conviction of the accused is altered from Section 302 I.P.C. to 304 Part-II I.P.C.

20. Considering all these facts, it would be appropriate and proper that the accused be sentenced with the period already undergone in prison by him and the amount of fine be imposed.

21. In the result the conviction of the present accused is altered from Section 302 I.P.C. to section 304 Part-II and he is convicted under Section 304 Part-II with imprisonment already undergone in prison with no fine as the appellant is a poor person and was not able to engage even a lawyer for himself. The fine as ordered by trial court is set aside.

22. Sri Brij Raj, learned Amicus Cuarie has argued this appeal on behalf of appellant Ram Awatar @ Ganesh and he shall be paid a sum of Rs. 15,000/- as his remuneration.

23. Office is directed to transmit the lower court record along with a copy of this judgment to the learned court below for information and necessary compliance as warranted.

(2023) 3 ILRA 659
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.03.2023

BEFORE

THE HON'BLE MRS. RENU AGARWAL, J.

Criminal Appeal No. 476 of 1994

Devi Dayal & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
J.P. Maurya, Arun Kumar Shukla, Jayant Singh Tomar, Santosh Kumar Kannaujiya, Shaquiel Ahmad, Upendra Sharma, Varun

Counsel for the Respondent:
G.A.

A. Criminal Law- Indian Penal Code, 1860 – Sections 394, 397, 366 & 376 I.P.C - St.ment of prosecutrix is corroborated by P.W. 2, 3 and 4, who are brothers and parents of prosecutrix as she was kidnapped by accused Devi Dayal and Ambika Pasi in their presence and rest of accused robbed the houselhold goods, jewellery and cash, witnesses are illiterate and the St.ment were recorded after the lapse of three years from the date of occurrence and the evidence of the witness were recorded in piecemeal with the gap of time, therefore, the discrepancies are bound to happen. (Para 32, 35)

B. Criminal Law- Indian Penal Code, 1860 - The prosecution has proved the place of occurrence as the prosecutrix has herself pointed out the place where she was raped by all the accused- The place of occurrence has also shown by Inviestigation Officer in the site plan and, therefore, there is no doubt about the place of occurrence - P.W.7 Ramdayal deposed that there was enmity between the complainant and the father of accused regarding the land and also that father of Devi Dayal refused to accept the prosecutrix as his daughter-in-law, arguments are self contradictory, If there is strong enmity regarding the land between them, then there is no possibility that complainant would marry his daughter to accused - D.W.-2 St.d that there was enmity between complainant and father of the appellant but no such document of any litigation regarding the same is adduced as a defence evidence - Therefore, the defence of appellant is not substantiated by any cogent evidence – Held, order by trial court is found in consonance with the evidence on record, upheld - Appeal is dismissed. (Para 36, 38, 43)

The appeal is dismissed. (E-13)

List of Cases cited:

1. Balwant Singh & anr. Vs St. of Punj. AIR 1997 Supreme Court page 1080

2. Gurcharan Singh Vs St. of Har. 1973 ACC page 04

3. St. of Mah. vs Chandraprakash Kewal Chand Jain G AIR 1990 page 658

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

1. Present Criminal Appeal under section 374(2) Cr.P.C. has been filed against the Judgment and Order dated 22.10.1994 passed by Jagdish Prasad, Special/Additional Sessions Judge, Lakhimpur Kheri in Sessions Trial No.73 of 1990 (State Vs. Debi Dayal and 3 others) arising out of Case Crime No.170 of 1989, under Sections 394, 397, 366 and 376 I.P.C., Police Station Mitauli, District Lakhimpur Kheri convicting the appellants, under Sections 376/366 I.P.C. and sentencing them to undergo rigourous imprionsment of ten years under Section 376 I.P.C. and furher sentencing them to undergo rigourous imprionsment of five years under Section 366 I.P.C. Both the punishment are directed to run concurrently.

2. In the guidelines of the Hon'ble Supreme Court, the name of the victim is not disclosed. Her name is referred as letter "X'.

3. Wrapping the facts of the case in brief, at about 12:00 p.m. i.e. in the midnight of 10/11.06.1989 the informant Buddha Chamar alongwith his wife, his daughters namely; Goda and victim "X' and his son Ram Prasad was sleeping in the courtyard of his old house and wingnut (*dibari*) was kept blown, four persons armed with gun and country made pistol entered in the house and took away his daughter victim "X' aged about 18 years. On the hue and cry by her daughter i.e. victim "X', his wife, his daughter Goda and son awoke and saw the accused presons namely Devi Dayal, Arjun Pasi, Ambika Pasi and Fareed Khan were kidnapping his daughter Victim "X' was being taken by Devi Dayal and Ambika Pasi on the gun point, and accused Arjun Pasi and Fareed Khan robbed the nose ring, sutiya and anklet of his wife and daughter Goda and other household items containing clothes and Rs.1,000/-. When they raised alarm and villagers gathered, accused took to their heels. He tried to search out his elder daughter victim "X', who came after about

one an hour from the eastern side of village by crossing the river in wet clothes. She narrated the whole story that all the four persons carried her across the Pirai river and raped her one by one against her will in the bushes and after committing rape upon her all of them fled away.

4. On the basis of written report, F.I.R. was lodged on 11.06.1989 and was registered as Case Crime No.170 of 1989, under Sections 394, 397, 366 and 376 I.P.C., Police Station Mitauli, District Lakhimpur Kheri. The case was entrusted for investigation to S.I. Devideen Singh, who recorded the statement of victim "X' under Section 161 Cr.P.C. and she was medically examined by P.W.-7 Dr. Indra Chopra on 11.06.1989 at about 5:15 p.m. Doctor did not find any mark of injury on her private parts, left abdomen or thigh. On her internal examination, hymen was found old torn. Investigating Officer visited the house of complainant and interrogated complainant and visited the spot where the rape was committed and after spot inspection, prepared site plan as Ext. Ka-2, recovered wingnut (*Dibari*) and prepared its recovery memo and proved it as Ext. Ka-4. I.O. took the petticoat of the victim "X', and prepared its recovery memo proved it as Ext. Ka-5. Arrested accused Arjun Pasi and Fareed Khan on 13.06.1989. After collecting sufficient evidence submitted the charge-sheet Ext. Ka-6 dated 23.06.1989 against all the accused persons under Sections 394 and 376 I.P.C.

5. Accused appeared before trial court and charges were framed and read over to the accused appellants under Sections 394/376 I.P.C. Accused appellants denied all the charges and claimed to be tried.

6. In order to prove the case, prosecution examined P.W.-1 Victim "X', who narrated whole the story. P.W.-2 Ram Prasad, the brother of the prosecutrix, P.W.-3 Buddha, complainant, who proved written report as Ext. Ka-1 and P.W.-4 Smt. Laxmi W/o the complainant, who corroborated the factum of robbery and abduction of victim "X' by the accused persons. P.W.-5 S.I., Devideen Singh, who investigated the case and proved site plans as Ext. Ka-2 and Ext. Ka-3, memo of *Dibari* as Ext Ka-4, memo for taking Petticoat as Ext. Ka5 and the charge-sheet as Ext. Ka-6. P.W.-6 Head Constable Shiv Mangal Singh, who prepared chik report on the basis of written report and proved the same as Ext. Ka-7 and registered the case vide entry in G.D. No.12 as Ext. Ka-8. He has further stated that he sent victim "X' for medical examination alongwith Constable Balak Ram. P.W.-7 Dr. Indra Chopra, who medically examined the victim "X' proved the medical report as Ext. Ka-9.

7. After conclusion of the prosecution evidence, the statements of accused-appellants were recorded under Section 313 Cr.P.C. All the accused denied the prosecution allegations and stated that they have been falsely implicated in the present case due to animosity. Accused Devi Dayal has stated that there was enmity between his family and the family of Buddha regarding the house and tree. It is also stated that complainant wanted to marry his daughter victim "X' with him but he refused becasue the victim "X' was not of a good character, therefore, he has been falsely implicated in the present case. Accused Arjun Pasi has stated that on the day of alleged incident he was busy in the marriage of his own daughter. Accused Ambika Pasi has stated that on the day of incident he was in the marriage of the daughter of the accused Arjun Pasi. He is nephew of co-accused Arjun Pasi.

8. Accused were provided the opportunity to adduce defence witness and they produced the defence witnesses, which are as follows:-

- D.W.-1 Rashid.
- D.W.-2 Ram Dayal.
- D.W.-3 Ram Kishun.

9. D.W.-1 Rashid stated that Fareed Khan was in his house to attend the marriage of his niece Parveen in the mid night of 10/11.06.1989 from 10:00 p.m. onwards.

10. D.W.-2 Ram Dayal has stated that his house was adjacent to the house of the complainant Buddha who wanted to grab the plot of accused Devi Dayal and he further stated that the complainant wanted to marry his daughter victim "X' with Devi Dayal and he (Devi Dayal) refused to marry her becasue of her bad name, therefore, Devi Dayal has been falsely implicated in the present case.

11. D.W.-3 Ram Kishun has stated that about five years back in the month of Jeth, Saptami on Saturday he went to attend the marriage of the daughter of accused Arjun Pasi and Arjun Pasi and Ambika Pasi remained there whole the night.

12. On the basis of evidence adduced in the court, learned trial court reached to the conclusion that nothing has been recovered from the possession of the accused-appellants, therefore, the theory of commission of robbery is not reliable. While appreciating the defence evidence, learned trial court held that Fareed Khan had failed to establish the plea of *alibi* as stated under Section 313 Cr.P.C. Learned trial court further held that the theory of Devi Dayal that he was falsely implicated because the complainant wanted to marry his daughter victim "X' with Devi Dayal and he refused to marry with her daughter victim "X' is not reliable, hence the statement of D.W.-2 Ram Dayal is not helpful to save the accused Devi Dayal. Evidence of D.W.-3 Ram Kishun is also not relied upon by the trial court and it is found that prosecution has successfully established the guilt of the accused-appellants for charges levelled against them under Sections 366 and 376 I.P.C. Thus, learned trial court passed the order of conviction under Sections 366 and 376 I.P.C. and acquitted of the accused-appellants from the charges under Sections 394 and 397 I.P.C.

13. Being aggrieved with the judgment and order dated 22.10.1994, convicted appellants has approached this Court by way of filing the present appeal.

14. Heard Shri Santosh Kumar Kannaujia, learned counsel for the appellants, Shri Manish Kumar Pandey, learned A.G.A.-I for the State-respondent and perused the material available on record.

15. It is submitted by learned counsel for the appellants that the judgment and order passed by the learned court below is against the evidence on record. The prosecution version is not corroborated by the medical evidence. The entire prosecution story is appeared to be highly improbable and unnatural, as the victim "X' has stated that after the gang rape by four persons, she returned herself again by crossing the river. It is also submitted that the punishment is too severe, therefore, the judgment and order of learned trial court is liable to be set aside.

16. On the contrary, learned A.G.A.-I for the State has vehemently opposed the above mentioned averments by submitting that prosecution has proved its case beyond

reasonable doubt with cogent evidence. All the accused-appellants were identified by witnesses in the light of wingnut (*dibari*), which was putting up at the time of occurrence. Medical evidence corroborated the offence under Section 376 I.P.C., therefore, the judgment and order of learned trial court is liable to upheld.

17. At the very outset, it is pertinent to mention here that the appeal against accused-appellant no.4 Fareed Khan, who is said to have been died on 06.09.2018 is dismissed as abated vide order dated 24.11.2022.

18. Before reaching to any conclusion, the evidence of witness is to be looked into.

19. **P.W.-1** Victim "X' has stated that accused Devi Dayal resides in her village. Accused Arjun Pasi and Ambika Pasi were residing in the village Manhan. Accused Fareed Mistri resides in Miatauli. In the night of incident, when she was sleeping on the cot alongwith her sister Goda in courtyard and her mother was sleeping on the another cot in the courtyard and other family members were sleeping on the mat and her father was sleeping outside the gate of house, accused-appellants Devi Dayal, Arjun Pasi, Ambika Pasi and Fareed Mistri entered in their house and kidnapped her forcefully. Devi Dayal and Ambika Pasi was armed with gun, Arjun Pasi was armed with half-bore gun and Fareed Mistri armed with country made pistol. Devi Dayal and Ambika Pasi took her across the Pirai river and throw her under the tree of Dhak (*Palash*) and *Khajuriya* and committed rape upon her one by one by all the four accused-appellants. When they went away, she came back to her house on her own by crossing the river. Accused-appellants have robbed the batua, jewellery, sutiya, nose ring, Rs.1000/- and other household items.

20. **P.W.-2** Ramprasad has stated on oath that on the night of incident both of his sisters Goda and victim "X' were sleeping on the cot in the courtyard. He was also sleeping on the another cot nearby. His father was sleeping in the room of colony and the *dibari* was lightening on the door step, when the accused-appellants entered the house and accused Devi Dayal and Ambika Pasi abducted his sister victim "X' and accused Fareed and Arjun Pasi carried the household goods and jewellery and cash, and the accused Devi Dayal and Ambika Pasi armed with gun, Arjun Pasi armed with half-bore gun and Fareed was armed with country made pistol went towards the east of the village. Her sister victim "X' returned after an hour and narrated the whole story to him.

21. **P.W.-3** Buddha, who is complainant of the case has corroborated the statements of P.W.-1 and P.W.-2.

22. **P.W.-4** Laxmi, who is mother of victim "X' corroborated the prosecution version and the statements of P.W.-1, P.W.-2 and P.W.-3. She has also stated that she recognized all the accused in the light of *dibari* and on the hue and cry, villagers Suraj, Badlu, Jaylal and others reached at the place of occurrence. It is also stated that witness Jaylal is in hand and glove with accused and witness Suraj has died.

23. **P.W.-5** S.I. Devideen Singh, who is Investigating Officer of the case has stated on oath that after lodging the F.I.R., he started investigation of case. He recorded the statement of Head Moharrir, Shiv Mangal Singh and visited the house of complainant, searched the house of

accused-appellants Devi Dayal, Arjun Pasi, Ambika Pasi and Fareed but neither any of the accused was arrested nor any of the stolen property was recovered from their houses. Thereafter, he visited the place where the accused have committed rape upon the victim and prepared the site plan. He recovered *dibari* and petticoat of victim "X' and prepared recovery memo thereof separately and proved the same in court as Ext. Ka-4 and Ext. Ka-5 and after collecting all the relevant evidence submitted charge-sheet, which he proved in court as Ext. Ka-6.

24. **P.W.-6** Head Constable, Shiv Mangal Singh, who proved F.I.R. as Ext. Ka-7 and G.D. No.12 as Ext. Ka-8 and written letter to C.M.O. and sent the victim "X' for medical examination alongwith constable 298 Balak Ram and her parents.

25. **P.W.-7** Dr. Indra Chopra, who stated that she medically examined the vicitm "X' on 11.06.1989, proved the medical report, in which the hymen was found old torn. Uterus was normal in size. Vaginal smear was taken and sent for histopathological examination. She could not give opinion regarding the commission of rape that stated that victim 'X' was used to intercourse or act like this and proved the medical report as Ext. Ka-9.

26. **D.W.-1** Rashid, who has stated that Fareed Khan was in his house to attend the marriage of his niece Parveen in the night in between 10/11.06.1989 from 10:00 p.m. onwards.

27. **D.W.-2** Ram Dayal has stated that his house was adjacent to the house of the complainant Buddha and who wanted to grab the plot of accused Devi Dayal and further stated that the complainant wanted to marry his daughter victim "X' with Devi Dayal and father of Devi Dayal refused then has been falsely implicated in the present case.

28. **D.W.-3** Ram Kishun has stated that about five years back in the month of Jeth, Saptami on Saturday he went to attend the marriage of the daughter of accused Arjun Pasi and Arjun Pasi and Ambika Pasi remained there whole the night.

29. As per prosecution story, victim "X' and her younger sister Goda were sleeping on the same cot in the courtyard and his brother was sleeping in courtyard on the separate cot. Mother of the victim "X', other children were also sleeping nearby on the mat when the accused are said to have entered the house and kidnapped the victim "X' across the river Pirai. So far as the robbery is concerned, learned trial court found that nothing recovered from the possession of the accused, hence, none of the accused were convicted under Sections 394 and 397 I.P.C. So far as the incident of rape is concerned, rape is said to have committed by four persons, therefore, there is no much probability of struggle on the part of the victim "X'. It is argued on behalf of learned counsel for appellants that four appellants are said to have committed rape upon the prosecutrix "X' but no sign of injury is found on the body of prosecutrix. As per prosecution version, she was throne under the tree of *Palash* and was committed rape. If she would have put any resistance, some injuries were bound to happen on the back of prosecutrix. P.W.:- 7 Dr. Indra Chopra found no external or internal injuries on the body of prosecutrix. This argument is devoid of merit. It cannot be said that whenever resistance is offered, there must be some injuries on the body of

prosecutrix. The appellants were four in number and the prosecutrix being a girl of eighteen years, she was not expected to offer such resistance as it would cause injuries to her body. It is not correct to say that there was no injury at all. As it has been mentioned by P.W.-7 Dr. Indra Chopra that hymen was old torn present. In this regard Hon. Apex Court held in **Balwant Singh and Another Vs. State of Punjab** AIR 1997 Supreme Court page 1080 that injuries are not always necessary to be found on the body of prosecutrix during rape if she fails to offer resistance. Apex Court has also held in **Gurcharan Singh Vs. State of Haryana 1973 ACC** page 04 that absence of violent and stiff resistance on the part of the prosecutrix in the present case may as well suggest helpless surrender to the inevitable due to sheer timidity. Therefore, mere absence of injuries on the body of prosecutrix do not brush aside the whole prosecution case.

30. It is also pertinent to mention here that the prosecutrix "X' fully corroborated the prosecution version. Its also clear that under the threat of life prosecutrix was raped. As per prosecution version, all the four armed with half bore gun and country made pistol. Therefore, the prosecutrix cannot be expected to offer resistance or any type of struggle.

31. It is also submitted on behalf of appellants that there is no independent witness of the occurence. It is also pertinent to mention here that the victim was taken away by the four accused across the river Perai. There cannot be any independent witness of the incident, however, the prosecutrix appeared in witness box and fully corroborated version of F.I.R. The statement of prosecutrix cannot be disbelieved merely because there is no coroborative evidence. In this regard, Hon. Apex Court in **State Of Maharashtra vs Chandraprakash Kewal Chand Jain** G AIR 1990 page 658, wherein it is held that "ordinarily an indian women would be most reluctant to level false accusation of rape involving her reputation unless she has a very strong bias or reason to do so. Therefore, the statement of victim "X' which fully corrobroates the prosecution version cannot be suspected and disbelieved as solitary statement of prosecutrix can be believed for proving the charges under Section 366 IPC." Hon. Supreme Court has given guidelines in **State Of Maharashtra vs Chandraprakash Kewal Chand Jain** in the paragraph 16 of the above case it is observed that*"..... But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circum-stances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence...." In paragraph 17 , it was further observed that " To insist on corroboration except in the rarest of rare cases is to equate a woman who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her story of woe will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime.....The standard of proof to be expected by the Court in such cases must take into account the fact that such crimes are generally committed on the sly and very rarely direct evidence of a person other than the prosecutrix is available. Courts must also realise that*

ordinarily a woman, more so a young girl, will not stake her reputation by levelling a false charge concerning her chastity."

32. In the impugned case, the statement of prosecutrix is corroborated by P.W. 2, 3 and 4, who are brothers and parents of prosecutrix as she was kidnapped by accused Devi Dayal and Ambika Pasi in their presence and rest of accused robbed the household goods, jewellery and cash.

33. It is submitted by learned counsel for accused-appellants that prosecutrix as is said to have kidnapped and carried across the Perai river but there is no sign of the fact that she was throne on grass or leaves and raped. No contents of grass or leaves were found on the clothes of prosecutrix. The court find this argument very week as prosecutrix "X' hereself stated in her statement that after the commission of crime of rape, all the accused fled away. Then, she herself came by crossing river and when she reached to the village, she was in wet clothes. Therefore, the presence of grass or leaves on the clothes of the prosecutrix could not be found out.

34. It is also argued by learned counsel for accused- appellants that no blood stained or spermatozoa were found on the clothes of prosecutrix. In the given set of circumstances, the prosecutrix came across the river and she was in wet clothes. Therefore, the presence of leaves, grass and blood stains or spermatozoa is not possible to be found on the body or clothes of prosecutrix.

35. Learned counsel for the accused appellants advanced the argument that there are major contradictions in the statement of witnesses of fact and learned trial court did not address those contradicions. On the persual of statement of witnesses, there is no major contradicions in the statement of witnesses as all of them corroborated the testimony of prosecutrix herself. However, minor contradictions are there. It is to be kept in mind that the witnesses are illiterate and the statement were recorded after the lapse of three years from the date of occurrence and the evidence of the witness were recorded in piecemeal with the gap of time. Therefore, the discrepancies are bound to happen. On the basis of minor discrepancies, the statement of witnesses cannot be discarded, if they are otherwise truthful.

36. The prosecution has proved the place of occurrence as the prosecutrix has herself pointed out the place where she was raped by all the accused-appellants . The place of occurrence has also been shown by Inviestigation Officer in the site plan and, therefore, the place of occurrence is ascertained and there is no doubt about the place of occurrence.

37. The accused-appellants placed the plea of *alibi* in the defence but they could not prove the plea in trial court as well as in appellate court. The accused appellant did not file the invitation card of marriage to prove that the accused Arjun Pasi was in the marriage of his own daughter. However, if there was marriage on the fretful date, the appellant must have possessed an invitation card of the marriage of his daughter. Accused Ambika Pasi also claimed *alibi* on the ground that he had gone in the marriage of the daughter of the co-appellant Arjun Pasi but he could also not proved the defence that there was the marriage of daughter of Arjun Pasi and he attended the marriage. So far as accused Farid Khan is concerned, he stated in his

statement recorded under Section 313 that he had gone to attend the marriage of his niece Parveen but Fareed Khan also could not proved the marriage of his niece. He could not even told to the court that where the marriage of his niece was performed. It is further pertinent to mention that accused Fareed khan, who is said to have been died on 06.09.2018 is dismissed as abated vide order dated 24.11.2022. Hence, none of the accused could prove their plea of *alibi*.

38. P.W.7 Ramdayal deposed in court that there was enmity between the complainant and the father of accused Devi Dayal regarding the land and also that father of Devi Dayal refused to accept the prosecutrix as his daughter-in-law. Therefore, accused Devi Dayal has been falsely implicated. These two arguments are self-contradictory and cannot run parallel. If there is strong enmity regarding the land between complainant and father of accused Devi Dayal, then there is no possibility that complainant would marry his daughter to Devi Dayal. D.W.-2 stated that there was enmity between complainant and father of the appellant Devi Dayal but no such document of any litigation regarding the land is adduced as a defence evidence. Therefore, the defence of appellant is not substantiated by any cogent evidence.

39. Learned counsel for the appellants stated that accused Devi Dayal has served out four years of incarceration, accused Ambika Pasi has served out three years and two months of incarceration and accused Arjun has served out incarceration of two years, therefore, it is prayed to commute the sentence of appellants to the period already undergone by them. It is also submitted that accused have no criminal antecedent apart from this case. Therefore, a lenient view may be taken in the case.

40. Section 376 (2)(g) I.P.C. that in case of gang rape, the rigorous imprisonment shall not be less than ten years. As the accused persons are charged with Section 376(2)(g) I.P.C., it is not a fit case to commute the sentence from ten years to the period already undergone by them.

41. No plausible reason is offered by appellants why they are falsely implicated in the case. No explanation is given by the appellants during the statement recorded under Section 313 Cr.P.C. as to why they are falsely implicated in the case. On the contrary, the prosecutrix in so many words proved the prosecution version as to the fact that she was taken away by accused Devi Dayal and all of the appellants committed rape against her will.

42. Hence, the prosecution successfully proved the charges under Section 366 and 376 IPC against all the accused beyond reasonable doubt by the cogent evidence of prosecutrix as well as by the evidence of P.W.-2 and P.W.-4, who are brother and parents of prosecutrix. It is also pertinent to mention here that P.W.-7 Dr. Indra Chopra prepared the medical report, in which the hymen was found old torn. In these circumstances where prosecutrix unequivocally proved the case of rape against all the appellants and appellants could not offer any explanation to the false implication of appellants in such a heinous crime.

43. The judgment of trial court is based on cogent evidence and is found in consonance with the evidence on record. The complicity of all the four accused is found in the crime and the judgment and order passed by learned trial court is liable to be upheld and the appeal is liable to be dismissed.

44. The Appeal is **dismissed**. The judgment of trial court is upheld. The appeal against appellant No. 4 Fareed Khan, who is said to have been died on 06.09.2018 is dismissed as abated vide order dated 24.11.2022. The appellant Nos. 1, 2 and 3, namely, Devi Dayal, Arjun and Ambika are on bail. They shall surrender before the court concerned within one month from the date of judgment and shall be sent to jail to serve out the remaining sentence. Learned trial court shall prepare the conviction warrant and sent them to jail.

45. Personal Bond and bail bonds of the accused are **cancelled**.

46. Certified copy of this judgment along with the lower court record be sent to the trial court concerned for necessary information and compliance.

(2023) 3 ILRA 668
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 19.12.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Criminal Appeal No. 564 of 2021

Shubhansh Chand Srivastava ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Nandit K. Srivastava, Anil Kumar Tripathi, Anurag Shukla, H.B. Singh, Pritma Shastri, Purnendu Chakravarti

Counsel for the Respondent:
Birshwr Nath, S.B. Pandey, Shiv P. Shukla

Criminal Law-The Prevention of Corruption Act, 1988-Sections 7, 13(1)(d) & 13(2)-Accused-appellant demanded bribe from the complainant for ensuring preparation of outstanding pay bill/payments-Conviction U/s 7 and 13(2) r/w 13(1) (d) of The P.C Act- Minor discrepancy would not destroy the entire case of the prosecution regarding demand, acceptance and recovery of bribe-Demand and acceptance proved-Amount was recovered from the drawer of the office table of the accused- To record a conviction under Section 7 and 13, proper proof of demand and acceptance of illegal gratification by the accused public servant is necessary-Mere possession and recovery of money without proof of demand by the accused does not constitute an offence- In absence of evidence of the complainant (direct/ primary/ oral/ documentary evidence), it would be permissible to draw an inferential deduction of culpability/ guilt of a public servant under Section 7, 13(2)/13(1)(d) of the Act based on other evidence adduced by the prosecution.

Appeal dismissed. (E-15)

List of Cases cited:

1. P. Satyanarayana Murthy Vs District Inspector of Police, St. of Andhra Pradesh & anr., (2015) 10 SCC 152

2. Neeraj Dutta Vs St.: 2022 SCC OnLine SC 1724

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

1. The present appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC') read with Section 27 of the Prevention of Corruption Act, 1988 (hereinafter referred to as "PC Act, 1988') has been filed by the appellant against the judgment and order dated 30.03.2012 passed by the Special Judge, Anti Corruption (West), CBI, Lucknow in Case No.14 of 1999 (State Vs. Subhash Chand Srivastava) under Section 7

and 13(2) read with 13(1)(d) of PC Act, 1988, arising out of R.C. No. 6(A)/1999, P.S. CBI/SPE/ACB, Lucknow, whereby the learned Special Judge has convicted and sentenced the appellant for 6 months rigorous imprisonment with fine of Rs. 1,500/- and 15 days additional simple imprisonment, in default of fine for offence under Section 7 of the PC Act, 1988 and 1 year rigorous imprisonment with fine of Rs. 1,500/- and 15 days additional simple imprisonment, in default of fine for offence under Section 13(2) read with Section 13(1)(d) of the PC Act, 1988. It was directed that both the sentences would run concurrently.

2. The appellant was posted and was functioning as Office Superintendent-II in establishment section in the office of D.R.M. (Personnel), Northern Railways, Lucknow. Complaint dated 30.01.1999 was lodged by one Ram Kumar-IV who was posted as Diesel Assistant, Alambagh Office Goods Lobby, Mawaiyya, Northern Railways, Lucknow alleging that the accused-appellant demanded a bribe amount of Rs.2,000/- as illegal gratification other than legal remuneration from Sri Ram Kumar-IV for favour of ensuring preparation of outstanding pay bill/payments for the months of October and November, 1998. In the month of October and November, 1998 the complainant was on leave for 8 days and 12 days respectively.

3. On the basis of the complaint, an FIR was lodged on the same day i.e. 13.01.1999 by the C.B.I. under Section 7 of the PC Act, 1988. Verification was conducted by Sri Jayant Kashmiri, Inspector, C.B.I., Lucknow. The accused-appellant was caught red handed while accepting Rs.1,000/- as first installment of bribe amount on 14.01.1999 for sending the charge memo in respect of pay bills of the complainant.

4. After completion of the investigation, the C.B.I. submitted charge-sheet (Exh. Ka 36) under Sections 7 and 13(2)/13(1)(d) of the PC Act, 1988 against the accused-appellant. The Court took cognizance on the charge-sheet and summoned the accused to face trial. Learned trial court framed charges under Sections 7 and 13(2)/13(1)(d) of the PC Act, 1988 on 25.02.2002 against the accused-appellant, which he pleaded not guilty and claimed trial.

5. During the investigation, it was noticed that preparation of leave account/advice note relating to the complainant, Ram Kumar for the months of October and November, 1998 was pending with the accused-appellant and for the preparation of the same and to ensure release of payment for the leave period in favour of the complainant, the accused-appellant demanded a bribe amount of Rs.2,000/-. The complainant who was not willing to pay the said amount, lodged a complaint with the C.B.I., and a trap was laid and the accused-appellant was caught red handed while demanding and accepting the first installment of bribe of Rs.1,000/- from the complainant. Bribe amount was recovered from the drawer of the table of the accused-appellant. The accused-appellant managed to escape from the spot, as such no hand wash could be taken place at that time.

6. Prosecution to prove its case, examined as many as 11 witnesses. Statement of the accused-appellant was recorded under Section 313 Cr.P.C. on 21.2.2012 and his plea was of denial. He

did not adduce any oral or documentary evidence in his defence. Trial court after analyzing in detail found the charge against the accused-appellant regarding demand, acceptance and recovery of bribe proved beyond reasonable doubt, and thus, convicted and sentenced the accused-appellant as mentioned above.

7. Sri Anurag Shukla, learned counsel appearing for the accused-appellant has submitted that though the prosecution has failed to prove its case to bring charge home against the accused-appellant but the trial court has convicted and sentenced the accused-appellant without properly appreciating the evidence brought on record.

8. It has been further submitted that the trial court has framed following four points for determination, which are essentially ingredients of the offence for which the accused-appellant was charged:-

"(i) Whether Sri Subhash Chand Srivastava was in a position to do any favour or disfavour to the complainant?

(ii) Whether Sri Subhash Chand Srivastava demanded Rs.2000/- as illegal gratification from the complainant for passing his claim?

(iii) Whether accused accepted Rs.1000/- as bribe from the complainant?

(iv) Whether the alleged amount of Rs.1000/- as bribe, was recovered from the accused?"

The learned trial Court in the entire judgment has not answered any of the aforesaid points framed for determination and, therefore, impugned judgment is bad in law and required to be set-aside.

9. It has been further submitted that admittedly, there was no recovery of Rs.1,000/- from the possession of the accused-appellant. P.W.-2, the complainant had failed to prove the place of recovery of bribe of Rs.1,000/-. At one place the complainant (P.W.-2) in his deposition had said that he had kept the money in an envelope in the almirah, however, at page 10, he had said that money in the envelope was kept in a drawer of the seat of the accused-appellant.

10. When the complainant reached to the office of the accused-appellant, there was no demand of bribe or illegal gratification made by the accused-appellant from him. The accused-appellant allegedly asked the complainant "Kaise aye ho?"

11. Preparation of pay bills of the complainant was to be done by Sri Ved Prakash Tiwari, the then Head Clerk in the office of D.R.M., Northern Railways, Lucknow (P.W.-9), and the accused-appellant had no role in the same. He was not responsible for keeping the leave record. Evidence with regard to demand of bribe was based on tape recorded conversation between the accused-appellant and the complainant, however, the same was not produced during the course of trial.

12. Independent witness, Satish Kumar Srivastava (P.W.-3) had not seen the drawer from which the bribe amount was recovered as he was standing other side of the table. Independent witness, Kapil Nath Rastogi, who had allegedly recovered the bribe, was not produced during the trial.

13. It has been submitted that prosecution had failed to prove that the accused-appellant disappeared from the alleged scene of incident instead he was arrested on the spot. The trap team reached

to the office of the accused-appellant during lunch hour and the complainant mischievously put the bribe amount in the drawer of the table of the accused-appellant.

14. Sri Anurag Shukla, learned counsel appearing for the accused-appellant has submitted that it is the basic principle of criminal jurisprudence that burden of proof always lies on the prosecution, and it never gets shifted. It is the onus only which shifts from stage to stage. There can be no conviction solely on the basis of allegation unless the charge is proved by leading cogent and credible evidence beyond reasonable doubt.

15. The prosecution had failed to prove any motive for demand of bribe from the accused-appellant as the accused-appellant was not in position to give any favour to the complainant. In the present case, neither demand is proved nor recovery was effected from the possession of the accused-appellant.

16. On the other hand, Sri Shiv P. Shukla, learned counsel appearing for the C.B.I. has submitted that the prosecution had been able to prove the charge against the accused-appellant beyond reasonable doubt. Learned trial court has considered the evidence in detail and rightly held that the accused-appellant had demanded and accepted the bribe amount of Rs.1,000/- from the complainant, which was recovered from the drawer of the table of the accused-appellant. He, therefore, has submitted that considering the evidence of the prosecution witnesses and the documentary evidence led by the prosecution, the appeal filed by the accused-appellant is liable to be dismissed.

17. For decision in the appeal, it would be appropriate to take note of the evidence brought by the prosecution in support of its case against the accused-appellant.

18. P.W.-1, Sri S.M.N. Islam, who was posted as Senior Divisional Personnel Officer, Northern Railway, Lucknow, had deposed before the court that the accused-appellant was posted as O.S.-II, in D.R.M. (Personnel) Office, on a Class-III post. The witness was competent to appoint and remove the accused-appellant from the post. The C.B.I. requested him for sanctioning the prosecution of the accused-appellant. After considering the case, facts and material brought before him, he passed the order granting sanction for prosecution of the accused-appellant. He proved the sanction order, which was marked as Exh Ka-1.

19. P.W.-2, Sri Ram Kumar-IV, Diesel Asstt., Northern Railway Lucknow, was the complainant of the case, who in his testimony deposed that the complainant was on leave for 20 days in the month of October and November, 1988. He did not get any salary for this period. He met the accused-appellant who was Dealing Assistant on 31.01.1999 and asked him that why his salary was deducted. The accused-appellant demanded Rs.2,000/- as bribe from him. The complainant reached to the office of C.B.I. and gave a complaint to the S.P. He proved the complaint given by him in the C.B.I. office, which was marked as Exh. Ka-2. S.P. C.B.I. introduced him to Sri Jayant Kashmiri and told him that Jayant Kashmini would investigate his case. Jayant Kashmiri called Satish Srivastava from Insurance Company and introduced the complainant to him. Jayant Kashmiri gave him a tape recorder and sent

him and Satish Srivastava to D.R.M. Office with a direction that the complainant should record conversation between him and the accused-appellant in tape recorder. On the same day i.e. 13.01.1999 at around 2:15 to 2:30 P.W.-2 went with Satish Srivastava to the office of the accused-appellant. The accused-appellant demanded Rs. 2000/-, which was recorded in the tape recorder. On demanding the bribe, the witness said that as he had received only one day's salary how he would give Rs.2,000/- to the accused-appellant. When the witness said that he would not be able to pay Rs.2,000/-, then the accused-appellant said that he should pay Rs.2,000/- in two installments of Rs.1,000/- each. It was deposed that thereafter, he and Satish Srivastava came back to the C.B.I. office and gave the cassette and recorder to Jayant Kashmiri. Jayant Kashmiri heard the conversation, which was recorded and he sealed the cassette and got the signatures of the witnesses and others on the envelope.

20. P.W.-3, Satish Kumar Srivastava who was posted as Stenographer, National Insurance Company, Regional Office, Hazratganj, Lucknow, had deposed that on 13.01.1999 he got instructions from Sri A.K. Verma, A.O. Vigilance Officer to reach C.B.I. Office, Hazratganj where he reached around 3-3:30 P.M. In C.B.I. office, he met Jayant Kashmiri, the complainant and Kapil Nath Rastogi. C.B.I. officers introduced him to the complainant and Kapil Nath Rastogi. He was told about the complaint of Sri Ram Kumar (P.W.-2) and he was given the complaint (Exh Ka-2) for reading. To verify the complaint, the witness was sent along with the complainant to D.R.M. Office where Subhash Chandra was posted. Before leaving for D.R.M. Office they were given a tape recorder and empty cassette, which was demonstrated to them. They were instructed that after reaching D.R.M. Office, tape recorder should be put on and after conversation would get over, the Tape Recorder was to be stopped. This witness gave the testimony to the effect that when they reached to the office of the accused-appellant, the complainant asked the accused-appellant regarding his payment of salary for the leave. The accused-appellant asked him that whether he had brought money or not, on which the complainant explained his poverty and said that he would arrange some money in 2-3 days on which the accused-appellant said that Rs.1,000/- should be given first and rest of the amount should be given after the complainant would receive his the salary. Thereafter, they came back to the C.B.I. office. On reaching back to the office, the tape was played in which conversation between the accused-appellant and the complainant was recorded. The complainant after looking at the material M.Exh-2 said that there were his signatures on it.

21. P.W.-4, Sri Rajesh Kumar Shukla, Senior Clerk, Senior Section Engineer, Loco N.R., Lucknow, had deposed that he was posted at the above mentioned post since 1995 and was allowed the work of preparing Absentee statement, compilation of leave application, sick certificate and fitness certificate of the employees. He had proved D26 (Ext. Ka-18) absentee statement, which bears the name of complainant i.e Ram Kumar-IV Diesel Asstt. at serial no. 35. Further, he had deposed about preparation of D-27 and D-28, D-29 (Ex Ka-19, Ka-20 & Ka-21). He also said that in absentee statement besides duty chart, there was sick certificate of the complainant. He proved the sick certificate of the complainant for 10 days from

16.10.1998 which was marked as Material Exh. Ka 20. He also proved fitness certificate from 23.03.1998 to 24.04.1998 for which sick certificate for 10 days from 23.03.1998 was issued by DMO, Alambagh ,which was marked as Material Exh 21 and 22.

22. P.W.-5 Ramesh Chandra Bhatia, the then Controller, had deposed on oath that the complainant, Ram Kumar-IV had worked under his subordination and his leave record was being maintained in Loco shed,, Alambagh. He had further explained the procedure regarding maintenance of leave of the concerned employee and the statement of their absence from the work. He had proved Ext Ka-37 in his oral testimony.

23. P.W.-6, Sri Rajiv Srivastava, the then Senior Divisional Medical Officer, Loco shed, Alambagh, Lucknow, had deposed on oath that he was authorized to issue sick and fitness certificate of the Railway Employees and had proved Ext. Ka-16, Ka-20 & Ka-24 of Ram Kumar-IV

24. P.W.-7 Suresh Chand Srivastava, the then APO (Bills) DRMNR/Lucknow, had stated in his oral testimony that his job was to forward the bills after duly checking to the Accounts Section for further process. He had identified D-25 as the charge memo (Exh Ka-25) which was forwarded to accused Subhash Chand Srivastava for further process. He also verified the signatures of accused on the aforesaid document.

25. P.W.-8 Anup Kumar Srivastava, the then O.S.-I, Confidential Section, DRM/NR/Lucknow, had deposed that the accused was posted in the Establishment during year 1997 and had also proved seizure memo Ext. Ka-27, Ka-28 & Ka-29

26. P.W.-9 Ved Prakasn Tripathi, the then Head Clerk DRM/NR/Lucknow had stated in his oral testimony that his main duty was to prepare pay bills of the employees of Loco shed Alambagh. Lucknow. He had further explained the procedure regarding preparation of pay bills and the documents to be considered for the same. He had also attested the documents of Ext. Ka-25, Ka-25/1, Ka-25/2, Ext. Ka-26, ka-26/1, Ka-26/2.

27. PW-10 Jayant Kashmiri, the then Inspector, CBI/ACB, Lucknow, had deposed in his oral testimony that on the basis of the complaint of the complainant Ram Kumar-IV, the RC was registered against the accused Subhash Chand Srivastava. He made a preliminary inquiry and finally lead the trap to catch hold of the accused red handed while demanding and accepting the bribe money. He had proved Ext. Ka-5, Ka-6, Ka-17, Ka-28, Ka-30 to Ka-33, Material Exhibit-3 to 5 & material exhibit-23

28. PW-11 Sri B.S.Mshra, the Investigating Officer of the present case, who was entrusted with the investigation of this case vide order dated 15.1.1999 had proved Ext. Ka-27, Ka-29, Ka-34, Ka-35, Ka-36.

29. The court has to consider that whether the prosecution has been able to prove demand and acceptance of the bribe by the accused-appellant from the complainant or not. Demand of bribe from the complainant had been substantiated by the testimony of the complainant P.W.-2 himself as well as Satish Srivastava, an independent witness (P.W.-3) who accompanied the complainant to the office of the accused-appellant on 13.01.1999, a day prior to the trap proceedings. On

13.01.1999 the complainant and P.W.-3 had gone to the office of the accused-appellant for verification of the allegation of demand of bribe by the accused-appellant. These two witnesses, i.e. P.W.-2 and P.W.-3 in their testimonies had proved the demand of Rs.2,000/- by the accused from the complainant, which was to be paid in two installments of Rs.1,000/- each.

30. The prosecution case is for acceptance and recovery of bribe of Rs.1,000/-. The complainant and P.W.-3 had deposed in the court that bribe amount was put in the drawer as per the asking of the accused-appellant himself and same was recovered from the drawer of the office table of the accused-applicant in the presence of T.L.O. (P.W.10) by other independent witness, Kapil Nath Rastogi who was, however, not produced by the C.B.I. during trial. Testimony of P.W.-3 had remained unshaken in respect of asking the complainant to put Rs.1,000/- in the drawer of the accused-appellant's office table, and the complainant put the bribe of Rs.1,000/- in the drawer of the accused-appellant, which was recovered from the drawer itself in the presence of the witnesses.

31. Submission of Sri Anurag Shukla, learned counsel appearing for the accused-appellant that the accused-appellant had nothing to do with the alleged leave account or payment of salary of the complainant and, therefore, there was no question for any demand of bribe from the complainant and the accused-appellant was not in a position to do any favour to the complainant as his leave account was nil prior to the incident itself. This argument is in respect of the motive for demanding the bribe. Motive would become irrelevant if the prosecution had been able to prove demand and acceptance of the bribe from the complainant. Testimonies of P.W.-2, P.W.-3 and P.W.-10 would fully prove demand and acceptance of bribe of Rs.1,000/- which was recovered from the drawer of office table of the accused-appellant. Submission of Sri Anurag Shukla that testimony of P.W.-2 was not cogent and cannot said to be credible inasmuch as at one point of time, he said that he put the bribe amount in almirah and later on corrected the statement that he considered table as almirah and, therefore, such testimony cannot be said to be credible and trial court should not have placed reliance on such testimony. This minor discrepancy would not destroy the entire case of the prosecution regarding demand, acceptance and recovery of bribe. When the demand and acceptance have been proved and the amount was recovered from the drawer of the office table of the accused-appellant, this minor discrepancy would become irrelevant.

32. Learned counsel appearing for the accused-appellant has submitted that statement of P.W.-3 in cross examination that as he was sitting across the table so he did not see the drawer in which bribe was kept and, therefore, said witness could not be treated as witness of acceptance and recovery of bribe, is also liable to be rejected.

33. P.W.-3 had supported the prosecution case from the very beginning and mere one statement in the cross examination that he did not exactly view the drawer would not be enough to say that the prosecution could not prove the case regarding acceptance and recovery of bribe from the drawer of the accused-appellant.

34. It is settled law that it is necessary to record a conviction under Section 7 and 13 of the PC Act, 1988 proper proof of demand and acceptance of illegal

gratification by the accused public servant is necessary. It is also settled that mere possession and recovery of money without proof of demand by the accused does not constitute an offence under Section 7 and 13(2)/13(1)(d) of the PC Act, 1988 **(P. Satyanarayana Murthy vs District Inspector of Police, State of Andhra Pradesh and another, (2015) 10 SCC 152)**

35. Term "demand" does not find place under PC Act, 1988 but it has virtually been inserted in the statute by interpretative process. Section 20 of the PC Act, 1988 derives certain statutory presumption of guilt. Section 7 has to be read in conjunction with Section 20 which reads as under:-

"20. Presumption where public servant accepts gratification other than legal remuneration.--

(1) Where, in any trial of an offence punishable under section 7 or section 11 or clause (a) or clause (b) of sub-section (1) of section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

(2) Where in any trial of an offence punishable under section 12 or under clause (b) of section 14, it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7, or as the case may be, without consideration or for a consideration which he knows to be inadequate.

(3) Notwithstanding anything contained in sub-sections (1) and (2), the court may decline to draw the presumption referred to in either of the said sub-sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no interference of corruption may fairly be drawn."

36. Plain reading with the words of Section 20 of the PC Act, 1988 would mean that if it can be proved that a public servant has received gratification, Section 20 brings in statutory presumption that he has received the same with an illegal motive as laid down in Section 7 of the Act. This shifts the burden of proof to the accused who is required to prove that what has been received is a valuable consideration and not an illegal gratification.

37. Constitution Bench in recent judgment in the case of **Neeraj Dutta vs State: 2022 SCC OnLine SC 1724** has held that to constitute an offence under Sections 7 and 13(2)/13(1)(d) (i) and (ii) of the PC Act, 1988, if a bribe giver makes an offer to pay without there being any prior demand of the same by a public servant and public servant accepts and receives the bribe, it would be a case of acceptance under Section 7 of the PC Act, 1988. If

public servant himself makes a demand and demand is accepted by bribe giver and bribe is paid by the bribe giver, it is a case of obtainment under Section 13(1)(d)(i) and 13(1)(d)(ii) of the Act.

38. It has been held that if the foundational facts are proved, presumption of receipt of obtainment of illegal gratification would be made. If such a presumption of fact would be raised, it is subject to rebuttal by the accused, however, if the presumption is not rebutted, the offence gets proved as provided under Section 20 of the PC Act, 1988.

39. In para 4 and 5 of the aforesaid judgment, ingredients to constitute an offence under Section 7 and 13(1)(d) of the PC Act, 1988 have been mentioned and the paras 4 and 5 of the said judgment are extracted hereunder:-

" 4. The following are the ingredients of Section 7 of the Act:

i) the accused must be a public servant or expecting to be a public servant;

ii) he should accept or obtain or agrees to accept or attempts to obtain from any person;

iii) for himself or for any other person;

iv) any gratification other than legal remuneration;

v) as a motive or reward for doing or forbearing to do any official act or to show any favour or disfavour.

5. Section 13(1)(d) of the Act has the following ingredients which have to be proved before bringing home the guilt of a public servant, namely, -

(i) the accused must be a public servant;

(ii) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or by abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or while holding office as public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest.

(iii) to make out an offence under Section 13(1)(d), there is no requirement that the valuable thing or pecuniary advantage should have been received as a motive or reward.

(iv) an agreement to accept or an attempt to obtain does not fall within Section 13(1)(d).

(vi) mere acceptance of any valuable thing or pecuniary advantage is not an offence under this provision.

(vii) therefore, to make out an offence under this provision, there has to be actual obtainment.

(viii) since the legislature has used two different expressions namely "obtains" or "accepts", the difference between these two must be noted."

40. In para 74 of the said judgment, the law for establishing guilt of the accused/public servant under Section 7 and 13(1)(d) has been summarized, which would read as under:-

"74. What emerges from the aforesaid discussion is summarised as under:

(a) Proof of demand and acceptance of illegal gratification by a public servant as a fact in issue by the prosecution is a sine qua non in order to establish the guilt of the accused public servant under Sections 7 and 13(1)(d)(i) and(ii) of the Act.

(b) In order to bring home the guilt of the accused, the prosecution has to

first prove the demand of illegal gratification and the subsequent acceptance as a matter of fact. This fact in issue can be proved either by direct evidence which can be in the nature of oral evidence or documentary evidence.

(c) Further, the fact in issue, namely, the proof of demand and acceptance of illegal gratification can also be proved by circumstantial evidence in the absence of direct oral and documentary evidence.

(d) In order to prove the fact in issue, namely, the demand and acceptance of illegal gratification by the public servant, the following aspects have to be borne in mind:

(i) if there is an **offer to pay by the bribe giver** without there being any demand from the public servant and the latter simply accepts the offer and receives the illegal gratification, it is a **case of acceptance** as per Section 7 of the Act. In such a case, there need not be a prior demand by the public servant.

(ii) On the other hand**, if the public servant makes a demand** and the bribe giver accepts the demand and tenders the demanded gratification which in turn is received by the public servant, it is **a case of obtainment**. In the case of obtainment, the prior demand for illegal gratification emanates from the public servant. This is an offence under Section 13(1)(d)(i) and (ii) of the Act.

(iii) In both cases of (i) and (ii) above, the offer by the bribe giver and the demand by the public servant respectively have to be proved by the prosecution as a fact in issue. In other words, mere acceptance or receipt of an illegal gratification without anything more would not make it an offence under Section 7 or Section 13(1)(d), (i) and (ii) respectively of the Act. Therefore, under Section 7 of the Act, in order to bring home the offence, there must be an offer which emanates from the bribe giver which is accepted by the public servant which would make it an offence. Similarly, a prior demand by the public servant when accepted by the bribe giver and inturn there is a payment made which is received by the public servant, would be an offence of obtainment under Section 13(1)(d) and (i) and (ii) of the Act.

(e) The presumption of fact with regard to the demand and acceptance or obtainment of an illegal gratification may be made by a court of law by way of an inference only when the foundational facts have been proved by relevant oral and documentary evidence and not in the absence thereof. On the basis of the material on record, the Court has the discretion to raise a presumption of fact while considering whether the fact of demand has been proved by the prosecution or not. Of course, a presumption of fact is subject to rebuttal by the accused and in the absence of rebuttal presumption stands.

(f) In the event the complainant turns "hostile', or has died or is unavailable to let in his evidence during trial, demand of illegal gratification can be proved by letting in the evidence of any other witness who can again let in evidence, either orally or by documentary evidence or the prosecution can prove the case by circumstantial evidence. The trial does not abate nor does it result in an order of acquittal of the accused public servant.

(g) In so far as Section 7 of the Act is concerned, on the proof of the facts in issue, Section 20 mandates the court to raise a presumption that the illegal gratification was for the purpose of a motive or reward as mentioned in the said Section. The said presumption has to be raised by the court as a legal presumption or a presumption in law. Of course, the said presumption is also

subject to rebuttal. Section 20 does not apply to Section 13(1)(d)(i) and (ii) of the Act.

(h) We clarify that the presumption in law under Section 20 of the Act is distinct from presumption of fact referred to above in point (e) as the former is a mandatory presumption while the latter is discretionary in nature."

41. The Supreme Court has answered the reference that if in absence of evidence of the complainant (direct/primary/ oral/documentary evidence), it would be permissible to draw an inferential deduction of culpability/guilt of a public servant under Section 7, 13(2)/13(1)(d) of the Act based on other evidence adduced by the prosecution.

42. Considering the evidence on the anvil of the law propounded by the Supreme Court, I am of the view that the prosecution has been able to prove the case of demand, acceptance and recovery of the bribe by the accused-appellant from the complainant. Thus, I find no merit and substance the present appeal, which is hereby **dismissed**. Bail bonds are cancelled and sureties are dischraged.

43. The accused-appellant is directed to surrender before the trail court forthwith to undergo the sentence awarded by the learned trial court. Let the record of the trail court be transmitted back to the trial court.

(Application No.127255 of 2021)

1. The application seeks taking additional evidence under Section 391 Cr.P.C.

2. I find that there is no relation between the cases registered against the accused-appellant in two different police stations under different sections. Therefore, application for taking additional evidence under Section 391 Cr.P.C. is ***rejected***.

(2023) 3 ILRA 678
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.01.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 911 of 2013

Shyam Dev & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Dhirendra Kr. Srivastava, Sri Rama Shanker, Sri Ray Sahab Yadav, Sri Shashi Shankar Tripathi, Sri Surendra Singh

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code, 1860 – Sections 302/34, 498A, 304B & 304 (II)- Murder - Dowry Prohibition Act, 1961 – Section 3/4 - Evidence Act, 1872 - Section 32 - Appeal against conviction - FIR by brother of deceased - In wedding, accused-appellants were given enough dowry and they demanded extra amount and motorcycle - When demand was not fulfilled, the deceased was harassed by the accused - Informant came to know that accused persons had poured kerosene oil on the deceased and tried to set her ablaze – Trial Court framed charges - Prosecution has examined 8 witnesses – Dying Declaration - Death was due to septicemia after 11 days of incident as per the testimony of P.W.1 - (Para 3, 4, 5, 8)

Held: While analysing the dying declaration and the postmortem report, it can't be accepted that it was an accidental death. It was a homicidal death and not accidental death. On scrutiny of the facts and circumstances of the case coupled with the opinion of the Medical Officer and

considering the principle laid down by the Apex Court it would be concluded that the death was not premeditated. 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. Accused are reported to have undergone 12 years of sentence and it will be sufficient punishment. Fine and default sentence are maintained. (Para 11, 12, 16, 21, 23)

Appeal is partly allowed. (E-13)

List of Cases cited:

1. Bengai Mandal @ Begai Mandal Vs St. of Bihar (Criminal Appeal No. 1418 of 2004)

2. Chirra Shivraj Vs St. of Andhra Pradesh (Criminal Appeal No.514 of 2010)

3. Smt. Rama Devi alias Ramakanti Vs St. of U.P. (Criminal Appeal No.1438 of 2010)

4. Smt. Kanti & anr. Vs St. of U.P. (Criminal Appeal No. 2558 of 2011)

5. Govindappa & ors. Vs St. of Karn., (2010) 6 SCC 533

6. Tukaram & ors. Vs St. of Maharashtra, reported in (2011) 4 SCC 250

7. B.N. Kavatakar & anr. Vs St. of Karnataka, reported in 1994 SUPP (1) SCC 304

8. Veeran & ors. Vs St. of M.P. Decided, (2011) 5 SCR 300

9. Mohd. Giasuddin Vs St. of AP, AIR 1977 SC 1926

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

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

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

13. Guru Basavraj vs St. of Karn., (2012) 8 SCC 734

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

15. St. of Punj. Vs Bawa Singh, (2015) 3 SCC 441

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

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Ajit Singh, J.)

1. Heard learned counsel for the appellant and learned A.G.A. for the state.

2. This appeal challenges the judgment and order dated 01.01.2013 passed by Addl. Sessions Judge Court No. 13, Varanasi in Session Trial No. 500 of 2010 (State of U.P. Vs. Shyam Deo and others) convicting the appellants under Section 302 read with Section 34 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC) with life imprisonment and a fine of 5000/- has also been imposed, in default of which the appellants shall have to under go for further three months imprisonment and appellant no.2 has been convicted under Section 498A I.P.C. with three year rigorous imprisonment and a fine of Rs. 2000/- has also been imposed, in default of which the appellant no.2 shall have to go for a term of further two month imprisonment.

3. Brief facts as culled out from the record are that the marriage of the deceased was solemnized with Shyam Deo. The F.I.R. discloses that in the wedding the accused-appellants were given enough dowry but despite that they started harassing deceased and demanded a sum of Rs. 50,000/- and a motorcycle. When the said demand could not be fulfilled, the deceased was harassed by all the accused.

Some person had conveyed to the informant that the accused persons had poured kerosene oil on the deceased and had tried to set her ablaze. On the basis of the complaint of the brother of the deceased, the First Information Report was registered on 20.04.2010. The investigation started for commission for offence under Section 498A and 304B Indian Penal Code read with Section 3/4 of the Dowry Prohibition Act. Investigation culminated into charge-sheet being laid against Shyam Deo (husband of the deceased), Vindhyanchali (Sister-in-law/Jethani) under Sections 498A and 304B of IPC and Section 3/4 of D.P. Act. On these brief facts the prosecution was put into motion.

4. The accused were summoned and charges were framed by learned Additional Sessions Judge under Sections 498A and 304B of IPC and Section 4 of D.P. Act with alternative charges under Section 302 read with Section 34 of IPC. The accused-persons 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-appellants was committed to the Court of Sessions.

5. The Trial started and the prosecution examined 8 witnesses who are as follows:

1	Vinod Sahani	PW1
2	Gudiya	PW2
3	Kuttar Devi	PW3
4	Mratyunjay Singh	PW4
5	Dr. D.K. Singh	PW5
6	Dr. Alok Singh	PW6
7	Dr. D.K. Kashyap	PW7
8	Ramanad Kushwaha	PW8

6. In support of ocular version following documents were filed:

1	Written Report	Ex.Ka.1
2	Dying Declaration	Ex.Ka.2
3	Postmortem Report	Ex.Ka.6
4	Death Certificate	Ex.Ka.4
5	Information after death	Ex. Ka.5
6	Panchayatnama	Ex.Ka.8
7	Site Plan with Index	Ex. Ka.7
8	Charge Sheet	Ex. Ka.9

7. The learned Additional Sessions Judge has convicted the accused-appellants as above.

8. Learned counsel for the appellant has relied on the decisions of Apex Court passed in Criminal Appeal No. 1418 of 2004 **(Bengai Mandal alias Begai Mandal vs. State of Biha)** decided on 11th January, 2010, in Criminal Appeal No.514 of 2010 **(Chirra Shivraj vs. State of Andhra Pradesh)** decided on 26 November, 2010, and decisions of this Court in Criminal Appeal No.1438 of 2010 **(Smt. Rama Devi alias Ramakanti vs. State of U.P.)** decided on 7.10.2014 and Criminal Appeal No. 2558 of 2011 (Smt. Kanti and Another vs. State of U.P.) decided on 1.2.2021 and has contended that there is faulty charge and the charge could not have been re-framed after the examination of witnesses of prosecution side, who did not support the prosecution. This is the contention of the learned counsel for the appellant, and in the alternative, it is submitted that this is a case which does not go beyond Section 304 Part I or Part II of IPC. There was no intention of the accused to do away with the deceased and the death was due to septicemia after 11 days of incident as per

the testimony of P.W.1 also that she died after 11 days of incident.

9. As against this, learned A.G.A. for the State has contended that the dying declaration is believable and, therefore, the learned Judge has not committed any error or there is no error which calls for interference by this Court in this appeal. Moreover, looking to the gruesomeness of the offence and the evidence of prosecution witnesses, this Court should not show any leniency in the matter. It is further submitted by learned A.G.A. that ingredients of Section 300 of IPC are rightly held to be made out by the learned Sessions Judge who has applied the law to the facts in case.

10. We have considered the evidence of witnesses and the Postmortem report which states that the injuries on the body of the deceased would be the cause of death and that it was homicidal death, we concur with the finding of the Court below.

11. Learned counsel for the appellant has submitted that the deceased died due to burn injuries which she sustained accidentally while cooking food. While going through the dying declaration and the postmortem report, we cannot accept the submission of counsel for the accused-appellants that it was an accidental death.

12. Therefore, we are of the considered opinion that the learned Judge has not committed any mistake in relying on the dying declaration. In the light of the decision in **Govindappa and others Vs. State of Karnataka, (2010) 6 SCC 533,** there is no reason for us not to accept the dying declaration and its evidentiary value under Section 32 of Evidence Act, 1872. We are convinced that P.W.3 was also conveyed by the deceased about the incident and, therefore, the contention of the counsel that it was an accidental death arising out of accidental burning during cooking in the house cannot be accepted. We are of the view that it was a homicidal death and not accidental death.

13. This takes us to the next question whether it was a perpetrated murder or would it fall within any of the exceptions to Section 300 of IPC?

14. It would be relevant to refer to Section 299 of the Indian Penal Code, which reads as under:

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

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

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

death is caused is done-	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. It is an admitted position of fact that the death was due to septicemia and had occurred after 11 days of incident. The accused-appellants are husband and sister-in-law (jethani) of the deceased. The accused-appellants are in jail for more than 10 years and they are not arguing for clean acquittal and requesting for lesser sentence. Hence, on overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra,** reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka**, reported in **1994 SUPP (1) SCC 304 & Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300,** we come to the definite conclusion that the death was not premeditated. The precedents discussed by us would permit us to uphold our finding which we conclusively hold that the offence is not punishable under Section 302 of I.P.C. but is culpable homicide not amounting to murder, punishable U/s 304 (Part II) of I.P.C. We are also fortified in our view by the decisions relied upon by learned Counsel for the appellants in **Bengai Mandal alias Begai Mandal vs. State of Biha, Chirra Shivraj vs. State of Andhra Pradesh, Smt. Rama Devi alias Ramakanti vs. State of U.P. &b Smt. Kanti and Another vs. State of U.P. (Supra).**

17. It is now to be seen as to what would be the quantum of sentence. In this regard, we have to analyse the theory of punishment prevailing in India.

18. 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."

19. '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.

20. 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.

21. 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.

22. 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.

23. The accused-appellants are reported to have undergone 12 years of sentence and therefore, we hold that the period undergone will be sufficient punishment. Fine and default sentence are maintained. The accused-appellants be set free forthwith, if not wanted in any other case. He will deposit the fine within four weeks from the date of release and in case fine is not deposited he will be procured to undergo the sentence of default.

24. In view of the above, the appeal is partly allowed. Judgment and order passed by the learned Sessions Judge shall stand modified to the aforesaid extent. Record be sent back to the Trial Court forthwith.

25. Therefore, we convert the sentence of accused appellants from 'life imprisonment' to 10 years' rigorous imprisonment. Fine and default sentence are maintained. If 10 years of incarceration is over. The accused-appellants be set free, if period of sentence and default sentence are over, if not wanted in any other case.

(2023) 3 ILRA 684
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.03.2023

BEFORE

THE HON'BLE MRS. RENU AGARWAL, J.

Criminal Appeal No. 1013 of 2000

Rajendra Prasad @ Gappu ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Ramakant Jaiswal, Amicus Curiae, Gopesh Tripathi

Counsel for the Respondent:
G.A.

Criminal Law- Indian Penal Code, 1860 – Sections 363, 366 & 376 – Rape - Indian Evidence Act, 1872 - 114-A - The Code of Criminal Procedure, 1973 - Sections 164, 313 - on 05.05.1992 accused entered the house of complainant and enticed away her minor daughter - Incident was witnessed by three persons - At the time of incident, the complainant had gone to attend a marriage – Complainant lodged FIR against accused on 12.05.1992 – Trial Court framed charges under aforesaid sections and held that victim was minor on the date of incident and the consent of minor has no effect - Accused enticed the victim for the purpose of marriage and raped her – Impugned order challenged in appeal - Held, no ambiguity and illegality - liable to be confirmed and dismissed. (Para 4, 7, 10, 40)

Held: It was the duty of the Investigating Officer to verify the age of the victim from the school document. If it is not verified then it is fault on behalf of the Investigating Officer for which the age of the victim could not be

disputed. The prosecution case cannot be brushed aside on the lacuna made by the Investigating Officer. The St.ment of the victim was recorded under Section 164 Cr.P.C. on 17.06.1992. But trial court did not discuss the said St.ment in this judgment. No St.ment under Section 164 Cr.P.C. is found on record but it is established law that plethora of judgments of Hon'ble Apex Court held that the St.ment of the victim under Section 164 Cr.P.C. is mere piece of evidence. There is no major contradictions in the St.ment of the victim recorded during the trial and the accused may be convicted on the basis of St.ment of the victim only. The appeal is dismissed. He is directed to surrender before the C.J.M concerned. Personal bond and bail bonds of the accused are cancelled. (Para 30, 35, 36, 42, 43)

The appeal is dismissed. (E-13)

List of Cases cited:

1. XYZ Vs St. of Guj. reported in (2019) 10 SCC 337

2. Javed Vs St. of NCT of Delhi reported in 2022 SCC OnLine Del 4182

3. Ram Bihari Yadav Vs St. of Bihar & ors. reported in MANU/SC/0302/1998

4. Phool Singh Vs The St. of M. P. reported in (2022) 2 SCC 74

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

1. Heard Sri Gopesh Tripathi, learned Amicus Curiae for the appellant and Sri Veer Raghav Chaubey, learned Additional Government Advocate for the State.

2. The instant Criminal Appeal under Section 374 (2) Cr.P.C. has been filed against the judgment and order dated 10.11.2000 passed by the Additional Sessions Judge, Lucknow in Sessions Trial No.460 of 1996 arising out of Case Crime No.234 of 1992, under Sections 363, 366, 376 I.P.C., Police Station Gosaiganj, District Lucknow, whereby the accused-appellant, Rajendra Prasad @ Gappu has been sentenced and convicted under Section 363 I.P.C. to undergo two years' rigorous imprisonment alongwith fine of Rs.1,000/-, under Section 366 I.P.C. to undergo two years' rigorous imprisonment alongwith fine of Rs.1,000/- and under Section 376 I.P.C. to undergo seven years' rigorous imprisonment alongwith fine of Rs.5,000/-. It was further directed in the impugned judgment that in default of payment of fine, the appellant has to undergo six months' additional imprisonment under Section 363 I.P.C., to undergo six months' additional imprisonment under Section 363 I.P.C. and three years' additional imprisonment under Section 376 I.P.C.

3. In the guidelines of Hon'ble Supreme Court, the name of victim is not disclosed. Her name is refereed as letter "X'.

4. The brief facts of the case are that on 05.05.1992 at about 11:00 P.M., accused Rajendra Prasad @ Gappu entered the house of complainant and enticed away her minor daughter, whose date of birth is 20.08.1980. The incident was witnessed by Vinod Kumar, Motilal, Ram Dashrath and Satrughan. When the accused Rajendra Prasad @ Gappu and the victim were inside the house, these witnesses went inside the house of the complainant. At the time of incident, the complainant had gone to Narainpur to attend a marriage. The complainant searched his daughter but she could not be found. The complainant came to know that Rajendra Prasad @ Gappu had kidnapped his daughter.

5. On the basis of written report, First Information Report under Sections 363 and

366 I.P.C. was lodged in the Police Station Gosaiganj, District Lucknow. Chik report was also prepared endorsing G.D. No.27 at about 15:40 hours on 11.05.1992.

6. The investigation was conducted by the Sub Inspector R.D. Singh, who recorded the statement of complainant and victim, visited place of occurrence and prepared site plan thereof. During the investigation, victim was recovered from Kaiserbagh Bus Stand. The Investigating Officer prepared the recovery memo, Ex. Ka-2 and site plan of the place of recovery, Ex. Ka-6 and handed over the victim to her parents. The victim was medically examined by lady doctor, who prepared medical report, Ex. Ka-4 and she was also medically examined for the purpose of determination of age. The X-ray report, Ex. Ka-3 and X-ray plate, material Ex.-1 is on record. It was opined by doctor that the victim was in between 16 to 17 years of age. After the conclusion of investigation, the charge sheet was submitted before the court of competent jurisdiction.

7. The case was committed to the court of sessions where accused appeared and charges were framed against him under Sections 363, 366 and 376 I.P.C. The accused/appellant denied from the charges levelled against him and claimed to be tried.

8. In order to prove its case, the prosecution has presented following witnesses.

"(i) P.W.-1, Munna Lal (Complainant)

(ii) P.W.-2, the Victim.

(iii) P.W.-3, Dr. J.P. Gupta, Radiologist.

(iv) P.W.-4, Dr. Mridula Sharma

(v) P.W.-5, Sub Inspector R.D. Singh.

(vi) P.W.-6, Ram Sumiran.

(vii) P.W.-7, Retired Sub Inspector Dev Nath Dubey."

9. Besides oral evidence, the following documentary evidences were also prepared and proved in the court.

"(i) Ex. Ka-1, Written Report.

(ii) Ex. Ka-2, Recovery Memo.

(iii) Ex. Ka-3, X-ray report.

(iv) Ex. Ka-4, Medical report.

(v) Ex. Ka-5, Site Plan.

(vi) Ex. Ka-6, Site Plan of recovery.

(vii) Ex. Ka-7, Charge sheet.

(viii) Ex. Ka-8, Chik report.

(ix) Ex. Ka-9, Carbon copy of G.D. dated 11.05.1992."

10. The learned trial court heard Government Counsel and learned counsel for the accused and after perusing the record, reached to the conclusion that the victim was minor on the date of incident and the consent of minor has no effect and the accused enticed the victim of minor age for the purpose of marriage and raped her. The trial court also reached to the conclusion that accused was 25 years' of age and found the accused guilty of the alleged offence. Aggrieved with judgment and order dated 10.11.2000, the present appeal is preferred.

11. It is submitted by learned counsel for the appellant that judgment and order passed by the learned trial court is erroneous and against the facts of the case. The victim was 18 years' old at the time of incident and the first information report was lodged with inordinate delay. No eye witness was produced in the court and if

the prosecution story may be assumed to be true, the consent of prosecutrix ought to be inferred from the material available on record. Therefore, it is prayed that the conviction and sentence fixed against the appellant may be set aside.

12. Per contra, learned A.G.A. submitted that according to the first information report, the victim was minor and her date of birth was mentioned in the F.I.R. itself as 20.08.1980 and the incident happened on 05.05.1992. In the light of above facts, the victim was minor and her consent cannot be presumed. The judgment and order of the trial court is in consonance with the evidence produced in the trial court hence the appeal is liable to be rejected.

13. To recapitulate the evidence of the prosecution, P.W.-1 Munna Lal stated that he went to Narainpur in a marriage of his relative alongwith his wife Saraswati Debi and his daughter i.e. the victim and his son i.e. Brij Mohan were at home. His daughter was aged about 12 years' old at the time of incident. Dinesh Chandra Sharma went to inform him about the incident in Narainpur. When he came, his daughter was missing from his house and co-villagers, Vinod Kumar, Motilal, Ram Dashrath and Satrughan had informed him that they had seen the accused, Rajendra Prasad @ Gappu entering his home and they locked the door of *kothari* where there was accused with the victim. The accused, Rajendra Prasad @ Gappu removed one part of the door and took the victim alongwith him from the back side. It is also deposed by the complainant that the victim had taken Rs.3,000/- and jewellery from the house. He searched his daughter in the village but could not ascertain her whereabout. This witness proved written report dated 11.05.1992 and stated on oath that he mentioned the date of birth of his daughter as 20.08.1980. P.W.-1 proved recovery memo of his daughter and identified his signature on it.

14. P.W.-2, the victim deposed that on the date of incident, her parents were gone to attend a marriage. Her brother went to the shop for sleeping. The accused, Rajendra Prasad @ Gappu and Urmila came to her house at about 10:00 P.M. to 11:00 P.M. and knocked the door. The victim had a small shop in her house. The accused Rajendra knocked the door and Urmila was also with him. On hearing the voice of Urmila, she opened the door. The accused Rajendra asked for *pukar* (pan masala). On this, she replied that shop is locked and she could not give *pukar* (pan masala) at this time. Urmila said that they are standing outside, she can give pan masala to them. When she entered the *kothari* (small room) from window, the accused also entered in the *kothari* (small room) and the Urmila shut the door from outside. On hearing hue and cry, the neighbors gathered there and shut the door from outside. The accused, Rajendra Prasad @ Gappu threatened the victim to kill by knife, if she does not accompany him and carried the victim with him. The accused, Rajendra Prasad @ Gappu carried her to Lucknow then Faizabad and kept her in a house for one month. The old land lady provided her food and clothes. The accused committed rape upon her. When she was coming to Lucknow with accused on 10.06.1992, she saw Ram Autar and Puranmasi, who were known to her, she raised alarm then the police personnel arrested the accused at the distance of 10 steps. Recovery memo was prepared and she affixed her thumb impression on it.

15. P.W.-3, Dr. J.P. Gupta who performed X-ray and prepared X-ray report and X-ray plate. Both the papers were proved by him in the court and he determined the age of the victim in between 16 to 17 years.

16. P.W.-4 Dr. Mridula Sharma deposed that she examined the victim on 11.06.1992 at about 12:15 P.M., who was brought by C.P. 2259 Siddheswari Tiwari. No external injuries were found on the person of the victim. According to pathological and radiological report, no opinion about rape could be given. P.W.-4 also proved medical report as Ex. Ka-4.

17. P.W.-5, Sub Inspector R.D. Singh appeared in the court and proved site plan, Ex. Ka-5, recovery memo, Ex. Ka-2, site plan of recovery, Ex. Ka-6 and charge sheet, Ex. Ka-7. He also stated that he produced the victim for recording of the statement under Section 164 Cr.P.C.

18. P.W.-6, Ram Sumiran, the scriber of first information report, who reduced in writing which was stated by the complainant Munna Lal, proved F.I.R. in court that it is his hand writing.

19. P.W.-7, Sub Inspector Dev Nath Dubey is a formal witness, who proved the chik report no.143 dated 11.05.1992, Ex. Ka-8 and G.D., Ex. Ka-9.

20. After the conclusion of prosecution evidence, the statement of accused was recorded under Section 313 Cr.P.C. wherein accused stated that he has been falsely implicated in the case. He had a dispute with complainant Munna on account of reaping water chestnut (singhada) and, therefore, he is falsely roped in the case. The appellant adduced two witnesses in defence i.e. D.W.-1, Urmila and D.W.-2, Ram Autar:-

"D.W.-1, Urmila stated that she knew that victim had fled away with accused but she was at her home because she had delivered a child two days prior to the date of incident.

D.W.-2, Ram Autar stated that he was not present at the time of occurrence. The Sub Inspector obtained his thumb impression on a plain paper."

21. From the perusal of record, it is evident that the incident occurred on 05.05.1992, however, first information report was lodged on 12.05.1992 with the delay of five days. The distance of police station is 7 km. West to the place of occurrence.

22. Learned counsel for the appellant argued that the F.I.R. is lodged with inordinate delay of five days but the delay is explained in the F.I.R. itself by the complainant and it is mentioned in the F.I.R. that he searched his daughter in village, when he could not find out his daughter then the F.I.R. was lodged in the police station. Therefore, the delay in F.I.R. has no effect on the truthfullness of the F.I.R.

23. It is also pertinent to mention here that on 10.06.1992, the victim was recovered when she was coming with accused appellant on rickshaw. Recovery memo is on record as Ex. Ka-2, which is signed by accused, Rajendra Prasad @ Gappu also. Therefore, it is undisputed fact that the accused enticed away the victim with him and she remained in the custody of Rajendra Prasad @ Gappu during this period till she was recovered from the possession of accused.

24. Learned counsel for the appellant has submitted that no external or internal injury was found on the person of the victim. P.W.-4, Dr. Mridula Sharma stated on oath that there are no external fresh injury on any part of the victim. Hymen was torn and healed and according to pathological report, no opinion of rape was given by the doctor but P.W.-2, the victim herself corroborated prosecution version that the accused carried her to Lucknow and, thereafter, Faizabad by bus. She explained that she did not raise alarm as accused threatened her to kill. She has also stated that if Urmila had not knocked her house, she would not have opened door. Witness in so many words stated that accused raped her against her consent, on her statement, on page no.8, she stated that she used force to refrain the accused from committing rape with her. She could not escape from the room as accused always locked that room. Therefore, there is no question of consent from the side of victim.

25. Section 114-A of the Indian Evidence Act, 1872 is being quoted hereunder:-

*"**114A**. Presumption as to absence of consent in certain prosecutions for rape.--In a prosecution for rape under clause*

(a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of section 376 of the Indian Penal Code, (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.]"

26. Hon'ble Supreme Court in the case of ***XYZ Vs. State of Gujarat*** reported in ***(2019) 10 SCC 337*** has held in para 15 as under:-

"During the course of hearing, learned counsel for the appellant, brought to our notice provision/Section 114-A of the Indian Evidence Act, 1872. Section 114-A of the Indian Evidence Act, 1872 deals with the presumption as to absence of consent in certain prosecution for rape. A reading of the aforesaid Section makes it clear that, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped, and such woman states in her evidence before the Court that she did not consent, the court shall presume that she did not consent."

27. Further, Hon'ble Supreme Court in the case of ***Javed Vs. State of NCT of Delhi*** reported in ***2022 SCC OnLine Del 4182*** has held in para 7 as under:-

"The consent of the minor at the age of 16 years, specially, when the applicant was 23 years old and already married also disentitles the applicant for grant of bail. Consent of a minor is no consent in the eyes of law."

28. It is submitted by the learned A.G.A. that the victim was 12 years' of age, therefore, the consent of minor has no effect.

29. Learned counsel for the appellant submitted that medical age of the victim is found between 16 to 17 years as the epiphysis around knee were partly fused and epiphysis around wrist not fused, therefore, in the opinion of doctor, the age is about 16-17 years.

30. From the perusal of record, it is clear that no proof of age is collected by the

Investigating Officer. However, complainant specifically noted the date of birth of the victim as per school document as 20.06.1980. It was the duty of the Investigating Officer to verify the age of the victim from the school document. If the date of birth is not verified from the school certificate by the Investigating Officer, it is fault on behalf of the Investigating Officer for which the age of the victim could not be disputed. The prosecution case cannot be brushed aside on the lacuna made by the Investigating Officer.

31. Further, in the case of **Ram Bihari Yadav Vs. State of Bihar and Ors.** reported in **MANU/SC/0302/1998,** Hon'ble Supreme Court has held that in a situation of lapses on the part of the Investigating Officer, the prosecution evidence must be looked at de hors such omissions to find out whether the said evidence is reliable or not.

"In such cases, the story of the prosecution will have to be examined de hors such ommissions and contaminated conduct of the officials otherwise the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and this would obviously shake the confidence of the people not merely in the law enforcing agency but also in the administration of justice."

32. It is well established law that where there is specific proof of age from educational document then the opinion of doctor could not be taken into account. However, learned counsel for the appellant stated that this law has been incorporated vide amendment in Juvenile Justice Act, 2013. Before this amendment, the medical evidence was admissible as proof of age. It is assumed that medical evidence is admissible then too, the medical age is merely opinion and the medical opinion is based on guess work. The complainant had given specific date of birth in the first information report itself. It is evident from the date of birth that victim was 12 years old at the time of incident.

33. Learned counsel for the appellant argues that it is stated by P.W.-3 in his cross-examination that "the age of the victim can neither be determined as 15 years nor 18 years", therefore, age of victim cannot be less than 15 years and the age of the victim as mentioned by the prosecution is not reliable.

34. Again at the cost of reiteration that the medical opinion is just an opinion which cannot substitute the date of birth mentioned in F.I.R. as well as proved by complainant who is the father of victim. Prosecution has discharged its burden regarding age of victim. No evidence is led by accused in defence to contradict the age of victim proved by the prosecution.

35. It is also contended by learned counsel for the appellant that the statement of the victim recorded under Section 164 were not found on record. However, the statement of victim was recorded as such. It is true that the statement of the victim was recorded under Section 164 Cr.P.C. on 17.06.1992. But learned trial court did not discuss the statement recorded under Section 164 Cr.P.C. in this judgment. No statement under Section 164 Cr.P.C. is found on record but it is established law that plethora of judgments of Hon'ble Apex Court held that the statement of the victim under Section 164 Cr.P.C. is mere piece of evidence. The evidentiary value of statement of the victim recorded under

Section 164 Cr.P.C. is to corroborate or to contradict the prosecution version. The victim had corroborated the prosecution version in her statement recorded on oath before P.O. during the trial. Therefore, if the statement of victim under Section 164 Cr.P.C. are not discussed in the judgment, it do not render statement of victim recorded in court false and unreliable.

36. There is no major contradictions in the statement of the victim recorded during the trial and statement inspired confidence to the level that the accused may be convicted on the basis of statement of the victim only.

37. The relevant paras of **Phool Singh Vs. The State of Madhya Pradesh** reported in **(2022) 2 SCC 74,** are being quoted hereunder wherein Hon'ble Supreme Court has opined as under:-

4.1 It is submitted that in the present case both, the learned trial Court as well as the High Court have rightly convicted the accused for the offence under Section 376 IPC, relying upon the sole testimony of the prosecutrix/victim. It is submitted that as such there is no reason to doubt the credibility and trustworthiness of the prosecutrix. It is submitted that even no question was asked to the prosecutrix while cross-examining the prosecutrix that a false case was filed against the accused.

4.2 It is submitted that once it is found that the prosecutrix is reliable and trustworthy, in that case, there can be a conviction for the offence of rape - Section 376 IPC, relying upon the deposition of the sole witness/victim. Reliance is placed on the decisions of this Court in the cases of ***Ganesan v. State, (2020) 10 SCC 573; Santosh Prasad v. State of Bihar, (2020) 3 SCC 443; State of H.P. v. Manga Singh, (2019) 16 SCC 759; and State (NCT of Delhi) v. Pankaj Chaudhary, (2019) 11 SCC 575.***

4.3 It is submitted that in the case of ***Pankaj Chaudhary (supra),*** *it is specifically observed and held by this Court that conviction can be sustained on the sole testimony of the prosecutrix if it inspires confidence and that there is no rule of law or practice that the evidence of the prosecutrix cannot be relied upon without corroboration.*

5.2 In the case of ***Ganesan (supra),*** *this Court has observed and held that there can be a conviction on the sole testimony of the victim/prosecutrix when the deposition of the prosecutrix is found to be trustworthy, unblemished, credible and her evidence is of sterling quality.*

In the aforesaid case, this Court had an occasion to consider the series of judgments of this Court on conviction on the sole evidence of the prosecutrix. In paragraphs 10.1 to 10.3, it is observed and held as under:

10.1. Whether, in the case involving sexual harassment, molestation, etc., can there be conviction on the sole evidence of the prosecutrix, in Vijay ***[Vijay v. State of M.P., (2010) 8 SCC 191],*** *it is observed in paras 9 to 14 as under: (SCC pp. 195-98)*

"9. In State of ***Maharashtra v. Chandraprakash Kewalchand Jain [State of Maharashtra v. Chandraprakash Kewalchand Jain, (1990) 1 SCC 550]*** *this Court held that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Court observed as under:*

"16. A prosecutrix of a sex offence cannot be put on a par with an

accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more.

10. In State of ***U.P. v. Pappu [State of U.P. v. Pappu, (2005) 3 SCC 594]*** *this Court held that even in a case where it is shown that the girl is a girl of easy virtue or a girl habituated to sexual intercourse, it may not be a ground to absolve the accused from the charge of rape. It has to be established that there was consent by her for that particular occasion. Absence of injury on the prosecutrix may not be a factor that leads the court to absolve the accused. This Court further held that there can be conviction on the sole testimony of the prosecutrix and in case, the court is not satisfied with the version of the prosecutrix, it can seek other evidence, direct or circumstantial, by which it may get assurance of her testimony. The Court held as under: (SCC p. 597, para 12).*

12. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would do.'

11. In State of ***Punjab v. Gurmit Singh [State of Punjab v. Gurmit Singh, (1996) 2 SCC 384],*** *this Court held that in cases involving sexual harassment, molestation, etc. the court is duty-bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice.*

12. In State of ***Orissa v. Thakara Besra [State of Orissa v. Thakara Besra, (2002) 9 SCC 86],*** *this Court held that rape is not mere physical assault, rather it often distracts (sic destroys) the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence.*

13. In ***State of H.P. v. Raghubir Singh [State of H.P. v. Raghubir Singh, (1993) 2 SCC 622],*** *this Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an*

order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity. A similar view has been reiterated by this Court in ***Wahid Khan v. State of M.P. [Wahid Khan v. State of M.P., (2010) 2 SCC 9]*** *placing reliance on an earlier judgment* ***in Rameshwar v. State of Rajasthan [Rameshwar v. State of Rajasthan, AIR 1952 SC 54].***

14. Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix."

5.3 In the case of ***Pankaj Chaudhary (supra),*** *it is observed and held that as a general rule, if credible, conviction of accused can be based on sole testimony, without corroboration. It is further observed and held that sole testimony of prosecutrix should not be doubted by court merely on basis of assumptions and surmises. In paragraph 29, it is observed and held as under:*

"29. It is now well-settled principle of law that conviction can be sustained on the sole testimony of the prosecutrix if it inspires confidence ***[Vishnu v. State of Maharashtra [Vishnu v. State of Maharashtra, (2006) 1 SCC 283].*** *It is well-settled by a catena of decisions of this Court that there is no rule of law or practice that the evidence of the prosecutrix cannot be relied upon without corroboration and as such it has been laid down that corroboration is not a sine qua non for conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the "probabilities factor" does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming.* ***[State of Rajasthan v. N.K. [State of Rajasthan v. N.K., (2000) 5 SCC 30]."***

38. Learned counsel for the appellant had drawn attention on the statement of defence witness Urmila as the same lady who is said to have come to knock the door of the victim alongwith accused Rajendra Prasad @ Gappu and she stated on oath that she did not come with Rajendra Prasad @ Gappu as she delivered a child two days back. She is interested witness and to some extent, she assisted the appellant in commission of crime, therefore, the statement of the defence witness Urmila cannot be relied upon. So far as D.W.-2 Ram Autar is concerned, he is the witness of recovery, who affixed his thumb impression on recovery memo. He admitted his signature on recovery memo during trial, but he denied the contents of recovery memo. It is already proved that victim was with accused when she was recovered and recovery memo was signed by accused Rajendra Prasad @ Gappu, therefore recovery memo could not be doubted even though contents are denied by D.W.2 Ram Autar.

39. It is a case of appellant that he had dispute over water chestnuts, which were sown by Munna and reaped by accused appellant unlawfully but there is no F.I.R. regarding the incident. It appears that this was not major incident. In the the entire evidence the prosecution proved the fact that the victim was enticed away by Rajendra Prasad @ Gappu on 05.05.1992

and she was recovered from the possession of accused Rajendra Prasad @ Gappu on 10.06.1992. Recovery memo is signed by accused as well as witnesses, delay is explained, the age of the victim is specifically mentioned in F.I.R. by way of date of birth as well as in the statement of the complainant. The victim is proved minor and her consent has no effect. Moreover, the consent of the victim could not be presumed in favour of the accused. Consent is to be proved by the accused appellant by clear evidence.

40. All the factum have been discussed and dealt by the trial court in its judgment. There is no ambiguity and illegality in the judgment of the trial court and the judgment of the trial court is liable to be confirmed and the appeal is liable to be dismissed.

41. So far as the punishment is concerned, learned trial court has considered the young age of the appellant at the time of passing the order and passed seven years' rigorous imprisonment under Section 376 I.P.C., which is bare minimum punishment prescribed in the case. Learned counsel for the appellant could not show any circumstances to mitigate the sentence awarded by the trial court, therefore, the punishment awarded by trial court is also confirmed.

42. The appeal is **dismissed**. The accused is on bail, he shall surrender before the C.J.M concerned within one month from the date of judgment and shall be sent to jail and serve out the punishment awarded by the trial court.

43. Personal Bond and bail bonds of the accused are cancelled.

44. Let certified copy of this judgment alongwith lower court record be sent to the trial court concerned for necessary information and compliance.

(2023) 3 ILRA 694
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.03.2023

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Criminal Appeal No. 1057 of 2015

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

Counsel for the Appellant:
Purnendu Chakravarty, Ramesh Chandra Pathak

Counsel for the Respondent:
Bireshawr Nath, Shiv P. Shukla

Criminal Law- The Prevention of Corruption Act, 1988-Sections 7, 13(1)(d), 13(2), & Sec 20 - Evidence Act, 1872-Section 3- Accused-Appellant demanded bribe-amount for preparing the TCR and making payment of the work done-Conviction U/s 7 and 13(2) r/w Section 13 (i) (d) P.C Act-Complainant in his evidence fully proved the demand- Evidence of independent shadow witness fully corroborated the testimony of the complainant-Recovery of the tainted-money from drawer of office-table of the accused-appellant creates no doubt- Other evidence, such as wash of hand and cloth turning pink also support the recovery of the "tainted" money-Accused refused to give his voice sample-Chain of events points out towards the guilt of the accused- Prosecution has to first prove the demand of illegal gratification and the subsequent acceptance as a matter of fact, this fact in issue can be proved either by direct evidence which can be in the nature of oral evidence or documentary evidence.

Appeal dismissed. (E-15)

List of Cases cited:

1. Neeraj Dutta Vs St. (Govt. of N.C.T. of Delhi2022 SCC OnLine SC 1724

2. K. Shanthamma Vs St. of Telangana(2022) 4 SCC 574

3. M.K. Harshan Vs St. of Kerala(1996) 11 SCC 720

4. C.M. Girish Babu Vs CBI, Cichin, High Court of Kerala (2009) 3 SCC 779

5. Surajmal Vs St. (Delhi Administration (1979) 4 SCC 725

6. M. Narsinga Rao Vs St. of A.P)(2001) 1 SCC 691

7. St. of Mah.Vs DnyaneshwarLaxman Rao Wankhede (2009) 15 SCC 200

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

1. The present criminal appeal under Section 374(2) CrPC has been filed against the judgment and order dated 31.08.2015 passed by the learned Special Judge, CBI, Court No. 4, Lucknow in Criminal Case No.01 of 2011 (Computerized No.1600001 of 2011) (State through Central Bureau of Investigation, Lucknow Vs. Banshraj), arising out of R. C. No. 0062011A0001/2011, under Sections 7 and 13(2) read with Section 13(i)(d) Prevention of Corruption Act, 1988, (hereinafter referred to as the "PC Act, 1988") Police Station C.B.I./A.C.B., Lucknow by means of which the accused-appellant has been convicted and sentenced as follows:-

i. U/s 7 PC Act, 1988 three years rigorous imprisonment and fine of Rs.30,000/- and, in case of default in deposition of the fine amount, six months additional rigorous imprisonment; and

ii. U/s 13(2) read with Section 13(i)(d) PC Act, 1988 four years rigorous imprisonment and fine of Rs. 40,000/- and in case of default in deposition of the fine amount, one year's additional rigorous imprisonment.

It has also been directed that both the sentences would run concurrently and the period spent in jail shall be adjusted in the sentence awarded.

2. Prosecution case, in FIR, was that accused-appellant, Banshraj, who was posted as Senior Executive Engineer (Electrical & Mechanical) (hereinafter referred to as the "E&M), Kakari Project, National Coal Limited, Sonbhadra, Uttar Pradesh (hereinafter referred to as the "NCL") used to harass complainant, R.K. Mittal by asking for bribe for the work of dismantling and creating HT overhead line.

3. The tender was floated when required at mines in the area of the Kakari Project. The Technical Committee Member was Mr. P. Rai, Chief Engineer (Mines), but in his absence, the accused-appellant, being the Senior Executive Engineer (E&M), acted as Technical Committee Member. The Tender Committee Recommendations (hereinafter referred to as the "TCR") were made by the accused-appellant.

4. Complainant, R.K. Mittal was L-1. The accused-appellant allegedly asked the complainant to bring Rs. 2,600/- otherwise, he would disturb working of the complainant. The accused-appellant allegedly also told the complainant that his Rs.7,000/- was balance for the previous TCR and asked the complainant to bring the previous balance amount of Rs. 7,000/- as well.

5. The complainant gave a complaint to the CBI/ACB on 13.01.2011 in respect of the said demand of bribe by the accused-appellant.

6. After verifying the complaint, the case was registered by the CBI. During pre-trap and post-trap proceedings, the accused-appellant was arrested on 18.01.2011, at around 2 p.m., demanding and accepting Rs.9,600/- from the complainant, which was for making TCR in favour of the complainant and Rs. 20,000/- in respect of the payment made against the bills for the work done by the complainant.

7. After completing investigation, charge-sheet was filed against the accused-appellant under Section 7 and Section 13 (2) read with Section 13(i) (d) PC Act, 1988. The cognizance was taken on the said charge-sheet on 06.05.2011 by the learned trial Court and accused-appellant was summoned to face trial.

8. Charge was framed on 08.07.2011 for the offence under Section 7 read with Sections 13(2) and 13(i)(d) PC Act, 1988.

9. The accused-appellant denied the charge and claimed trial.

10. The prosecution, to prove its case, examined 9 witnesses and proved 20 documents.

11. The accused-appellant, in his defence, examined 5 witnesses.

12. Statement of the accused-appellant was recorded under Section 313 CrPC wherein he had said that the sanction for his prosecution was given without application of mind and, denied that he demanded and accepted any bribe from the complainant. He had also said that pre-trap and post-trap proceedings were illegal and denied the evidence brought on record by the prosecution. He also said that the CBI, after arresting him, got his signatures on post-trap memo (Exhibit Ka-3) and other documents. In respect of recovery of the bribe amount of Rs. 29,600/- from him, the accused-appellant said that it was wrong and when he was going to take lunch by his jeep then the complainant, who met him on the way, said that *"I had kept in the drawer sir"*. Later on, he could realize that the complainant had planted the money and, he was arrested by the CBI after getting off the jeep. No money was recovered from him. After his arrest, signatures of the witnesses were obtained on papers. He denied his signatures on post-trap memo, D-6 (Exhibit Ka-4). The accused-appellant also denied the recovery of the bribe amount from drawer of his office-table by Ram Narain Duble (PW-4) and, also denied the solution turned pink after dipping his fingers. He denied Exhibits Ka-2 to Ka-6 and material exhibits (ME-1 to ME-10). The accused-appellant denied the Memorandum D-12 (Exhibit Ka-20) prepared by Pramod Kumar Singh, PW-3. He said that neither voice recorder of pre-trap and post-trap was produced nor proved in the Court. Neither the TLO nor the CBI had submitted any certificate under Section 65-B of the Evidence Act in respect of the electronic evidence.

13. In his defence, the accused-appellant produced documents and proved the same.

14. Learned trial Court, after analyzing the evidence in detail found the charge proved and held the accused-appellant guilty for the offence under Section 7 read with Sections 13(2) and

13(i)(d) PC Act, 1988 and convicted and sentenced him, as mentioned above.

15. On behalf of the accused-appellant, Mr. Purnendu Chakravarti has submitted that the prosecution has failed to prove the demand, acceptance and recovery of the bribe amount from the accused-applicant; it is sine-qua-none to hold an accused guilty for the offence under Section 7 and Section 13(2) read with 13(i)(d) PC Act,1988 to prove the demand, acceptance and recovery of the bribe amount from the accused; the accused-appellant was not in a position to favour the complainant; PW-5, Vasudeo Adya, who was posted as Deputy General Manager (Finance) at NCL Kakari Project, had explained the entire procedure for work contract and, its execution at NCL; PW-5, in his evidence, said that the bills of the complainant, the contractor, was signed on 10.12.2010; Jag Mohan, Fitment In-charge, checked the bills and signed the same; after processing the bills by Jag Mohan, the accused-appellant, having supervisory capacity, also checked and signed the bills on 10.12.2010; this PW-5 had proved the Document No. 15 (Work Order allotted to the complainant) and Document No. 14 (Bills submitted by the complainant).

16. On behalf of the accused-applicant, Mr. Chakravarti, learned counsel, has further submitted that D. N. Mandal, DW-2, posted in NCL Kakari Project had proved Document No.A94/4 to A94/25. These documents are in respect of TCR and credentials of M/s Vimal Electrical Works, the proprietorship concern of the complainant. This witness has proved the duty-chart, TCR and credentials, submission of the work order and bills for verification, cancellation and show-cause-notices to M/s Vimal Electrical Works for obtaining work order on the basis of forged documents, debarring and blacklisting of M/s Vimal Electrical Works from getting tender of NCL. DW-3, Ram Niwas Sharma, posted at NCL Kakari Project, in his statement recorded on 13.04.2015, proved the document A94/12 (Exhibit Kha-12, which is order of blacklisting of M/s Vimal Electrical Works. This defence witness had also said that he was present on the site-office on 18.01.2011 and he, along with the accused-appellant, left for taking lunch at 2 p.m. from the site-office. The site-office remained open 24 hours. The accused-appellant went to his jeep and he, accompanied him, towards this witness's motorcycle. The complainant went inside the site-office and came out within five minutes. He had call on his mobile. Thereafter, the complainant came towards the accused-appellant and started talking to him. In the meantime, the CBI officials also arrived and took the accused-appellant to site-office. The said witness had specifically denied any demand and acceptance of any bribe-amount made by the accused-appellant from the complainant.

17. Mr. Chakravarti has drawn attention of this Court to the evidence of Suresh Singh, DW-4, posted at NCL Kakari Project. He was also PW-10 in the list of witnesses filed by the CBI along with the charge-sheet. However, the CBI did not examine the said witness. The said defence witness had explained the events in chronological order which took place on 18.01.2011. He had said that DW-3, Ram Niwas Sharma was present with the accused-appellant outside the site-office during lunch hour. Presence of this witness was testified from the attendance-sheet (Paper No. A94/2). DW-5, Lalji, who was

driver at NCL Kakari Project, also explained chronological events of 18.01.2011. This witness was in the list of prosecution witnesses at serial no. 8 in the charge-sheet, but he was also not examined by the CBI. This witness, in his deposition, had said that on 18.01.2011 he was taking the accused-appellant in the government vehicle for lunch at 2 p.m. to his residence. When the vehicle had moved 14-15 meters then the complainant, along with another person, came there and parked the motorcycle in front of the jeep, and started talking to the accused-appellant and said that *"sir I have kept in the drawer'*. At that time, 4-5 other persons came there and the accused-appellant was taken off the jeep and taken to the site-office. Later on, he could know that these 4-5 persons were from CBI. He denied to have recorded his statement recorded under Section 161 CrPC during investigation. He also said that the CBI had never called him in office of the General Manager for investigation or recorded his statement. He said that only once, he was called in office of the General Manager for identifying the voice. When the voice was played in laptop then this witness told that the voice was not clear and, therefore, he was not in a position to identify the same. He said that though he was working with the accused-appellant, but he could not recognize the voice of the accused-appellant.

18. On behalf of the accused-appellant, Mr. Chakravarti has further submitted that there is material contradictions in the evidence of PW-2 and PW-4, shadow-witness, Ram Narain Duble. PW-2, in his examination, had deposed that he had kept the bribe-amount himself, as directed by the accused-appellant, in the drawer of office-table of the accused-appellant. The accused-appellant closed the drawer of the table from his right-hand. However, PW-4, shadow-witness, in his examination, said that when the accused-appellant was arrested, he came to the site-office and found diary inside the drawer of the office-table and the bribe-amount was kept on the diary and drawer of the table was half-opened. Mr. Chakravarti has also submitted that the accused-appellant was intercepted by the CBI, while he was going to have lunch by his official vehicle. Spontaneous reaction was "*maine koi paise nahi liya hai"*. This spontaneous statement cannot be said to be an afterthought, rather it would show innocence. The manner, in which the car was topped, would create a grave suspicion on conduct of the complainant. If the accused-appellant had accepted the bribe-amount from the complainant then why he would leave the bribe-amount in the drawer that was half-opened, while he was going for lunch. He has, therefore, submitted that the prosecution has failed to prove the case beyond reasonable doubt against the accused-appellant. The conduct of the complainant had not been considered by the trial Court.

19. On the other hand, Mr. Shiv P. Shukla, learned counsel for the respondent - CBI, has submitted that the prosecution has proved the case against the accused-appellant beyond reasonable doubt by leading cogent and credible evidence. It has been further submitted that the demand, acceptance and recovery are fully proved in the present case. Minor contradictions, in the testimony of the witnesses, are embellishment and not material to destroy the present case. The trial Court has considered each & every evidence in detail while convicting the accused-appellant. The prosecution has proved the case beyond reasonable doubt and the judgment

and & order appealed does not suffer from any illegality or perversity, either in appreciation of evidence or in law and, therefore, the appeal, having no merit and substance, is liable to be dismissed.

20. The question, which falls for consideration in this appeal, is that whether the prosecution has been able to prove the demand and acceptance of the bribe-amount by the accused-appellant. Provisions of Sections 7, 13(i)(d) and 13(2) of the PC Act, 1988 which are relevant, are extracted hereunder:-

*"7. **Public servant taking gratification other than legal remuneration in respect of an official act.**--Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than 1[three years] but which may extend to 2[seven years] and shall also be liable to fine.*

Explanations.--(a) "Expecting to be a public servant." If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, be may be guilty of cheating, but he is not guilty of the offence defined in this section.

(b) "Gratification." The word "gratification" is not restricted to pecuniary gratifications or to gratifications estimable in money.

(c) "Legal remuneration." The words "legal remuneration" are not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which he is permitted by the Government or the organisation, which he serves, to accept.

(d) "A motive or reward for doing." A person who receives a gratification as a motive or reward for doing what he does not intend or is not in a position to do, or has not done, comes within this expression.

(e) Where a public servant induces a person erroneously to believe that his influence with the Government has obtained a title for that person and thus induces that person to give the public servant, money or any other gratification as a reward for this service, the public servant has committed an offence under this section.

*"13. **Criminal misconduct by a public servant.--(1) A public servant is said to commit the offence of criminal misconduct,--***

(a).....

(b).....

(c) .....

(d) if he,--

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest.

(e).....

Explanation.--For the purposes of this section, "known sources of income" means income received from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant.

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than 3[four years] but which may extend to 4[ten years] and shall also be liable to fine."

21. Section 20 PC Act, 1988 reads as under:-

"20. Presumption where public servant accepts any undue advantage.-- *Where, in any trial of an offence punishable under section 7 or under section 11, it is proved that a public servant accused of an offence has accepted or obtained or attempted to obtain for himself, or for any other person, any undue advantage from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or attempted to obtain that undue advantage, as a motive or reward under section 7 for performing or to cause performance of a public duty improperly or dishonestly either by himself or by another public servant or, as the case may be, any undue advantage without consideration or for a consideration which he knows to be inadequate under section 11."*

22. Plain words of the Statue would meant that if it can be proved that a public servant has received illegal gratification, Section 20 PC Act,1988 brings a statutory presumption that he has received the same with an illegal motive as laid down in Section 7 PC Act, 1988. This shifts burden of proof upon the accused. He has to discharge the burden that what has been received is for a valuable consideration and not for illegal gratification. The Statute does not provide for 'demand' of illegal gratification to constitute an offence under the PC Act, 1988. It has virtually been inserted into the Statute by the Supreme Court by an interpretative process. In order to bring home the guilt of the accused, the prosecution has to first prove the demand of illegal gratification and the subsequent acceptance as a matter of fact. This fact in issue can be proved either by direct evidence which can be in the nature of oral evidence or documentary evidence.

23. Corruption by a public servant is an offence against the State and the society at large. The Supreme Court in ***2022 SCC OnLine SC 1724 (Neeraj Dutta Vs. State (Govt. of N.C.T. of Delhi)*** has answered the reference that *"whether circumstantial evidence can be used to prove demand of illegal gratification"*. In the said case, the Constitution Bench has held that In the absence of evidence of the complainant (direct/primary, oral/documentary evidence), it is permissible to draw an inferential deduction of culpability/guilt of a public servant under Section 7 and Section 13(1)(d) read with Section 13(2) of the Act based on other evidence adduced by the prosecution. Paragraph-7 of the said judgment would read as under:-

"7. It was further observed with reference to Ram Krishan v. state of Delhi, AIR 1956 SC 476 ("Ram Krishan"), that for

the purpose of Section 13(1)(a) and (b) of the Act:

"It is enough if by abusing his position as a public servant a man obtains for himself any pecuniary advantage, entirely irrespective of motive or reward for showing favour or disfavour."

24. In the event of complainant turns hostile, or dies or is unable to give his evidence during trial, the demand of illegal gratification can be proved by leading evidence of any other witness, who can again lead any evidence, oral or documentary, or prosecution can prove the case by circumstantial evidence. In such a situation, the trial does not abate nor it would result in an order of acquittal of the accused-public servant. The Supreme Court has held in several judgments that offer of the bribe and demand by the public servant have to be proved by the prosecution as a fact in issue. Mere acceptance or receipt of an illegal gratification without anything more would not make it an offence under Section 7 or Section 13 (1)(d), (i) and (ii) respectively of the Act. The proof of demand of bribe by public servant and its acceptance by him is sine-qua-none for establishing the offence under Section 7 PC Act, 1988. The failure of the prosecution to prove the demand or illegal gratification would be fatal and mere recovery of the amount from the accused would not constitute an offence under Section 7 or 13 PC Act, 1988 and it would not entail his conviction thereunder as held in ***(2022) 4 SCC 574 (K. Shanthamma Vs. State of Telangana).***

25. The accused-appellant was posted as Manager (E&M) at NCL Kakari Project, Sonbhadra. The complainant, PW-2 was a contractor in the NCL. He used to take electric contract. Allegedly, the accused-appellant would demand bribe-amount for preparing the TCR and making payment of the work done. PW-2, the complainant, in his evidence, has fully proved the demand of Rs. 2,600/- made by the accused-appellant, which is 1% of the current TCR i.e. Rs.2,67,270/- and Rs.7,000/- in respect of some old TCR and Rs. 20,000/- for the payment made to the complainant for the work done by him. The complainant had withdrawn this amount from his two bank-accounts which fact got proved. The accused-appellant on 18.01.2011, when the complainant reached to office along with shadow witness, Jai Kumar Bansal (PW-7), enquired from the complainant (PW-2) whether the complainant had brought the money, then the complainant said "yes' and on asking by the accused-appellant, he kept Rs. 29,600/-, the bribe-amount, in the drawer of the office-table of the accused-appellant. Evidence of this independent shadow witness had fully corroborated the testimony of the complainant. The recovery of the bribe-amount from drawer of office-table of the accused-appellant creates no doubt. The bribe-amount was recovered by Ram Narain Duble. The other evidence, such as wash of hand and cloth turning pink, also fully support the recovery of the tainted money from the drawer of office-table of the accused-appellant, which was under his control.

26. The accused-appellant refused to give his voice sample for matching the voice recorded in the voice-recorder, which was kept in the pocket of the complainant, PW-2. When the CD was played, the complainant, PW-2 completely recognized his voice and voice of the accused-appellant demanding the bribe-amount. The testimonies of PW-2, PW-4 and PW-7, regarding demand and acceptance of the bribe-amount, had remained intact.

Whether the drawer was completely closed or half opened, would not make much of difference to brings home the charge against the accused-appellant. This Court cannot substitute its reasoning for not taking the bribe-amount home after receiving the same from the complainant, PW-2. Why the accused-appellant did not take the bribe-amount home, it was for him to decide, and the Court absolutely cannot presume the reasoning for such an action by the accused-appellant. However, since the accused-appellant did not take the bribe-amount home that would not falsify the evidence of the complainant and the independent witnesses, including the recovery witness.

27. The conviction of an accused cannot be founded on the basis of inference, but the prosecution has to prove the offence against accused beyond reasonable doubt by leading cogent and credible evidence. In the present case, each link of chain of events points out towards the guilt of the accused-appellant by evidence led in that regard by the prosecution which satisfies that the chain was complete. The Supreme Court in ***(1996) 11 SCC 720 (M.K. Harshan Vs. State of Kerala)*** in somewhat similar circumstances, where the tainted money was kept in the drawer of the accused, who denied the same and said that it was put in the drawer without his knowledge in paragraph-8 has held as under:-

". The plea of the accused is that he was not in the office prior to 4 p.m. and he only entered the office at about 4 p.m. and when he was in his seat, the trap party entered his office and which plea is fairly suggestive that without his knowledge the tainted money must have been put in the drawer of his table. We find some anxiety and an attempt was there on the part of the DSP as well as the other trap witnesses to show that the accused had handled the notes either before they were put into the drawer or thereafter thereby trying to connect him directly with the receipt of the tainted money. Whereas the plea of the accused is that the same has been put in his drawer without his knowledge. PW 1, as mentioned above, deposed that PW 11 asked the accused to touch the currency notes and thereafter his fingers were dipped into the liquid which turned pink. It is significant that PW 8, another Vigilance Officer, who was in the company of PW 11 throughout, deposed that after the necessary signals were given, the trap party proceeded. PW 1 came out, met them and told that the accused had accepted the money and that he had put it in the left top drawer of the table and hearing this the trap party entered the room of the accused. His evidence suggests that PW 1 told him that the accused accepted the money and he himself put the money in the left top drawer of the table. PW 11 also deposed that PW 1 came out and told them that he has given the currency notes to the accused as bribery and it was kept in the left drawer and thereafter the trap party entered the office. These two witnesses also deposed that the accused was asked to dip his right hand in the liquid in the glass and when he did so it became pink in colour. Therefore, according to their versions, as informed by PW 1, the accused himself received the amount and put the same in the drawer and consequently when he dipped his fingers the solution became pink. But the positive case of the prosecution on the other hand as narrated by PW 1 is that the accused never touched the currency notes and it was he who put them in the table drawer. It may be noted that PW 3, a constable, was sent along with PW 1. He was asked to wait

outside and relay the signal. PW 11 admitted in the cross-examination that PW 3 could see what was happening in the office of the accused, but PW 3 does not say anything about having seen anything happening in the office of the accused. He does not even say that when PW 1 went inside with the money, he saw the accused in his seat. In the light of these conflicting versions and suspicious features on this crucial aspect, the plea of the accused that the notes were put in the drawer without his knowledge, does not appear to be improbable. In any event, PW 1's evidence for the above said reasons, does not appear to be wholly reliable. It is in this context the courts have cautioned that as a rule of prudence, some corroboration is necessary. In all such type of cases of bribery, two aspects are important. Firstly, there must be a demand and secondly there must be acceptance in the sense that the accused has obtained the illegal gratification. Mere demand by itself is not sufficient to establish the offence. Therefore, the other aspect, namely, acceptance is very important and when the accused has come forward with a plea that the currency notes were put in the drawer without his knowledge, then there must be clinching evidence to show that it was with the tacit approval of the accused that the money had been put in the drawer as an illegal gratification. Unfortunately, on this aspect in the present case we have no other evidence except that of PW 1. Since PW 1's evidence suffers from infirmities, we sought to find some corroboration but in vain. There is no other witness or any other circumstance which supports the evidence of PW 1 that this tainted money as a bribe was put in the drawer, as directed by the accused. Unless we are satisfied on this aspect, it is difficult to hold that the accused tacitly accepted the illegal gratification or obtained the same within the meaning of Section 5(1)(d) of the Act, particularly when the version of the accused appears to be probable."

28. Here the evidence of PW-2 and PW-4 would suggest that the accused-appellant demanded the bribe-amount and he accepted by asking the complainant to keep it in the drawer of the office-table which the accused-appellant himself opened and, therefore, it is not mere demand, but also acceptance of the bribe-amount by asking the complainant to put the same in the drawer. The evidence of PW-2 does not suffer from any infirmity in this regard.

29. In ***(2009) 3 SCC 779 (C.M. Girish Babu Vs. CBI, Cichin, High Court of Kerala)*** the Supreme Court has held that mere recovery of money from the accused itself is not enough in absence of substantive evidence for demanding and accepting the money. The Supreme Court has held that there was no voluntary acceptance of the money, knowing it to be bribe. The Supreme Court, after analyzing the evidence on record, in paragraphs 18, 19 and 20 of the said judgment has held as under:-

"18. In Suraj Mal v. State (Delhi Admn.) [(1979) 4 SCC 725 : 1980 SCC (Cri) 159] this Court took the view that (at SCC p. 727, para 2) mere recovery of tainted money divorced from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of the prosecution against the accused, in the absence of any evidence

to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe.

19. The learned counsel for CBI submitted that the onus of proof was upon the appellant to explain as to how he came into possession of the amount recovered from him during the trap. The argument of the learned counsel is obviously based on Section 20 of the Prevention of Corruption Act, 1988 which reads as under:

"20. Presumption where public servant accepts gratification other than legal remuneration.--(1) Where, in any trial of an offence punishable under Section 7 or Section 11 or clause (a) or clause (b) of sub-section (1) of Section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in Section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

(2) Where in any trial of an offence punishable under Section 12 or under clause (b) of Section 14, it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in Section 7, or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

(3) Notwithstanding anything contained in sub-sections (1) and (2), the court may decline to draw the presumption referred to in either of the said sub-sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no inference of corruption may fairly be drawn."

20. A three-Judge Bench in M. Narsinga Rao v. State of A.P. [(2001) 1 SCC 691 : 2001 SCC (Cri) 258] while dealing with the contention that it is not enough that some currency notes were handed over to the public servant to make it acceptance of gratification and prosecution has a further duty to prove that what was paid amounted to gratification, observed: (SCC p. 700, para 24)

"24. ... we think it is not necessary to deal with the matter in detail because in a recent decision rendered by us the said aspect has been dealt with at length. (Vide Madhukar Bhaskarrao Joshi v. State of Maharashtra [(2000) 8 SCC 571 : 2001 SCC (Cri) 34] .) The following statement made by us in the said decision would be the answer to the aforesaid contention raised by the learned counsel: (Madhukar case [(2000) 8 SCC 571 : 2001 SCC (Cri) 34] , SCC p. 577, para 12)

"12. The premise to be established on the facts for drawing the presumption is that there was payment or acceptance of gratification. Once the said premise is established the inference to be drawn is that the said gratification was accepted "as motive or reward" for doing or forbearing to do any official act. So the word "gratification" need not be stretched to mean reward because reward is the outcome of the presumption which the court has to draw on the factual premise that there was payment of gratification.

This will again be fortified by looking at the collocation of two expressions adjacent to each other like "gratification or any valuable thing". If acceptance of any valuable thing can help to draw the presumption that it was accepted as motive or reward for doing or forbearing to do an official act, the word "gratification" must be treated in the context to mean any payment for giving satisfaction to the public servant who received it."

30. The said principle is not new one, but a reiteration of the principle enunciated by the Supreme Court in ***(1979) 4 SCC 725 (Surajmal Vs. State (Delhi Administration).***

31. In ***(2001) 1 SCC 691 (M. Narsinga Rao Vs. State of A.P.),*** while dealing with sub-section 1 of Section 20 PC Act, 1988 in respect of presumption where the public servant accepts gratification other than legal remuneration, in paragraphs 14, 15, 16, 17, 18 and 19 it has has held as under:-

"14. When the sub-section deals with legal presumption it is to be understood as in terrorem i.e. in tone of a command that it has to be presumed that the accused accepted the gratification as a motive or reward for doing or forbearing to do any official act etc., if the condition envisaged in the former part of the section is satisfied. The only condition for drawing such a legal presumption under Section 20 is that during trial it should be proved that the accused has accepted or agreed to accept any gratification. The section does not say that the said condition should be satisfied through direct evidence. Its only requirement is that it must be proved that the accused has accepted or agreed to accept gratification. Direct evidence is one of the modes through which a fact can be proved. But that is not the only mode envisaged in the Evidence Act.

15. The word "proof" need be understood in the sense in which it is defined in the Evidence Act because proof depends upon the admissibility of evidence. A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. This is the definition given for the word "proved" in the Evidence Act. What is required is production of such materials on which the court can reasonably act to reach the supposition that a fact exists. Proof of the fact depends upon the degree of probability of its having existed. The standard required for reaching the supposition is that of a prudent man acting in any important matter concerning him. Fletcher Moulton L.J. in Hawkins v. Powells Tillery Steam Coal Co. Ltd. [(1911) 1 KB 988 : 1911 WN 53] observed like this:

"Proof does not mean proof to rigid mathematical demonstration, because that is impossible; it must mean such evidence as would induce a reasonable man to come to a particular conclusion."

16. The said observation has stood the test of time and can now be followed as the standard of proof. In reaching the conclusion the court can use the process of inferences to be drawn from facts produced or proved. Such inferences are akin to presumptions in law. Law gives absolute discretion to the court to presume the existence of any fact which it thinks likely to have happened. In that process the court may have regard to common course of natural events, human conduct, public or private business vis-à-vis the facts of the

particular case. The discretion is clearly envisaged in Section 114 of the Evidence Act.

17. Presumption is an inference of a certain fact drawn from other proved facts. While inferring the existence of a fact from another, the court is only applying a process of intelligent reasoning which the mind of a prudent man would do under similar circumstances. Presumption is not the final conclusion to be drawn from other facts. But it could as well be final if it remains undisturbed later. Presumption in law of evidence is a rule indicating the stage of shifting the burden of proof. From a certain fact or facts the court can draw an inference and that would remain until such inference is either disproved or dispelled.

18. For the purpose of reaching one conclusion the court can rely on a factual presumption. Unless the presumption is disproved or dispelled or rebutted, the court can treat the presumption as tantamounting to proof. However, as a caution of prudence we have to observe that it may be unsafe to use that presumption to draw yet another discretionary presumption unless there is a statutory compulsion. This Court has indicated so in Suresh Budharmal Kalani v. State of Maharashtra [(1998) 7 SCC 337 : 1998 SCC (Cri) 1625] : (SCC p. 339, para 5) "A presumption can be drawn only from facts -- and not from other presumptions -- by a process of probable and logical reasoning."

19. Illustration (a) to Section 114 of the Evidence Act says that the court may presume that "a man who is in the possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession". That illustration can profitably be used in the present context as well when prosecution brought reliable materials that the appellant's pocket contained phenolphthalein-smeared currency notes for Rs 500 when he was searched by PW 7 DSP of Anti-Corruption Bureau. That by itself may not or need not necessarily lead to a presumption that he accepted that amount from somebody else because there is a possibility of somebody else either stuffing those currency notes into his pocket or stealthily inserting the same therein. But the other circumstances which have been proved in this case and those preceding and succeeding the searching out of the tainted currency notes, are relevant and useful to help the court to draw a factual presumption that the appellant had willingly received the currency notes.

32. In ***(2009) 15 SCC 200 (State of Maharashtra Vs. Dnyaneshwar Laxman Rao Wankhede),*** the Supreme Court has held that the burden to discharge the presumption is on the accused in respect of money recovered from him other than the legal remuneration, but the prosecution must prove the foundational facts. Paragraph-16 of the said judgment would read as under:-

"16. Indisputably, the demand of illegal gratification is a sine qua non for constitution of an offence under the provisions of the Act. For arriving at the conclusion as to whether all the ingredients of an offence viz. demand, acceptance and recovery of the amount of illegal gratification have been satisfied or not, the court must take into consideration the facts and circumstances brought on the record in their entirety. For the said purpose, indisputably, the presumptive evidence, as is laid down in Section 20 of the Act, must

also be taken into consideration but then in respect thereof, it is trite, the standard of burden of proof on the accused vis-à-vis the standard of burden of proof on the prosecution would differ. Before, however, the accused is called upon to explain as to how the amount in question was found in his possession, the foundational facts must be established by the prosecution. Even 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."

33. Considering the evidence on record, I am of the view that the prosecution has been able to discharge its burden and laid down the foundational facts regarding the charge of the demand and acceptance of bribe-amount by the accused-appellant from the complainant whereas the accused-appellant has not been able to discharge his burden of tainted money found in the drawer of his office table. In view thereof, I find that the appeal has no merit and substance, which is hereby **dismissed**.

34. The accused-appellant is on bail. His bail bonds are cancelled. Sureties are discharged. The accused-appellant is directed to be taken in custody forthwith to undergo the sentence. Let the trial Court record be remitted back to the learned trial Court forthwith.

(2023) 3 ILRA 707
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.03.2023

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Criminal Appeal No. 1588 of 2021
Connected With
Criminal Appeal No. 1761 of 2021 & 1837 of 2021

Indra Pratap Tiwari ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Dhirendra Kumar Mishra, Ishan Baghel, Manoj Kumar Mishra, Salil Kumar Srivastava

Counsel for the Respondent:
G.A., Anuj Pandey, Ashok Pande, Sushil Kumar Singh

Criminal Law-Code of Criminal Procedure,1973- Sections 154, 221 & 223-The Indian Evidence Act, 1872- Section 65-Accused-Appellants taken admission on the basis of forged mark-sheets-Conviction U/s 420, 468 ,471 of IPC-Evidence of the prosecution witnesses had gone un-rebutted - Nothing in their testimony which would suggest that they have any axe to grind against the accused-appellants or they were falsely deposing-No objection regarding the admissibility of the documents were taken during trial and the documents were proved by the witnesses, not open for them to take such objection in the appeal -The accused-appellants are not in a position to say that they were prejudiced in any manner by common FIR, one charge sheet and same charge for all three accused-appellants and one trial-The allegations are identical, witnesses were common, who had proved the documents and deposed in support of the charge. (Para 21, 22, 29, 30, 31)

The Indian Penal Code-1860-Sections 420, 468 & 471- Except technical ground no argument has been advanced that the offences under Sections 468, 471 and 420 IPC are not attracted.

Appeal dismissed. (E-15)

List of Cases cited:

1. Muddasani Venkata Narasaiah (Dead) through Legal Representatives Vs Muddasani Sarojana (2016) 12 SCC 288

2. R.VSE. Venkatachala Gounder Vs Arulmigu Viswesaraswami & VSP. Temple and another, (2003) 8 SCC 752: AIR 2003 SC 4548

3. P.C. Purushotham Reddiar Vs VSS. Perumal (1972) 1 SCC 9: AIR 1972 SC 608

4. Smt. Sudha Agarwal Vs VIth Additional District Judge, Ghaziabad, 2006 (3) ADJ 429

5. Behari Prasad & ors.Vs St. of Bihar (1996) SCC (Cri) 271

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

1. The present three appeals under Section 374(2) Cr.P.C. have been instituted against the common judgement and order dated 18.10.2021 passed by the learned Special Judge (MP/MLA)/Additional Sessions Judge, Court No.3, Faizabad in Special Case No.3012 of 2018 (State Vs. Phool Chandra Yadav and others), arising out of Case Crime No.24 of 1992, Police Station Ram Janam Bhumi, District Faizabad, whereby the learned trial court has convicted and sentenced the accused-appellants as under:-

U/s 420 I.P.C. three years imprisonment and fine of Rs.6,000/- each and in default of payment of fine, eighteen days additional simple imprisonment; and

U/s 468 I.P.C. five years imprisonment and fine of Rs.8,000/- each and in default of payment of fine, twenty days additional simple imprisonment.

U/s 471 I.P.C. two years imprisonment and fine of Rs.5,000/- each and in default of payment of fine, fifteen days additional simple imprisonment.

Facts:-

2. The prosecution case, in brief, is that the Principal of K.S. Saket Postgraduate College, Faizabad, Sri Yaduvansh Ram Tripathi gave a complaint to the Senior Superintendent of Police, Faizabad on 16.2.1992 alleging that in his previous letter dated 14.2.1992 in respect of the accused-appellants, he informed that they had taken admission on the basis of the forged mark-sheets. It was alleged that accused-appellant Phool Chandra Yadav S/o Tilakdhari Yadav had failed in B.Sc Part-I examination in 1986 having Roll No.60999 and despite writing back papers, he could not clear the examination of the B.Sc Part-I and, therefore, he was not eligible to take admission in B.Sc Part-II, but by forging the mark-sheet and fabricating the documents in criminal conspiracy, he had obtained a forged mark-sheet of clearing B.Sc Part-I. Copy of the result of back paper of 1986 examination, of which the accused Phool Chandra Yadav had fabricated his marks to declare himself passed, was also annexed with the letter. On the basis of this forged and fabricated mark-sheet, he got admission in B.Sc Part-II for the academic session 1986-87, and the then Principal of the College had approved the admission form of the said accused-appellant. A copy of the admission form verified by the then Principal of the College was also attached with the said letter.

3. Accused-appellant, Indra Pratap Tiwari had appeared in B.Sc Part-II examination in the year 1990 as ex-student with Roll No.4263. He failed in the said examination. Despite having got failed in B.SC Part-II examination, the accused-appellant, Indra Pratap Tiwari submitted a forged mark-sheet allegedly issued by the

University dated 8.12.1990 and took admission in B.Sc Part-III for the academic session 1990-91. Copy of the said forged mark-sheet was annexed with the letter. He was given a show cause notice by the College, but no reply was given to the said notice and, thereafter, his admission in B.Sc Part-III was cancelled and his election to the post of Secretary of the student union was also declared as illegal. Copy of the said order of cancelling admission in B.Sc Part-III and his election to the post of Secretary of the student union of accused-appellant, Indra Pratap Tiwari was also annexed with the letter of the Principal of the College.

4. In the said letter, it was further alleged that the accused-appellant, Kripa Nidhan Tiwari had given examination of LLB Part-I in the year 1989 with Roll No.51570, but he was unsuccessful. Despite having got failed in LLB Part-I examination, he on the basis of the forged mark-sheet allegedly issued by the University, took admission in LLB Part-II for the academic session 1989-90 on 11.3.1991. Copy of the forged mark-sheet and the admission form were annexed with the letter. When the Principal got to know about this forgery, he gave a show cause notice to Kripa Nidhan Tiwari, but he did not give any reply to the said notice and, thereafter, his admission in LLB Part-II was cancelled.

5. On the basis of the above-mentioned facts, the Principal requested the Senior Superintendent of Police, Faizabad to take appropriate legal action against these three accused-appellants, who had taken admission on the basis of the forged and fabricated mark-sheets/documents and played fraud with the college administration and the University.

6. On this letter, the Senior Superintendent of Police, Faizabad on 18.2.1992 directed the Station House Officer, Police Station Ram Janam Bhumi, Ayodhya to register a case and investigate the offence. In pursuance to the said direction, FIR at Case Crime No.24 of 1992, under Sections 420, 467, 468, 471 IPC against the three accused-appellants came to be registered at Police Station Ram Jhanam Bhumi, Ayodhya.

7. The Investigating Officer after completing the investigation, filed the charge sheet against the three accused-appellants under Sections 468, 471 and 420 IPC on 19.7.1996. After taking cognizance, the accused-appellants were summoned on 4.9.1996. However, the charges could be framed only on 9.12.2019 by the learned Special Judge (MP/MLA), Court No.1, Faizabad, which would read as under :-

"(i) That before 18.2.1992 on different occasions Phool Chandra Yadav despite having got failed in B.Sc Part-I examination in 1986 from K.C. Saket Postgraduate College, Accused Indra Pratap Tiwari having got failed in B.Sc Part-II examination in 1990 and accused Kripa Nidhan Tiwari having got failed in LLB Part-I examination in 1989, by playing fraud, prepared forged mark-sheets to have passed in these examinations. Thus, the said act of the accused is an offence punishable under Section 468 IPC, for which the cognizance has been taken by the court.

(ii) That despite knowing the fact that these mark-sheets were forged, the accused Phool Chandra Yadav, on the basis of the forged mark-sheet, took admission in B.Sc Part-II, Indra Pratap Tiwari in B.Sc Part-III and Kripa Nidhan Tiwari in LLB Part-II and, this act of the

accused-appellants was an offence punishable under Section 471 IPC and the court has taken cognizance for the said offence.

(iii) That on the basis of the forged mark-sheets, the accused-appellants had taken admission in the next class by cheating the college and such offence is punishable under Section 420 IPC, for which the court has taken cognizance."

8. The accused denied the charges and claimed trial.

Evidence:-

9. The prosecution to prove its case, examined three witnesses. P.W.-1 Mahendra Kumar Agarwal, P.W.-2, Ram Bahadur Singh and P.W.-3 Srikant Pathak.

10. P.W.-1 Mahendra Kumar Agarwal in his examination-in-chief said that he was appointed in the college on 1.10.1966. In the year 1992, Sri Yaduvansh Ram Tripathi was the Principal of the K.S. Saket Postgraduate College. At the relevant time, the witness was working as Office Superintendent of the College. The accused-appellant, Kripa Nidhan Tiwari was the student of LLB Part-I and, as per the tabulation register of the college, he could secure only 120 marks in all the seven papers and was failed. Similarly, Accused-appellant, Indra Pratap Tiwari and Phool Chandra Yadav had also failed in B.Sc Part-II and B.Sc Part-I examinations in 1990 and 1986 respectively. He further said that the Investigating Officer came to the college for the purposes of the investigation and he showed him the tabulation register. He also said that he knew the hand writing and signature of the then Principal, Dr. Yaduvansh Ram Tripathi. He proved Paper Nos.4A/6 and 6A/1, 6A/3 and 6A/5 and 6A/7, on which there were signatures of Dr. Yaduvansh Ram Tripathi, the then Principal. These papers were marked as Ext.Ka-1 to Ext. Ka-7. The witness said that all the three accused-appellants had taken admission on the basis of forged mark-sheets in the next class. He further said that the Office Assistant, Guru Charan Yadav working with him, had died. He gave the information to the Investigating Officer on the basis of the tabulation register of the college.

11. P.W.-2, Ram Bahadur Singh in his examination-in-chief said that in the year 1992, he was working as Senior Assistant (Confidential) in Awadh University, Faizabad. Dr. Yaduvansh Ram Tripathi, the then Principal of K.S. Saket Postgraduate College, Faizabad had requested him for furnishing information regarding the results of the examination of the three students, Phool Chandra Yadav, Indra Pratap Tiwari and Kripa Nidhan Tiwari, accused-appellants. He said that after examining the record of the University, he sent verification of the results of the three students. Certified copy of the papers sent by him to the College i.e. 6A/1, 6A/3, 6A/6 and 6A/7 were verified by the witness.

12. P.W.-3, Srikant Pathak in his examination-in-chief said that Head Moharrir Shivaji Mishra was posted with him in Districts Faizabad and Barabanki. He had seen the hand writing and signatures of the Head Moharrir Shivaji and he was fully aware of his hand writing and signature. He further said that Paper Nos.4A/1 and 4A/2 were in the hand writing and signature of Head Moharrir Shivaji Mishra and he verified his signatures. These papers were marked as Ext.Ka-8. He further said that Sub-

Inspector Ram Chandra Singh was posted with him in District Gonda, and he had seen him writing and he knew the signatures of Sri Ram Chandra Singh. He was fully aware of the hand writing and signature. He further said that Paper No.3A/1, Charge Sheet No.11 dated 20.1.1996 was in the hand writing and signature of Sub-Inspector, Ram Chandra Singh and he verified the same and marked as Ext.Ka-9.

13. After the evidence of the prosecution got over, statements of the accused-appellants under Section 313 Cr.P.C. were recorded. They denied the evidence and circumstances against them and said that they had been falsely implicated because of enmity. They were innocent. However, the accused-appellants did not lead any defence evidence oral or documentary.

14. The trial court after analyzing the evidence on record and considering the entire facts and circumstances of the case, convicted and sentenced the accused-appellants as mentioned above.

Submissions:-

15. Sri I.B. Singh, learned Senior Advocate, assisted by Sri Ishan Baghel, Dr. Salil Kumar Srivastava and Sri Diwakar Singh, for the accused-appellants has submitted that a common FIR was lodged in respect of the three different incidents and in respect of the three different accused, and a common charge sheet was filed against the three accused, on which the common charges were framed. He has further submitted that there was no allegation of criminal conspiracy and abetment among the three appellants. Accused-appellants are the three individuals and as per Section 154 Cr.P.C., the FIR should relate to one offence and not many offences, which are not part of the one transaction and not related to each other. It is submitted that under Sections 221 and 223 Cr.P.C. separate charges should be framed against separate persons and the trial should be conducted separately. However, the accused-appellants were tried jointly in violation of the said procedure. It has further been submitted that conviction of the accused-appellants is based upon using the forged mark-sheets to get admission in the next class. Only photocopies of the mark-sheets allegedly forged by the accused-appellants were produced before the trial court. The originals were never produced before the trial court. The documents produced before the trial court were not proved in accordance with the provisions of the Indian Evidence Act. The learned trial court had convicted the accused-appellants on the basis of the secondary evidence in gross violation of Section 65 of the Indian Evidence Act. The accused-appellants had been tried and convicted together in violation of the procedure established by law, which vitiated the entire trial proceedings.

16. On the other hand, Sri U.C. Verma, learned AGA, assisted by Sri Rao Narendra Singh, learned AGA, has submitted that the accused-appellants had never taken objection regarding the admissibility of the documentary evidence, which was produced by the prosecution and proved by the witnesses. No objection whatsoever was taken by the accused-appellants during trial. They have never denied that these were not the mark-sheets and admission forms submitted by them for taking admission in the next class. When the accused-appellants have never denied

the existence of the documents on the basis of which they took admission in the next class, and they never took objection, it is not open for them to take this objection at this stage of the appeal. It is further submitted that the accused-appellants have also not taken any objection in respect of their trial together or lodging of one FIR or framing of common charge for the offence under Sections 468, 471 and 420 IPC.

17. Learned AGA has further submitted that the accused-appellants may be different, but they had committed identical offence by taking admission in the next class on the basis of the forged and fabricated documents and by cheating the College. It is also submitted that three witnesses have fully proved the prosecution case against the accused-appellants. When the accused-appellants had not taken the objection which they are taking here, their objections are to be rejected. It is further submitted that the documents have been duly proved by the witnesses as they knew the authors of the documents. The Principal himself was no more when the trial commenced and other witnesses had also died. It is also submitted that accused-appellant, Indra Pratap Tiwari is a Mafia, gangster and dreaded criminal and his character is also important while deciding the appeal. The prosecution has brought on record the criminal history of the accused-appellant, Indra Pratap Tiwari, which would read as under:-

"1. Case Crime No.258 of 1991, under Sections 1478, 148, 149 and 307 IPC, Police Station Ram Janam Bhumi, Ayodhya;

2. Case Crime No.20 of 1992, under Sections 379, 427, 436, 454, 451, 504 and 186 IPC, Police Station Ram Janam Bhumi, Ayodhya;

3. Case Crime No.24 of 1992, under Sections 420, 467, 468 and 471 IPC, Police Station Ram Janam Bhumi, Ayodhya;

4. Case Crime No.68 of 2012, under Sections 147, 148, 323, 504, 506 and 427 IPC, Police Station Maharajganj, Ayodhya;

5. Case Crime No.1352 of 1991, under Sections 147, 148, 323 and 504 IPC, Police Station Kotwali Nagar, Ayodhya;

6. Case Crime No.397 of 1993, under Sections 147, 148, 149 and 302 IPC, Police Station Kotwali Nagar, Ayodhya;

7. Case Crime No.776 of 1995, under Section 3 Goonda Act, Police Station Kotwali Nagar, Ayodhya;

8. Case Crime No.618 of 1995, under Sections 147, 148, 149 and 307 IPC, Police Station Kotwali Nagar, Ayodhya;

9. Case Crime No.286 of 1997, under Section 302 IPC, Police Station Kotwali Nagar, Ayodhya;

10. Case Crime No.1684 of 1997, under Section 3(1) of U.P. Gangster Act, Police Station Kotwali Nagar, Ayodhya;

11. Case Crime No.771 of 1996, under Sections 392, 411 and 504 IPC, Police Station Kotwali Nagar, Ayodhya;

12. Case Crime No.981 of 1999, under Sections 147, 148, 149, 120-B and 302 IPC, Police Station Kotwali Nagar, Ayodhya;

13. Case Crime No.1150 of 1999, under Sections 504 and 506 IPC, Police Station Kotwali Nagar, Ayodhya;

14. Case Crime No.1593 of 1999, under Section 3(1) of U.P. Gangster Act, Police Station Kotwali Nagar, Ayodhya;

15. Case Crime No.824 of 1997, under Section ¾ Gooda Act, Police Station Kotwali Nagar, Ayodhya;

16. Case Crime No.2157 of 2001, under Sections 143, 504, 427, 386 IPC and

Section 3(1) of U.P. Gangster Act, Police Station Kotwali Nagar, Ayodhya;

17. Case Crime No.2234 of 2001, under Sections 353, 504 and 506 IPC, Police Station Kotwali Nagar, Ayodhya;

18. Case Crime No.814 of 2002, under Sections 147, 323, 386 IPC and Section 3(1) U.P. Gangster Act, Police Station Kotwali Nagar, Ayodhya;

19. Case Crime No.1658 of 2002, under Sections 386, 504 and 506 IPC, Police Station Kotwali Nagar, Ayodhya;

20. Case Crime No.2256 of 2002, under Sections 323 and 506 IPC, Police Station Kotwali Nagar, Ayodhya;

21. Case Crime No.2724 of 2002, under Sections ¾ Goonda Act, Police Station Kotwali Nagar, Ayodhya;

22. Case Crime No.240 of 2005, under Section 298 Nagar Palika Act and Sections 341 and 506 IPC, Police Station Kotwali Nagar, Ayodhya;

23. Case Crime No.220 of 1994, under Sections 147, 148, 149 and 307 IPC, Police Station Kotwali Nagar, Ayodhya;

24. Case Crime No.828 of 1997, under Section ¾ Goonda Act, Police Station Kotwali Nagar, Ayodhya;

25. Case Crime No.417 of 1993, under Sections 307 and 506 IPC, Police Station Kotwali Ayodhya, Ayodhya;

26. Case Crime No.418 of 1993, under Sections 147, 148, 149 and 307 IPC, Police Station Kotwali Ayodhya, Ayodhya;

27. Case Crime No.419 of 1993, under Section 25 Arms Act, Police Station Kotwali Ayodhya, Ayodhya;

28. Case Crime No.6 of 1997, under Sections 147, 148, 149, 120-B and 302 IPC, Police Station Khandasa, Ayodhya;

29. Case Crime No.9 of 1997, under Sections 504 and 506 IPC, Police Station Khandasa, Ayodhya;

30. Case Crime No.19 of 2002, under Sections 110-G Cr.P.C., Police Station Poorakalander, Ayodhya;

31. Case Crime No.431 of 2001, under Section 3(1) U.P. Gangster Act, Police Station Poorakalander, Ayodhya;

32. Case Crime No.131 of 2005, under Sections 147, 148, 308, 323, 504 and 506 IPC and Section 7 Criminal Law Amendment Act, Police Station Poorakalander, Ayodhya;

33. Case Crime No.105 of 1996, under Sections 323, 504 and 506 Police Station Gosainganj, Ayodhya;

34. Case Crime No.387 of 1986, under Sections 324, 323, 504 and 506 IPC, Police Station Gosainganj, Ayodhya; and

35. Case Crime No.620 of 2005, under Sections 147, 323, 504 and 506 IPC, Police Station Gosainganj, Ayodhya."

18. Similarly other two accused-appellants, Phool Chandra Yadav and Kripa Nidhan Tiwari also had some other cases to their credit, which would read as under:-

"1. Case Crime No.16 of 1991, under Sections 323, 504 and 506 IPC, Police Station Ram Janam Bhumi, Ayodhya;

2. 1. Case Crime No.20 of 1992, under Sections 379, 427, 436, 454, 451, 504 and 186 IPC, Police Station Ram Janam Bhumi, Ayodhya; and

3. Case Crime No.24 of 1992, under Sections 420, 467, 468 and 471 IPC, Police Station Ram Janam Bhumi, Ayodhya. And

1. Case Crime No.104 of 1992, under Section 323 IPC and Sections 145 and 146 R.A. Act, Police Station G.R.P. Faizabad, Ayodhya."

19. Except for raising technical grounds, no argument has been advanced that the offences under Sections 468, 471 and 420 IPC are not attracted against the accused-appellants. Therefore, these technical arguments are liable to be rejected.

20. I have considered the arguments advanced by the learned counsel for the parties as well as perused the judgement and order of the learned trial court and the evidence on record.

21. P.W.-1 Mahendra Kumar Agarwal and P.W.-2 Ram Bahadur Singh have proved the forged mark-sheets and admission forms of the accused-appellants, on the basis of which they had taken admission. There is nothing in their testimony which would suggest that they have any axe to grind against the accused-appellants or they were falsely deposing. P.W.-1 Mahendra Kumar Agarwal, who was working as Office Superintendent in the college, had specifically deposed that from the tabulation register of the college and the marks obtained by the students, it was evident the three accused-appellants had failed in B.Sc Part-I, B.Sc Part-II and LLB Part-I respectively. However, they had taken admission in the next class on the basis of the forged and fabricated mark sheets. There is no suggestion put by the defence to the said witness that these accused had not submitted these mark-sheets (forged one) for taking admission in the next class. The evidence of the prosecution witnesses had gone un-rebutted and, this Court finds that their testimony was cogent and credible to bring home the charge against the accused-appellants. When the accused-appellants had not taken any objection with respect to the admissibility of the documents during trial and the documents were proved by the witnesses, at this stage it is not open for them to take such objection in the appeal.

22. The cross-examination of the three witnesses would show that the accused-appellants had not put their version in cross-examination of the witnesses.

Case Laws:-

23. The Supreme Court in the case of ***Muddasani Venkata Narasaiah (Dead) through Legal Representatives Vs. Muddasani Sarojana,*** (2016) 12 SCC 288 has held that the cross-examination is a matter of substance and not of procedure. One is required to put one's own version in cross-examination of opponent. Paragraph 15 of the judgment which is relevant, would read as under:-

*"**15**. Moreover, there was no effective cross-examination made on the plaintiff's witnesses with respect to factum of execution of sale deed, PW 1 and PW 2 have not been cross-examined as to factum of execution of sale deed. The cross-examination is a matter of substance not of procedure one is required to put one's own version in cross-examination of opponent. The effect of non-cross-examination is that the statement of witness has not been disputed. The effect of not cross-examining the witnesses has been considered by this Court in Bhoju Mandal v. Debnath Bhagat [Bhoju Mandal v. Debnath Bhagat, AIR 1963 SC 1906] . This Court repelled a submission on the ground that the same was not put either to the witnesses or suggested before the courts below. Party is required to put his version to the witness. If no such questions are put the Court would presume that the witness account has been accepted as held in Chuni Lal Dwarka*

Nath v. Hartford Fire Insurance Co. Ltd. [Chuni Lal Dwarka Nath v. Hartford Fire Insurance Co. Ltd., 1957 SCC OnLine P&H 177 : AIR 1958 P&H 440]"

24. The Supreme Court in the case of ***R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and another,*** (2003) 8 SCC 752: AIR 2003 SC 4548 in paragraph 20 has held that ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. Once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. Paragraph 20 of the judgment which is relevant, would read as under:-

*"**20**. The learned counsel for the defendant-respondent has relied on Roman Catholic Mission v. State of Madras [AIR 1966 SC 1457] in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to*

hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court.'

25. Similarly, the Supreme Court in the case of ***P.C. Purushotham Reddiar Vs. V.S. Perumal*** (1972) 1 SCC 9: AIR 1972 SC 608 has held that if the documents are marked without any objection, it would not be open to the other party to object their admissibility. Paragraphs 18 and 19 of the said judgment is extracted hereunder:-

*"**18**. Now coming to the question as to the expenditure incurred in connection with those meetings, it is no doubt for the appellant to prove the same. According to the respondent he had not maintained any accounts in connection with his election. The expenditure incurred for his election is specially within the knowledge of the respondent. He has not adduced any evidence in that connection. He has totally denied having held those meetings. That denial for the reasons already mentioned cannot be accepted. Therefore we have now to find out what would have been the reasonable expenditure incurred in connection with those meetings. Even according to the respondent for the seven meetings held by him, he incurred an expenditure of more than Rs 225. That means on an average he had incurred an expense of about Rs 32 per meeting. This is clearly an underestimate. But even if we accept that to be correct, for the four meetings referred to earlier, he would have incurred an expenditure of Rs 128. If this expense is added to the sum of Rs 1886/9 p. referred to earlier, the total expenditure incurred exceeds the prescribed limit of Rs 2000. Hence the respondent is clearly guilty of the corrupt practice mentioned in Section 123(6).*

***19**. Before leaving this case it is necessary to refer to one of the contentions taken by Mr Ramamurthi, learned Counsel for the respondent. He contended that the police reports referred to earlier are inadmissible in evidence as the Head Constables who covered those meetings have not been examined in the case. Those reports were marked without any objection. Hence it is not open to the respondent now to object to their admissibility see Bhagat Ram v. Khatu Ram [AIR 1929 PC 110 : 116 IC 394]."*

26. This Court also in the case of ***Smt. Sudha Agarwal Vs. VIth Additional District Judge, Ghaziabad,*** 2006 (3) ADJ 429 has held that if any party wants to raise an objection in respect of the admissibility of secondary evidence, then such objection should positively be raised at the trial stage so that the other side should have an opportunity to remove the deficiency. Once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit.

27. It is well settled law that non-examination of the Investigating Officer is not fatal to the prosecution case if the prosecution case is otherwise proved by the evidence, and the evidence is in conformity with case made out in the FIR. Mere non-examination of the Investigating Officer, the prosecution case should not fail if it is

otherwise proved by other evidence brought on record.

28. The Supreme Court in the case of ***Behari Prasad and others Vs. State of Bihar*** (1996) SCC (Cri) 271 in paragraphs 21 and 23 held as under:-

*"**21**. After considering the facts and circumstances of the case and the judgments of the learned Additional Sessions Judge and of the High Court and the evidences adduced in the case through which we have been taken by the learned counsel for the parties and considering the submissions made by the learned counsel for the parties, it appears to us that the prosecution case has been proved by the eyewitnesses in this case. Over the shop room, a long-drawn battle was fought by the deceased up to this Court. Ultimately, the delivery of possession of the shop through court was fixed on the date of incident. It was, therefore, quite natural that the said eyewitnesses being close relations of the deceased were present at the place and at the time of the incident. In our view, the learned counsel for the State is also justified that in the facts of the case the presence of the daughter of the accused aged 14 years in the company of elderly relations was also not unusual. Accused 2 to 4 and deceased-accused Rameswar though related to the deceased had been harbouring ill feeling and grudge against the deceased. As a matter of fact, suit for eviction was also filed by the deceased against Rameswar. It was, therefore, quite likely that they took side of Sheoji Prasad in frustrating the execution of the eviction decree against Sheoji Prasad. Although, the accused managed for the time being to frustrate execution of decree through court by influencing the Naib Nazir to accept the case of independent tenancy in favour of a third party on the face value of the statement of such tenant without ascertaining relevant facts and thereby sending him back without executing the decree, the accused were fully aware that the decree for eviction affirmed up to this Court was staring on their face. They were, therefore, quite agitated and it is not at all unlikely that they became revengeful against the decree-holder deceased Ram Babu.*

***23**. It, however, appears to us that the entire case diary should not have been allowed to be exhibited by the learned Additional Sessions Judge. In the facts of the case, it appears to us that the involvement of the accused in committing the murder has been clearly established by the evidences of the eyewitnesses. Such evidences are in conformity with the case made out in FIR and also with the medical evidence. Hence, for non-examination of Investigating Officer, the prosecution case should not fail. We may also indicate here that it will not be correct to contend that if an Investigating Officer is not examined in a case, such case should fail on the ground that the accused were deprived of the opportunity to effectively cross-examine the witnesses for the prosecution and to bring out contradictions in their statements before the police. A case of prejudice likely to be suffered by an accused must depend on the facts of the case and no universal strait-jacket formula should be laid down that non-examination of Investigating Officer per se vitiates a criminal trial. These appeals, therefore, fail and are dismissed. The appellants who have been released on bail should be taken into custody to serve out the sentence."*

Conclusion:-

29. A document in terms of Section 65 of the Indian Evidence Act is to be proved by a person, who is acquainted with the hand writing of the author thereof. P.W.1 Mahendra Kumar Agarwal, P.W.-2 Ram Bahadur Singh and P.W.-3 Srikant Pathak have proved the documents i.e. Paper Nos.4A/6 and 6A/1, 6A/3 and 6A/5 and 6A/6 and 6A/7 as they were acquainted with the hand writing and signatures of the then Principal Yaduvansh Ram Tripathi and the Sub-Inspector Ram Bahadur Singh.

30. In view thereof, I do not find no substance in the submission of learned counsel for the accused-appellants that the documents were not proved in accordance with the provisions of Section 65 of the Indian Evidence Act.

31. The technical objections taken at this stage have no relevance. The accused-appellants have forged their mark-sheets and took admission in the next class knowing it to be forged and thus, they have committed the offences under Sections 420, 468 and 471 IPC. The forgery was done with obvious purposes of utilizing the mark-sheets to secure admission. The accused-appellants are not in a position to say that they were prejudiced in any manner by common FIR, one charge sheet and same charge for all three accused-appellants and one trial. The allegations are identical. Witnesses were common, who had proved the documents and deposed in support of the charge. Therefore, I am of the considered view that technical plea in this regard has no substance and is rejected.

32. Essentially, the offence under Section 468 IPC is the commission of forgery with an intention to use the forged document for the purposes of cheating, whereas the essential ingredients of Section 471 IPC are fraudulently or dishonestly using as genuine any document or electronic record which the accused knows or has reason to believe to be a forged.

33. From the evidence lead by the prosecution, the offences under Sections 420, 468 and 471 IPC are fully made out and proved against the accused-appellants and, the learned trial court has rightly convicted and sentenced the accused-appellants for the aforesaid offences.

34. In view thereof, I find no substance in these appeals, which are hereby ***dismissed***. The accused-appellants are on bail. Their bail bonds are cancelled and sureties are discharged. They shall be taken into custody forthwith to serve out the sentence as awarded by the learned trial court. The trial court record be returned back forthwith.

(2023) 3 ILRA 718
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 14.02.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 2070 of 2021

Najmi Begum ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Nadeem Murtaza, Anjani Kumar Mishra

Counsel for the Respondents:
G.A.

Criminal Law- U.P. Gangster and Anti Social (Prevention of Activities) Act, 1986 – Sections 2/3, 14 (1), 15(1), 15 (2), 16 (1), 17 - Indian Penal Code, 1860 –

Chapters 16, 17 and 22 – FIR dated 01-01-2021 was lodged against the husband of appellant and 2 others – Allegations - accused are involved in anti social activities, on account of fear no one has dare to adduce evidence against them - Immovable properties and automobile vehicles of appellant and her husband were attached - Representations filed – Dismissed – Submission by appellant - District Magistrate has wrongly attached the property, on the wrong presumption that the said properties have been made by involving in anti social activities - Appellant is not named in the F.I.R, she has been implicated for being the wife of accused, whose property has already been released by the court below - Neither Gangster nor she has earned these properties from involving in anti social activities – Held, impugned order is quashed – District Magistrate is directed to release the properties of the appellant. (Para 4, 5, 7, 8, 9, 11, 28, 29)

Held: It is well settled that property being made subject matter of an attachment must have been acquired by a gangster and by commission of an offence triable under the Act. The District Magistrate has to record its satisfaction on this point and is not open to challenge in any appeal. Only a representation is provided for before the District Magistrate under Section 15 and in case he refuses to release the property on such representation, then the person aggrieved has to make a reference to the Court having jurisdiction to try an offence. The Court, under Section 15 (2) has to see whether the property was acquired by a gangster as a result of commission of an offence and has to record his own finding on the basis of the inquiry held by him under Section 16. If the Court finds that the property was not acquired by the gangster, the Court shall order for release of the property. Hence, the enquiry under Section 16, the provisions of Section 14, 15 & 17 was also not followed in accordance with the Act and is hereby quashed. (Paras - 19, 26, 27)

Appeal is allowed. (E-13)

List of Cases cited:

1. Smt. Maina Devi Vs St. of U.P. 2013(83) ACC 902

2. Smt. Shanti Devi wife of Sri Ram Vs St. of U.P. 2007(2) ALJ 483 (All)

3. Rajbir Singh Tyagi Vs St. of U.P. & ors. 2018 SCC Online AII 5986

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

1. Pleadings have already been exchanged between the parties and are on the record. The case is ripe up for final hearing.

2. Heard Sri Nadeem Murtaza, learned counsel for the appellant along with Sri Wali Nawaz Khan and Ms. Snidha Singh and Sri Manoj Singh, learned A.G.A. for the State and perused the material available on record.

3. Perused the lower court record.

4. The present appeal under Section 18 of U.P. Gangster and Anti Social (Prevention of Activities) Act, 1986 (herein after referred to as, 'Gangster Act') has been preferred by the appellant, namely, Najmi Begum against the judgment and order dated 30.10.2021 passed by the court of Special Judge, Gangster Act/Additional Sessions Judge Court No.5, Sitapur in Criminal Misc. Case No. 122 of 2021, Najmi Begum Vs. State, arising out of Case Crime No. 3 of 2021, under Section 2/3 of the Gangster Act, Police Station Kotwali, District Sitapur, whereby the learned trial court has rejected the application under Section 15(1) of Gangster Act moved on behalf of appellant and confirmed the order dated 22.02.2021 passed by the District Magistrate, Sitapur, directing attachment of property of appellant.

5. In Short facts of the case are that initially a first information report dated 01-

01-2021 was lodged by Shri Tej Prakash Singh, Incharge Inspector of Police Station Kotwali, District Sitapur bearing Case Crime No. 0003 of 2021 against the husband of appellant and 2 others alleging therein that accused persons are involved in anti social activities and on account of fear created by them in the locality no one has dare to adduce evidence against them. They are involved in the illegal activities against Chapter 16, 17 and 22 of Indian Penal Code.

6. Learned Counsel Mr. Nadeem Murtaza submits that on implication of husband of the appellant in Case Crime No. 0003 of 2021, under Section 2/3 of U.P. Gangster and Anti Social (Prevention of Activities) Act, registered at Police Station Kotwali, District Sitapur, the husband of the appellant and and co-accused Ahmad Husain @ Chhannu, approached this Hon'ble Court for quashing of FIR and this Hon'ble Court was much pleased to stay the arrest of the husband of the appellant and co-accused Ahmad Husain @ Chhannu in Misc. Bench No. 410 of 2021 vide order dated 08-01-2021.

7. Learned Counsel of the appellant further submitted that in furtherance of the FIR bearing Case Crime No. 003/2021 registered at Police Station Kotwali, District Lucknow, Respondent No. 2 proceeded to exercise his powers under Section 14(1) of the UP. Gangsters and Anti-Social Activities (Prevention) Act, 1986 and passed an order for attaching the immovable properties of, inter alia, the Appellant and her husband on 02.01.2021. Further, another order dated 02.01.2021 was passed by Respondent No. 2, whereby, automobile vehicles of the Appellant and her husband were attached under Section 14(1) of the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986.

8. That being aggrieved of the aforesaid attachment orders dated 02.01.2021 passed by Respondent No.2, representations dated 03.02.2021 and 05.02.2021 were preferred before Respondent No. 2 under Section 15 (1) of the Gangsters Act seeking release of the Appellant's properties from attachment. However, the aforesaid representations were dismissed vide a common order dated 22.02.2021 of Respondent No. 2. While passing the aforesaid order dated 22.02.2021 Respondent No 2 referred the case to the Ld. Gangsters Court under Section 16 (1) of the UP Gangsters and Anti-Social Activities (Prevention) Act, 1986 in respect of properties which were not released by him; and, the Ld. Gangsters Court, thereafter, proceeded to pass the impugned order dated 30.10.2021 in exercise of its powers under Section 17 of the Gangsters Act.

9. That Learned Counsel for the appellant further pointed out that Ld. Court of Special Judge Gangster Act/ Additional Sessions Judge Court No. 5. Sitapur vide its order dated 27/08/2021 was pleased to release the properties of Mujeeb Ahmed (Appellant's husband) which were attached by Respondent No. 2 under Section 14 (1) of the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 in furtherance of the same criminal case, i.e., FIR bearing Case Crime No. 0003/2021 registered at Police Station Kotwali, Dsitrict Sitapur. It was further pointed out that the Appellant's husband (Mujeeb Ahmed) is an accused in the aforesaid FIR but the Appellant is not the accused in the aforesaid F.I.R.

10. Learned Counsel for the appellant further pointed out that State had filed an Appeal under Sec 378(3) Cr.P.C. by means of Government Appeal no. 1000112 of 2021, against the judgement and order dated 27.08.2021 passed by the learned Special Judge, Gangster Act/Additional District and Session Judge, Court No.5, Sitapur in Criminal Misc. Case No. 121 of 2021, Mujeeb Ahmad Vs. State of U.P., under Section 16(2) of U.P. Gangster and Anti-Social Activities (Prevention) Act, 2016 Police Station Kotwali Nagar. District Sitapur, releasing the seized property in favour of the accused husband namely Mujeeb Ahmad. However, the Application for leave to Appeal in Government Appeal no. 1000112 of 2021 was rejected and the appeal was dismissed at the stage of admission itself. vide order dated 14.12.2022.

11. Learned Counsel for the appellant further submits that the District Magistrate has wrongly and incorrectly attached the property and vehicle of the appellant on the wrong presumption that the said properties have been made from the income earned by the appellant involving in anti social activities, whereas the appellant is not named in the F.I.R. she has just been implicated in the present case for being the wife of accused Mujeeb Ahmad, whose property has already been released by the learned court below, appellant is neither Gangsters nor she has earned these properties from involving in anti social activities. It has further been argued that the some of the property and the vehicle in dispute are not existing in the names of appellant, but it has been presumed by the District Magistrate in its order dated 02-01-2021 that the same has been earned by her from involving in anti social activities.

12. Learned Counsel for the appellant further submits that the learned trial court while passing the impugned order, without properly perusing the contents of application and documents annexed with the said application have wrongly and incorrectly rejected the said application by presuming that the property in question have been earned from the income indulging in anti social activities without going through documentary evidence filed on behalf of appellant and wrongly interpreting that appellant has not filed any documents to prove that the said property in question have not been earned from the income indulging in anti social activities.

13. Learned Counsel for the appellant further submits that the learned trial court had erred in law while rejecting the application of appellant for release of property in dispute, learned counsel submits that the appellant had explained the completed details of the property in application, the reference of the same is reproduced herein below :-

I. That plot no. 263, village Saraibhat tehsil Sitapur measuring 0.336 hectares was purchased by the appellant on 06.03.2009 from one Richa manglani in lieu of Rs.1,25,000 by means of registered sell deed it is been pointed out that plot no. 263 village Saraibhat tehsil Sitapur the appellant has alienated some portion by registered sell deed dated 13.07.2011 in favour of her sister- in -law namely Smt. Rizwana does the appellant by means of the instant appeal has sought release of plot no. 263 village Saraibhat tehsil Sitapur only in so far as she owns it.

II. That Plot No. 264, Village Saray Bhat. Tehsil Sitapur admeasuring 0.845 hectares was purchased by the Appellant on 06.03.2009 from one Manik

Kailash Chandra in lieu of Rs. 3,20,000/- by means of a registered sale deed.

III. That Plot No. 265, Village Saray Bhat, Tehsil Sitapur admeasuring 0.312 hectares was purchased by the Appellant on 06.03.2009 from one Manik Kailash Chandra in lieu of Rs. 1,10,000/- by means of a registered sale deed.

IV. That Plot Nos. 263, 264 and 265, Village Saray Bhat, Tehsil Sitapur were purchased by the Appellant on 06.03.2009 by means of registered sale deeds. And, the money which was given in consideration for the aforesaid lands was transferred by the brother in law of the Appellant, namely, Sattar Ali on 04.03.2009. It is further submitted that Rs. 14,00,000/- were transferred to the bank account of the Appellant and the same was used by her to Purchase the aforesaid land. The Appellant has already annexed her bank statement with the memo of the criminal appeal as Annexure No. 12.

V. That Plot Nos 263, 264 and 265, Village Saray Bhat, Tehsil Sitapur are being used by the Appellant to hurt and operate a brick field in the name and style of M/s F.I.T. Brickfield. It is further submitted that M/s FIT. Brickfield has been operating since the year 2009-10. Relevant documents pertaining to the commencement of M/s FIT. Brickfield and other relevant documents which fortify the fact that the same have already been annexed with the memo of criminal appeal as Annexure No. 14

VI. That House No. 447, Batsganj, Sitapur it is submitted that the plot of land on which the aforesaid house is built was purchased by her from her brother in law, namely. Ekhlaak Ahmed for Rs. 1,25,000/- on 16.01.2008 by means of registered sale deed After purchasing the aforesaid land, the Appellant took loan amounting to Rs. 12,00,000/- from the Union Bank of India in year 2009 and started the construction of her house. Later on in the year 2014 and 2017 money amounting to Rs. 20,54,050/-, Rs. 15,00,000/- and Rs.20,00,000/- was taken on loan from State Bank of India for renovation of the house and causing alterations therein. Also, loan was taken by the husband of the Appellant (Mujeeb Ahmed) on Kisan Credit Card amounting to Rs. 13,38,176/- and the same was used for the purpose of renovation and alteration of the aforesaid house. It is further submitted that the Appellant had taken loan amounting to Rs. 68,54,050/- from the banks and used the same for the purpose of renovation and causing alterations in the aforesaid house: thus, the money used in the aforesaid house for the purpose of renovation and causing alterations comes from reasonable, well accounted and lawful sources. The documents pertaining to the aforesaid loans have already been annexed as Annexure No. 17 and 18 to the criminal appeal.

VII. Apart from the above, the Appellant had also borrowed money amounting to Rs 24,00,000/- Rs. 10,00,000/-, Rs. 14,00,000/-, Rs. 4,00,000/- Rs. 5,50,000/- Rs. 4,00,00/- Rs 4,50,000/- Rs. 75,000/- and Rs 2,50,000/- from her brother in law, namely, Sattar All which was transferred in her bank account on 24.10.2013, 28.07.2014, 11.08.2014, 12.08.2014, 05.09.2014. 06.09.2014, 30.09 2014 and 02.02.2015, respectively. In nut-shell, the Appellant had borrowed money amounting to Rs. 69,25,000/- from her brother in law, namely, Sattar All And, the aforesaid money was utilized by the Appellant for doing renovation of the House No. 447, Batsganj, Sitapur and for carrying out alterations in the aforesaid house. The brother in law of the Appellant, namely, Sattar All was an employee of The

Saudi Arabian Oil Company (Saudi Aramco) and worked there till the year 2020, and, his annual salary was US Dollars 109,056,00/- (Rs 80,96,099.33/-). And, therefore, it is submitted that the money which was sent by Sattar Ali to the Appellant and further used for carrying out alterations in the House No. 447. Batsganj Sitapur was earned by legal means. Copies of the bank statement of the Appellant and as well as the documents relating to the pay scale of Sattar Ali (Appellant's brother in law) have been annexed as Annexure No. 19 and 20. respectively, to the memo of criminal appeal.

VIII. With respect to Plot No. 447A, Batsganj, Sitapur it is submitted that the same was purchased by the Appellant through sale deed dated 21.05.2013 from certain persons in lieu of Rs. 1,50,000/-. It is further submitted that certain portion of the same plot was bought by the Appellant's husband and the same has been released by competent court.

IX. With respect to Plot No. 485, Batsganj. Sitapur it is submitted that the same was purchased by the Appellant by one Abdul Salam on 11.05.2013 with her self-earned income.

X. With respect to Car bearing Registration No. U.P. 34 AV 0555 it is submitted that the same been purchased by the Appellant after obtaining loan from State Bank of India of which she is paying Equated Monthly Installments. The documents pertaining to car loan have been annexed as Annexure No. 23 to the memo of criminal appeal.

14. Learned Counsel for the appellant further submits that the order dated 22-02-2021 passed by the District Magistrate Sitapur does not reveal that respondent no.-2 had *"reason of believe"* that the properties in question were acquired by the Appellant as a commission of an offence under the Gangsters Act rather the aforesaid order is passed on mere suspicion, Surmises and conjectures.

15. Shri Manoj Singh, the learned A.G.A. has vehemently argued that the learned trial court has correctly appreciated the material on record before passing the impugned order. The District Magistrate, Sitapur has passed the order dated 02-01-2021 after being fully satisfied that appellant has acquired the properties in question by illegal means involving in anti social activities as prescribed under the Gangster Act, as such there is no illegality, infirmity or perversity in the impugned order. The learned trial court after considering the entire material including the documentary evidence available on record has passed the impugned judgment and order in correct perspectives and it needs no interference.

16. I have heard learned counsel for both the parties and gone through the impugned judgment and order passed by the court below.

17. It seems to be just and expedient to refer to the relevant provisions of the Gangster Act which are as under :-

2. Definitions- *In this Act,- (a) "Code" means the Code of Criminal Procedure, 1973;*

(b) "Gang" means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti-social activities, namely-

(i) offences punishable under Chapter XVI, or Chapter XVII, or Chapter XXII of the Indian Penal Code, or (ii) distilling or manufacturing or storing or transporting or importing or exporting or selling or distributing any liquor, or intoxicating or dangerous drugs, or other intoxicants or narcotics or cultivating any plant, in contravention of any of the provisions of the U.P. Excise Act, 1910 or the Narcotic Drugs and Psychotropic Substances Act, 1985 or any other law for the time being in force, or

(iii) occupying or taking possession of immovable property otherwise than in accordance with law, or setting-up false claims, for title or possession of immovable property whether in himself or any other person, or

(iv) preventing or attempting to prevent any public servant or any witness from discharging his lawful duties, or

(v) offences punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956, or

(vi) offences punishable under Section 3 of the Public Gambling Act, 1867, or

(vii) preventing any person from offering bids in auction lawfully conducted, or tender, lawfully invited, by or on behalf of any Government department, local body or public or private undertaking, for any lease or rights or supply of goods or work to be done, or

(viii) preventing or disturbing the smooth running by any person of his lawful business, profession, trade or employment or any other lawful activity connected therewith, or

(ix) offences punishable under Section 171-E of the Indian Penal Code, or in preventing or obstructing any public election being lawfully held, by physically preventing the voter from exercising his electoral rights, or

(x) inciting others to resort to violence to disturb communal harmony, or

(xi) creating panic, alarm or terror in public, or

(xii) terrorising or assaulting employees or owners or occupiers of public or private undertakings or factories and causing mischief in respect of their properties, or

(xiii) inducing or attempting to induce any person to go to foreign countries on false representation that any employment, trade or profession shall be provided to him in such foreign country, or

(xiv) kidnapping or abducting any person with intent to extort ransom, or (xv) diverting or otherwise preventing any aircraft or public transport vehicle from following its scheduled course;

**(xvi) offences punishable under the Regulation of Money Lending Act, 1976;*

(xvii) illegally transporting and/or smuggling of cattle and indulging in acts in contravention of the provisions in the Prevention of Cow Slaughter Act, 1955 and the Prevention of Cruelty to Animals Act, 1960;

(xviii) human trafficking for purposes of commercial exploitation, bonded labour, child labour, sexual exploitation, organ removing and trafficking, beggary and the like activities;

(xix) offences punishable under the Unlawful Activities (Prevention) Act, 1966;

(xx) printing, transporting and circulating of fake Indian currency notes;

(xxi) involving in production, sale and distribution of spurious drugs;

(xxii) involving in manufacture, sale and transportation of arms and

ammunition in contravention of Sections 5, 7 and 12 of the Arms Act, 1959;

(xxiii) felling or killing for economic gains, smuggling of products in contravention of the Indian Forest Act, 1927 and The Wildlife Protection Act, 1972;

(xxiv) offences punishable under the Entertainment and Betting Tax Act, 1979;

(xvv) indulging in crimes that impact security of State, public order and even tempo of life,"

(c) "gangster" means a member or leader or organiser of a gang and includes any person who abets or assists in the activities of a gang enumerated in clause (b), whether before or after the commission of such activities or harbours any person who has indulged in such activities;

(d) "public servant" means a public servant as defined in Section 21 of the Indian Penal Code or any other law for the time being in force, and includes any person who lawfully assists the police or other authorities of the State, in investigation or prosecution or punishment of an offence punishable under this Act, whether by giving information or evidence relating to such offence or offender or in any other manner;

(e) "member of the family of a public servant" means his parents or spouse and brother, sister, son, daughter, grandson, granddaughter or the spouses of any of them, and includes a person dependent on or residing with the public servant and a person in whose welfare the public servant is interested;

(f) words and phrases used but not defined in this Act and defined in the Code of Criminal Procedure, 1973, or the Indian Penal Code shall have the meanings respectively assigned to them in such Codes.

***3. Penalty**-(1) A gangster, shall be punished with imprisonment of either description for a term which shall not be less than two years and which may extend to ten years and also with fine which shall not be less than five thousand rupees:*

Provided that a gangster who commits an offence against the person of a public servant or the person of a member of the family of a public servant shall be punished with imprisonment of either description for a term which shall not be less than three years and also with fine which shall not be less than five thousand rupees.

(2) Whoever being a public servant renders any illegal help or support in any manner to a gangster, whether before or after the commission of any offence by the gangster (whether by himself or through others) or abstains from taking lawful measures or intentionally avoids to carry out the directions of any Court or of his superior officers, in this respect, shall be punished with imprisonment of either description for a term which may extend to ten years but shall not be less than three years and also with fine.

18. The issue involved in the present case may be resolved with the help of the consideration of provisions of section 14, 15 and 17 of the Gangsters Act, which read 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.*

19. It is now well settled that property being made subject matter of an 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. 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, in that case the person aggrieved has 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.

20. **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 property 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.

21. 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 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 the District Magistrate in its order has not recorded his satisfaction having reason to believe with regard to the property attached that it was acquired by appellants as a result of commission of an offence triable under Gangster Act, even though while deciding the reference under Section 16 of the Act, the court below does not appreciate the evidence and in a mechanical manner passed the impugned order relying upon the observations made by the District Magistrate which is illegal and an unjustified approach.**

22. A coordinate Bench of this Court in the case of **Smt. Maina Devi versus State of U.P. 2013(83) ACC 902** in paras-8, 9 and 10 has been pleased to held as under:-

8. Considering the facts, circumstances of the case, submissions made by the learned Counsel for the appellant and the learned A.G.A. and from the perusal of the record it appears that the issue involved in the present case may be resolved with the help of the consideration of the provisions of section 14, 15 and 17 of the Gangsters Act, which read as under:

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 property shall be made over to the claimant.

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.*

9. In light of above mentioned provisions of the Gangster Act the District Magistrate is empowered to attach movable or immovable properties in possession of any person acquired by a gangster as a result of the commission of an offence triable under this Act. But for exercising such powers there must be the reason to believe to the District Magistrate that such property was acquired by a gangster as a result of the commission of an offence triable under this Act. The words reason to

believe are stronger than the word "satisfied", it must be passed on reasons which are relevant and material. In the present case, from the perusal of the lower Court record it appears that only on the basis of the police report submitted by the officer incharge of P.S. Sarai Lak-hansi, District Mau, the District Magistrate, Mau has attached two houses of the appellant, no material was supplied to the District Magistrate to have a reason to believe that the property in question was acquired by the gangster Raj Bahadur Singh as a result of commission of an offence triable under this Act. It vitiates the subjective satisfaction of the District Magistrate also. The learned District Magistrate was having no material in support of the police report that both the houses of the appellant were acquired by his son Raj Bahadur Singh. The learned District Magistrate rejected the application under section 15 of the Gangsters Act moved by the appellant for releasing the attached houses. The application was moved well within the time, the application was a representation to the District Magistrate, Mau, it was having all the details disclosing the sources by which both the houses were acquired by the appellant. But learned District Magistrate did not consider the sources disclosed by the appellant and rejected the application vide order dated 29.12.2008. The explanation of all the sources by which the appellant acquired the houses has not been properly considered. Therefore, impugned order dated 29.12.2008 has become illegal. The learned Special Judge (Gangsters Act), Azamgarh rejected the application moved by the appellant under section 17 of the Gangsters Act without considering the provisions of the section 14 of the Gangsters Act and the "relevancy of the reasons' recorded by the District Magistrate to believe that both the attached houses were acquired by a gangster Raj Bahadur Singh son of the appellant as a result of commission of an offence triable under this Act. The order dated 17.3.2009 passed by learned Special Judge (Gangsters Act)/Additional Sessions Judge, Azamgarh in Criminal Misc. Application No. 2 of 2009 is also illegal.

10. In view of the above discussion, the order passed by District Magistrate, Mau under section 14(1) of the Gangsters Act attaching two houses of the appellant the order dated 29.12.2008 passed by District Magistrate, Mau by which the application under section 15(1)(2) of the Gangster Act has been rejected and the order dated 17.3.2009 passed by learned Special Judge (Gangster Act), Additional Sessions Judge, Azamgarh in Criminal Misc. Application No. 2 of 2009 are illegal, the same are hereby set aside and the District Magistrate, Mau is hereby directed to release both the houses No. 204-D/8 and 205-D/9 situated in Mohalla Chandmari, Imiliyan, P.S. Sarai Lak-hansi, District Mau in favour of the appellant forthwith.

23. Further, another coordinate Bench of this Court in the case of **Smt. Shanti Devi wife of Sri Ram versus State of U.P. 2007(2) ALJ 483 (All)** in paras-9, 10 and 11 has been pleased to held as under:-

9. The conjoint reading of these sections shows that first it has to be proved that gangster or any person on his behalf is or has been in possession of the property, and such property has been acquired by the commission of any offence triable under this Act, only then the District Magistrate acquires jurisdiction to proceed in the matter and to attach the property. Only when the initial burden is discharged, the onus shifts to the gangster or such person,

to account for the same satisfactorily. But if it is found that the concerned person was not a gangster and did not acquire the property in commission of any offence triable under this Act, it has to be released as provided in Section 17. In other words the initial burden is on the prosecution to show that the concerned person is a gangster and has acquired property on account of his criminal activity as triable under the Act.

10. Therefore, in order to proceed under section 14 there must be materials for objective determination of the District Magistrate that the person is either a member, leader or organiser of a gang and has acquired any property in commission of any offence under the Act. There must be a nexus between his criminal acts as enumerated therein and the property acquired by him. His mere involvement in any offence is not sufficient to attach his property. In other words what is necessary to find is whether, his acquisition of property was a result of commission of any offence enumerated in the Act being a member, leader or organiser of a gang. One might have committed several offences but if the property acquired by him was with the aid of his earning from legal resources no action under Section 14 of the Act can be taken against him.

11. In the case of Badan Singh alias Baddo v. State of U.P., 2002 Cri LJ 1392 : 2001 All LJ 2852 it has been held by this Court that Section 14 of the Act is a harsh provision that affects one's right to property, which is a fundamental right under the Constitution. Therefore, initial burden was upon the State to satisfy the District Magistrate with necessary materials that a gangster acquired the properties as a result of commission of any offence. It has also been held in this case that the Act does not provide that the aggrived person seeking release of the properties from attachment must prove the source of income for acquisition thereof.

24. Further, another coordinate Bench of this Court in the case of ***Rajbir Singh Tyagi Vs State of U.P. and Others 2018 SCC Online AII 5986.*** in paras 16 and 18 has been pleased to held as under:-

" 16. A conjoint reading of the aforesaid two definitions what appears is that for taking action under Section 14 against a person, there must be materials for objective determination of the District Magistrate that he either as a member, leader or organizer of a gang acquired any property as a result of commission of any offence under the Act. There must be nexus between his criminal act and the property acquired by him. His mere involvement in any offence is not sufficient to attach his property. In other words, what is necessary to find is whether his acquisition of property was as a result of commission of any offence enumerated in the Act being a member, leader or organizer of a gang. One might have committed several offences, but if the property acquired by him was with the aid of his earning from legal source, no action under Section 14 of the Act can be taken against him.

18. Section 14 of the Act is a harsh provision that affects one's right to property which is a constitutional right under the Constitution. Therefore, initial burden was upon the State to satisfy the District Magistrate with necessary materials that petitioner Rajbir Singh Tyagi being a gangster acquired the properties as a result of commission of any offence. That was however, not done. So, complaining the attachment order to be illegal, a move was made by the petitioners by filing a

representation for release of the properties. The said prayer was rejected with the observation that the petitioners could not establish the source of income to build the house and acquire the movables. This approach of the District Magistrate, in my opinion, has no sanction under law. The Act does not provide that-aggrieved person seeking release of the properties from attachment must prove the source of income for acquisition thereof. So, on a conspectus of the relevant provisions of the Act, I am of the considered opinion that the order of attachment passed by the District Magistrate, Muzaffar Nagar is illegal, arbitrary and against the weight of the materials on record."

25. Keeping in view the aforesaid settled proposition of law and the judgment 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), and Rajbir Singh Tyagi Vs State of U.P. and Others 2018 SCC Online AII 5986,*** this Court is of the view that the properties in question, which were attached, were acquired by appellant with the aid of her earning from legal resources and not by commission of any offence triable under the Act. As 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. And also the seized property of the husband of the appellant namely Mujeeb Ahmad who is an accused in crime no. 0003 of 2021 was also released in favour of Mujeeb Ahmad by Learned Court below and the present appellant being the wife of co-accused in not even named in the F.I.R. but has only been implicated in the present case just for being the wife of co-accused. And also the impugned order was not passed on reasons which are relevant and material. In the present case from the perusal of the court orders and record it appears that only on the basis of the police report the D.M. has attached the property in question, no material was supplied to the District Magistrate to have reasons to believe that the property in question was acquired by the gangster the present appellant as a result of commission of any offence triable under this Act. It vitiates the subjective satisfaction of the District Magistrate also from the record. It appears that the District Magistrate has no material in support of the police report that the property in question was acquired by the present appellant being gangsters even though the proceedings was not followed as per the provisions of the Act. While passing the impugned orders of attachment the order was passed in mechanical manner without application of mind and is arbitrary. Thus the order passed by learned Special Judge Gangsters Act / Additional Session Judge Court No.-5 Sitapur is also illegal and the same is also liable to be quashed.

26. In view of above facts and circumstances of the case, the impugned judgment and order of the learned court below cannot be said to be passed in correct perspectives as it is not sustainable in the eye of law and requires interference by this court, the prosecution has failed to establish that the provisions of Section 2 and 3 of the Gangster Act is attracted in the case of appellant, and further the appellants' property is also not attached in accordance with law, as the prosecution has failed to establish that the said property and vehicle acquired and owned by the appellant have been earned from the income indulging in anti social activities. The enquiry under

Section 16 was not done in accordance with the Act, the provisions of Section 14, 15 & 17 was also not followed in accordance with the Act, thus the entire proceeding initiated in pursuance thereof is vitiated.

27. Accordingly, the present appeal is **allowed**. The impugned judgment and order dated 30-10-2021 passed by the court of learned Special Judge, Gangster Act/ Additional Sessions Judge, Court No. 5, Sitapur in Criminal Misc. Case No. 122 of 2021, Najmi Begum Vs. State, arising out of Case Crime No. 0003 of 2021, under Section 2/3 of the Gangster Act, Police Station Kotwali, District Sitapur is hereby quashed.

28. Consequently the order dated 22-02-2021 passed by District Magistrate, Sitapur is also **quashed**.

29. The District Magistrate, Sitapur is directed to release the properties of the appellant attached vide order dated 02-01-2021 in favour of appellant, forthwith.

30. No order as to costs.

(2023) 3 ILRA 732
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.02.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 3212 of 2014

Dharmmuni Joshi & Anr.
...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Ramesh Prasad, Sri Birendra Singh, Sri Hafeez Khan, Sri Hans Pratap Singh, Sri Syed Ali Imam

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code, 1860 – Sections 366, 368, 376 – Punishment for Rape - Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3 (2) (v) - The Code of Criminal Procedure, 1973 – Sections 156 (3), 313 – Appeal against conviction - As per FIR - Prosecutrix was given some toxic medicine - both the brothers committed forcible sexual intercourse on her for one year - Sessions Judge framed charges on the accused - Prosecution has examined 7 witnesses – Medical evidence does not support the prosecution version as no internal/external injury was found. (Para 4, 6, 7, 11)

Appeal is allowed. (E-13)

Held: Evidence on record does not highlight the theory of commission of rape on the ground that the prosecutrix belong to a particular community. Neither the FIR nor the oral testimony have suggests the same. In the medical report of the prosecutrix, no injury was found on her private part. There was no forcible sex by the appellants with the prosecutrix. The fact that even after her marriage, she has deserted her three children and she was staying with the accused. Her evidence does not proved that she was forced into any kind of relationship. The impugned judgment and order is set aside. (Para 15, 16, 20, 21)

List of Cases cited:

1. Patan Jamal Vali Vs St. of Andhra Pradesh, 2021 (4) Supreme 16

2. Dinesh @ Buddha Vs St. of Rajasthan, 2006 (2) Supreme 363

3. Kaini Rajan Vs St. Kerala, 2013 0 Supreme (SC) 896

4. Vishnu Vs St. of U.P (Criminal Appeal No. 204 of 2021)

5. Pintu Gupta Vs St. of U.P (Criminal Appeal No.4083 of 2017)

6. Patan Jamal Vali Vs St. of Andhra Pradesh, 2021 SCC OnLine SC 343

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Ajit Singh, J.)

1. Heard Sri Syed Ali Imam, learned counsel for the accused-appellants and learned A.G.A. for the State.

2. Most unfortunate aspect of this litigation is that despite the fact that the incident occurred in the year 2008, the accused are in jail since 07.08.2014.

3. This appeal challenges the judgment and order dated 07.08.2014 passed by Special Judge (SC/ST Act)/Additional Sessions Judge, Banda in Special Criminal Case No.77 & 107 of 2008, under Sections 366, 368, 376 I.P.C. & 3(2)V SC/ST Act (State vs. Dharmmuni Joshi & Balkhandi Giri) wherein the learned Special Judge has convicted & sentenced accused-appellants, Dharmmuni Joshi and Balkhandi Giri, under Section 376 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') read with Section 3 (2) (v) of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as SC/ST Act) and sentenced them to imprisonment for life with fine of Rs.10,000/- each (Default sentence one year). Under Section 368, they were sentenced to ten years' rigorous imprisonment with fine of Rs.5,000/- and, in case of default in payment of fine, further to under go six months simple imprisonment. Accused-appellant, Dharmmuni Joshi was also sentenced under Section 366 of IPC for ten years' rigorous imprisonment with fine of Rs.5,000/- and, in case of default in payment of fine, further to under go six months simple imprisonment.

4. Brief facts as culled out from the F.I.R. are that the prosecutrix was given some medicine which have toxic effect in it and that is how she was lured into following the accused to their home and thereafter, both the brothers committed forcible sexual intercourse on her for one year and after one year she filed an application under Section 156 (3) Cr.P.C. which culminated into investigation having taken place.

5. The Investigating Officer investigated the matter after recording the statements of about five witnesses and prepared a site plan and enquired and filed the supplementary report after collecting the injury report returned the case of the prosecutrix culminated into F.I.R. and the charge sheet was laid against the accused-appellants.

6. The accused was committed to the Court of Sessions as the case was triable by the Court of Session. The learned Sessions Judge framed charges on the accused. The accused pleaded not guilty and wanted to be tried.

7. So as to bring home the charge, the prosecution has examined the following witnesses who are as under :

1	Prosecutrix	PW1

2	Sankar Giri	PW2
3	Bharat Giri	PW3
4	Dr. Smt. Aneeta Sagar	PW4
5	Lalman Verma	PW5
6	Kishan Lal	PW6
7	Vijay Tripathi	PW7

8. In support of ocular version following documents were filed:

1	F.I.R.	Ex.Ka.5
2	Written Report	Ex.Ka.1
3	Injury Report	Ex. Ka.2
4	Supplementary Report	Ex. Ka.3
5	Charge sheet	Ex. Ka. 7
6	Charge-sheet	Ex. Ka. 8
7	Site Plan with Index	Ex. Ka.3A
8	Site Plan with Index	Ex. Ka.4

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

10. As far as commission of offence under Section 3 (2) (v) of SC/ST Act is concerned, it is submitted by learned counsel for the accused-appellants that the offence would not fall within the purview of 3(2) (v) of SC/ST Act as none of the ingredients required for proving that the act was committed because the prosecutrix belong to the said community nor is it proved by cogent evidence that the accused committed the offence (if any) as she belonged to the said community.

11. As far as commission of offence under Section 376 of IPC is concerned, it is submitted by learned counsel for the appellant that the accused has been falsely implicated in the present case. The medical evidence does not support the prosecution version as no internal/external injury was found on person of the prosecutrix. It is further submitted the finding of the Special Judge is based on surmises and conjectures and requires to be upturn. In support of his argument, learned counsel for the appellants has relied on the decisions in **Patan Jamal Vali vs. State of Andhra Pradesh, 2021 (4) Supreme 16, Dinesh @ Buddha vs. State of Rajasthan, 2006 (2) Supreme 363, Kaini Rajan vs. State Kerala, 2013 0 Supreme (SC) 896** and also on the decision of this Court in Criminal Appeal No. 204 of 2021 **(Vishnu vs. State of U.P.)** decided on 28.1.2021 & in Criminal Appeal No.4083 of 2017 **(Pintu Gupta vs. State of U.P.)** decided on 28.7.2022 and has contended that no ingredients of Section (3) (2) (v) of SC/ST Act & Sections 366, 368 and 376 of IPC is made out and, therefore, the conviction is required to be set aside.

12. Per contra, learned A.G.A. for the State has submitted that the conviction of the accused is just and proper as ingredients of offences alleged to have been committed are very much there. It is further submitted by learned A.G.A. the accused-appellants were well aware of the caste of the prosecutrix and only because of her caste the above offence has been committed with her and, therefore, finding of the learned Special Judge is just and proper. The learned A.G.A. has heavily relied on the decision of the Apex Court in the case of **Patan Jamal Vali (Supra).** The accused has also relied on the said judgement.

13. Before we venture upon to discuss the evidence and the arguments advanced by the learned counsel for the parties, it would be pertinent to discuss Section 3 (2) (v) of SC/ST Act and provisions of Section 366, 368 & 375 of IPC which read as under :

"3. Punishments for offences of atrocities.--

(1).....xx.....xx.....

(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,--

(i).....xxx.....

(ii).....xx.....

(iii).....xxx.....

(iv).....xxx.....

(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine."

366. Kidnapping, abducting or inducing woman to compel her mar-riage, 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; 1[and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid].*

368. Wrongfully concealing or keeping in confinement, kidnapped or abducted person.--*Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement.*

[375. Rape.--*A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following de-scriptions:--*

(First) -- Against her will.

(Secondly) --Without her consent.

(Thirdly) -- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly) --With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be law-fully married.

(Fifthly) -- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupe-fying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly) -- With or without her consent, when she is under sixteen years of

age. Explanation.--Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Exception) --Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.]

14. The aforesaid provisions of law would now be seen in view of the ocular version as well as the documentary evidence of the prosecution witnesses.

15. The evidence on record does not highlight the theory of commission of rape on the ground that the prosecutrix belong to a particular community. Neither the F.I.R. nor the oral testimony have been remotely suggests the same. So as to attract the provisions of Section 375 read with Section 376 of IPC and Section 3 (2) (v) of SC/ST Act, ingredients of the said offence has to be proved.

16. In the medical report of the prosecutrix, no injury was found on her private part. Two slides were taken from the discharge of vagina and sent for examination. Pathology report received by the doctor and supplementary report was prepared. In supplementary report, no living or dead spermatozoa was found which shatters the prosecution case with regard to commission of rape. Neither dead nor live spermatozoa was found. She was having fetus of five months.

17. This judgment shows that the learned Sessions Judge has convicted the accused-appellant where there was no evidence for commission of offence under Section 3 (2) (v) of The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Neither the First Information Report nor the oral testimony of prosecution witnesses even remotely suggest that the the above offence was committed on the ground that the prosecutrix belongs to a particular community.

18. The medical report does not show presence of any spermatozoa. No injury was found on her private part. The learned judge, unfortunately, no where has discussed about the ingredients of Section 375 of IPC. The learned Sessions Judge has also gone on the assumption that as she was married lady, there is no necessity of there being any kind of injury sustained by her. The learned Session Judge has considered the fact that spermatozoa may or may not be found. The important aspects are non founding of spermatozoa and non finding of any kind of injuries which would permit us to upturn the judgment of learned Sessions Judge. There is no finding as far as commission of offence under Section 3 (2) (v) of SC/ST Act. Only on the ground that the prosecutrix and her family members belong to a particular community, can it be said that the offence has been committed? The answer is, No. We are also fortified in our view by the decision of the Apex Court in **Patan Jamal Vali vs. State of Andhra Pradesh, 2021 SCC OnLine SC 343,** wherein the Apex Court has held as under :

"58. The issue as to whether the offence was committed against a person on the ground that such person is a member of a SC or ST or such property belongs to such member is to be established by the prosecution on the basis of the evidence at the trial. We agree with the Sessions Judge that the prosecution's case would not fail merely because PW1 did not mention in her statement to the police that the offence was committed against her daughter because

she was a Scheduled Caste woman. However, there is no separate evidence led by the prosecution to show that the accused committed the offence on the basis of the caste identity of PW2. While it would be reasonable to presume that the accused knew the caste of PW2 since village communities are tightly knit and the accused was also an acquaintance of PW2's family, the knowledge by itself cannot be said to be the basis of the commission of offence, having regard to the language of Section 3(2)(v) as it stood at the time when the offence in the present case was committed. As we have discussed above, due to the intersectional nature of oppression PW2 faces, it becomes difficult to establish what led to the commission of offence - whether it was her caste, gender or disability. This highlights the limitation of a provision where causation of a wrongful act arises from a single ground or what we refer to as the single axis model.

59 It is pertinent to mention that Section 3(2)(v) was amended by the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, which came into effect on 26 January 2016. The words "on the ground of" under Section 3(2) (v) have been substituted with "knowing that such person is a member of a Scheduled Caste or Scheduled Tribe". This has decreased the threshold of proving that a crime was committed on the basis of the caste identity to a threshold where mere knowledge is sufficient to sustain a conviction. Section 8 which deals with presumptions as to offences was also amended to include clause (c) to provide that if the accused was acquainted with the victim or his family, the court shall presume that the accused was aware of the caste or tribal identity of the victim unless proved otherwise. The amended Section 8 reads as follows:

"8. Presumption as to offences. - In a prosecution for an offence under this Chapter, if it is proved that

(a) the accused rendered [any financial assistance in relation to the offences committed by a person accused of], or reasonably suspected of, committing, an offence under this Chapter, the Special Court shall presume, unless the contrary is proved, that such person had abetted the offence;

(b) a group of persons committed an offence under this Chapter and if it is proved that the offence committed was a sequel to any existing dispute regarding land or any other matter, it shall be presumed that the offence was committed in furtherance of the common intention or in prosecution of the common object.

[(c) the accused was having personal knowledge of the victim or his family, the Court shall presume that the accused was aware of the caste or tribal identity of the victim, unless the contrary is proved.]"

60 The Parliament Standing Committee Report on Atrocities Against Women and Children has observed that, "high acquittal rate motivates and boosts the confidence of dominant and powerful communities for continued perpetration" and recommends inclusion of provisions of SC & ST Act while registering cases of gendered violence against women from SC & ST communities53. However, as we have noted, one of the ways in which offences against SC & ST women fall through the cracks is due to the evidentiary burden that becomes almost impossible to meet in cases of intersectional oppression. This is especially the case when courts tend to read the requirement of "on the ground" under Section 3(2)(v) as "only on the ground of". The current regime under the SC & ST Act, post the amendment, has facilitated the conduct of an inter-sectional analysis under

the Act by replacing the causation requirement under Section 3(2)(v) of the Act with a knowledge requirement making the regime sensitive to the kind of evidence that is likely to be generated in cases such as these. 61 However, since Section 3(2) (v) was amended and Clause (c) of Section 8 was inserted by Act 1 of 2016 with effect from 26 January 2016 these amendments would not be applicable to the case at hand. The offence in the present case has taken place before the amendment, on 31 March 2011. Therefore, we hold that the evidence in the present case does not establish that the offence in the present case was committed on the ground that such person is a member of a SC or ST. The conviction under Section 3(2)(v) would consequently have to be set aside."

19. Even if, we go by the evidence of PW-1 who was 35 years of age has nowhere in her oral testimony even mentioned that the accused had kept her captive in their house because she belonged to a particular community and hence, the charge itself having not been proved. The accused could not have been convicted for the charges. She does not have caste certificate, which would be be necessary to see by the learned Sessions Judge for invoking Section 3 (2) (v) of the SC/ST Act which is also absent in the judgement. Just because the parents belonged to a particular community and she was earlier married with one Ganga Ram Bajpayee, does not mean that it was proved that the act was committed because she belonged to a particular community. Thus, the conviction under Section 3(2)(v) of SC/ST Act cannot be upheld and is set aside.

20. There is no medical evidence to prove that she was dragged by the accused when she was taken to their home. The judgment cited by the learned counsel for the appellants in **Patan Jamal Vali vs. State of Andhra Pradesh, Dinesh @ Buddha vs. State of Rajasthan, Kaini Rajan vs. State Kerala,** and in **Vishnu (Supra)** would inure for the benefit of the accused. One more aspect is that PW-1, after staying for one year, had gone to the Commissionrate with an advocate, there also she has not raised any hue and cry. It cannot be said that she was confined against her wish. Neither can it be said nor is it proved that there was forcible sex by the appellants herein with the prosecutrix. We are unable to accept the submissions made by learned counsel for the State that this was a case of rape. The ingredients of Sections 366, 368 & 375 of IPC are not proved. The fact that even after her marriage, she has deserted her three children and she was staying with the accused. Her evidence does not proved that she was forced into any kind of relationship.

21. In view of the above, this appeal is allowed. The judgment and order impugned in this appeal is set aside. The accused-appellants are acquitted from the charges levelled against them. The accused are on bail pursuant to the order of this Court dated 10.2.2023. The need not surrender.

22. Record and proceedings be sent back to the Trial Court forthwith.

(2023) 3 ILRA 738
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.02.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 5149 of 2012
Connected With
Jail Appeal No. 5203 of 2012

Mukesh @ Jeet Lal @ Jateye ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Ratnesh Kumar Jaiswal, Sri Shyam Babu Vaish, Sri Chetan Chaterjee (A.C.)

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code, 1860 – Sections 307/34, 504 & 506 - Attempt to murder - The Code of Criminal Procedure, 1973 – Section 313 – Appeal against conviction - As per FIR - on 16.10.2009 the informant, his cousin brother and his uncle had gone to their field for irrigation - About one year ago a exchange of abusive terms took place between the aunt of informant and wife of the accused and due to that reason there was enmity between them - Both the accused persons reached near the field and used filthy language - Accused shot fired on the back of Mahesh - Sessions Judge framed charges - Sentenced to life imprisonment – No independent witness has been examined – Doctor mentioned in his St.ment if proper treatment not been given then it might be fatal. (Para 2, 3, 5, 6, 11)

Held: The trial court has rightly convicted the accused persons as there was trustworthy evidence of PW1 and PW2 against the accused persons, which were fully corroborated by the medical evidence. While determining the quantum of sentence, the court should bear in mind the principle of proportionately. 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. Considering the facts that substantive period already undergone by the appellants and both the appellants are young persons in their mid forties; there is no bread-earner in their families and they have realized the mistake committed by them. (Para 14,18,22)

The appeal is partly allowed. (E-13)

List of Cases cited:

1. Mohd. Giasuddin Vs St. of AP, AIR 1977 SC 1926

2. Sham Sunder Vs Puran, (1990) 4 SCC 731

3. St. of M.P. Vs Najab Khan, (2013) 9 SCC 509

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

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

6. Deo Narain Mandal Vs St. of UP (2004) 7 SCC 257

7. Shyam Narain Vs St. (NCT of delhi), (2013) 7 SCC 77

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

9. St. of Punj. Vs Bawa Singh, (2015) 3 SCC 441

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

11. Kokaiyabai Yadav Vs St. of Chhattisgarh(2017) 13 SCC 449

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

13. Jameel Vs St. of UP (2010) 12 SCC 532

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

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

16. St. of Punj. Vs Bawa Singh, (2015) 3 SCC 441

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

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

1. Heard Sri Chetan Chaterjee and Miss Nishi Mehrotra, learned Amicus Curiae for the appellants-accused, learned A.G.A. appearing on behalf of the State and perused the record.

2. This criminal appeal has been preferred against the judgment and order 22.10.2012 passed by Special Judge (E.C. Act), Mirzapur in Sessions Trial No. 14 of 2010 (State vs. Hari Narayan and others), arising out of Case Crime No. 1096 of 2009, whereby the appellants have been convicted and sentenced under section 307/34 IPC for life imprisonment and fine of Rs. 3000/- and in default of payment of fine the accused shall undergo one year additional imprisonment, one year R.I. Each under section 504 I.P.C. and fine of Rs. 1000/- each and in default of payment of fine accused shall further undergo three months R.I., 4 years months R.I. under section 506 I.P.C. and a fine of Rs. 2,000/- each and in default of payment of fine the accused shall further undergo eight months additional R.I. All the sentences shall run concurrently.

3. The FIR of this incident was lodged by Hari Kumar Gaur, informant on 16.10.2009 at Police Station Chunar, District-Mirzapur and it was mentioned in the FIR that on 16.10.2009 at about 8:30 p.m, the informant his cousin brother Yogesh Kumar and his uncle Sadanand Gaur had gone to their field for irrigation. At about 9:16 p.m. accused Hari Narain @ Devganda @ Jhinguri son of Shyama Bind, who used to work as labour, was residing at his in-laws house along with his wife and kids. About one year ago a slanging match (exchange of) abusive terms. took place between the aunt of the informant and the wife of the accused Hari Narain @ Devganda @ Jhinguri and due to that reason there was enmity between them. The accused threatened with dire consequences but the informant did not take it seriously. The other accused Mukesh used to come to village-Deogauda, that's why he was known to the informant. At about 9:15 p.m. both the accused persons reached near the field on their motorcycle. Upon seeing the brother of the informant, both the accused used filthy language and at that point of time the accused Mukesh put off his pistol and as an when brother of the informant Mahesh tried to run away, the accused Hari Narain @ Devganda @ Jhinguri shot fired on the back of Mahesh. We were afraid and ran away towards the field. Mahesh fell on the ground. After attacking Mahesh both the accused fled away from the scene on their motorcycle. The injured was taken to Mirzapur Hospital from where he was referred to B.H.U. Hospital after first aid.

4. The case was registered against the accused persons. After investigation, the police submitted charge-sheet under sections 307, 504 and 506 IPC. The learned Magistrate summoned the accused persons and committed them to Court of Sessions as prima facie charges were for offences under Sections 307, 504 and 506 I.P.C.

5. On being summoned, the accused-appellants pleaded not guilty and claimed to be tried. The learned Sessions Judge framed charges under Sections 307, 504 and 506 I.P.C.

6. The Trial started and the prosecution examined 6 witnesses who are as follows:

1	Hariom	PW1
2	Mahesh Kumar Gaur	PW2
3	Dr. A.K. Pandey	PW3
4	Constable Shyam Sunder	PW4
5	Dr. Prem Shankar	PW5
6	S.I. Pannag	PW6

	Bhushan	

7. In support of ocular version following documents were filed and proved:

1	Complaint	Ex.Ka-1
2	Fard Recovery	Ex.Ka-2
3	Medical Examination Report	Ex.Ka-3
4	FIR	Ex.Ka-4
5	Copy of G.D.	Ex.Ka-5
6	Admission Slip	Ex. Ka-6
7	Patient History	Ex.Ka-7
8	Operative Notes	Ex.Ka-8
9	Medical Examination Report	Ex. Ka-9
10	Discharge Note	Ex.Ka-10
11	X-ray Report	Ex. Ka-11
12	X-ray Report	Ex. Ka-12
13	Site Plan	Ex. Ka-13
14	Charge-sheet	Ex. Ka-14
15	Fard Recovery	Ex. Ka-15

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

9. The trial court recorded statement of the witnesses and after hearing the argument of both the sides, convicted the appellants as aforesaid.

10. This Court has perused the evidence available on record. The complainant Hariom Gaur PW1, who had seen the occurrence, has deposed against the accused persons and PW2 Mahesh Kumar Gaur who sustained injuries in the incident, has specifically nominated the accused persons and their evidence has been corroborated by medical evidence of PW3 Dr. A.K. Pandey.

11. Learned counsel for the appellants has specifically stated that no independent witness has been examined in this matter. He has further submitted that the injured Mahesh Kumar Gaur had not received injuries which could be said that they were fatal to life and doctor has nowhere mentioned in his statement that the injuries sustained by the injured were fatal to life in normal circumstances. The doctor has only mentioned that if proper treatment had not been given then injury might be fatal. Learned counsel for the appellant has further submitted that the incident has happened due to previous enmity between both factions and incident had happened at the spur of moment and the accused persons had not inflicted the injuries with intention to cause death to the injured Mahesh Kumar Gaur. He further submits that on the exhortation of accused Mukesh @ Jeet Lal @ Jetaye , other accused Hari Narain @ Devganda @ Jhinguri fired at the injured, which was hit on his back. The injured sustained injuries on his non-vital part. The injuries received by the injured were although grievous but were not fatal to life. The appellants could not have been convicted under section 307 IPC but they were convicted as per the evidence only under section 324 read with 34 IPC.

12. Learned counsel for the appellants has submitted that the incident took place in the year 2009. Accused Mukesh @ Jeet Lal @ Jetaya is in jail since 19.10.2009 and accused Hari Narain @ Devganda @ Jhinguri is in jail since 22.10.2012. Both the accused persons were convicted in the

year 2012. He further submitted that the accused persons have suffered mental and physical agony of incarnation and they have suffered mentally agony of criminal trial and after conviction since year 2012.

13. Learned A.G.A. has vehemently opposed the arguments advanced by the learned counsel for the appellants and has submitted that the accused Hari Narain @ Devganda @ Jhinguri had fired at the injured Mahesh Kumar Gaur, causing grievous injury to him and as per doctor opinion the injury sustained by the injured was dangerous and fatal to life. The shot was hit at the centre back of the injured and they have been rightly convicted by the trial court under section 307 read with 34 IPC.

14. We have perused the entire material available on record and considered the evidence minutely, we are of the opinion that the trial court has rightly convicted the accused persons as there was trustworthy evidence of PW1 informant and PW2 injured against the accused persons, which were fully corroborated by the medical evidence. The accused are in jail since 19.10.2009 and 22.10.2012 respectively. The old counsels for appellants have prayed for considering alternative prayer to consider is called up to modify the sentence, considering the various decisions of the Apex Court and the young age of accused and the manner in which incident occurred. Reference to the following decision would be necessary.

15. 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."

16. In ***Sham Sunder vs Puran, (1990) 4 SCC 731***, where the high court reduced the sentence for the offence under section 304 part I into undergone, the supreme court opined that the sentence needs to be enhanced being inadequate. It was held:

"The court in fixing the punishment for any particular crime should take into consideration the nature of offence, the circumstances in which it was committed, the degree of deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of offence."

17. In ***State of MP vs Najab Khan, (2013) 9 SCC 509,*** the high court, while upholding conviction, reduced the sentence of 3 years by already undergone which was only 15 days. The supreme court restored

the sentence awarded by the trial court. Referring the judgments in ***Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734,*** the court observed as follows:-

"In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice dispensation system to undermine the public confidence in the efficacy of law. It is the duty of court to award proper sentence having regard to the nature of offence and the manner in which it was executed or committed. The courts must not only keep in view the rights of victim of the crime but also the society at large while considering the imposition of appropriate punishment."

18. Earlier, "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 proportionately. 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.

19. In subsequent decisions, the supreme court has laid emphasis on proportional sentencing by affirming the doctrine of proportionality. In ***Shyam Narain vs State (NCT of delhi), (2013) 7 SCC 77,*** it was pointed out that sentencing for any offence has a social goal. Sentence is to be imposed with regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric. The purpose of just punishment is that the society may not suffer again by such crime. The principle of proportionality between the crime committed and the penalty imposed are to be kept in mind. The impact on the society as a whole has to be seen. Similar view has been expressed in ***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.***

20. In ***Kokaiyabai Yadav vs State of Chhattisgarh(2017) 13 SCC 449***, it has been observed that reforming criminals who understand their wrongdoing, are able to comprehend their acts,have grown and nartured into citizens with a desire to live a fruitful life in the outside world, have the capacity of humanising the world.

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. Considering the facts and circumstances of the case and the substantive period already undergone by the appellants in this case and the fact that considerable period has already been served by the accused persons in this case and the fact is that both the appellants are young persons in their mid forties; there is no bread-earner in their families and by so far they have realized the mistake committed by them and are remorseful to their conduct and feel it necessary to serve with their polite and cooperative behaviour to the society which they belong to and now they want to transform themselves into a law abiding citizen, I am of the considered opinion that they should be given a chance to reform themselves and extend their better contribution to the society to which they belong to.

23. Considering the facts and circumstances of the case, considering the evidence available on record and considering the nature of injury, this Court deems it fit to alter the conviction to already undergone by the accused persons.

24. Consequently, taking into consideration the period already undergone in prison by the appellants in this case as well as considering that they have suffered physical and mental agony of trial and after conviction for a long period of 10 years, the sentence awarded to them under Section 307/34 is converted to already undergone by them in prison with a fine of Rs. 2000/- each.

25. Accused-appellants are directed to deposit the fine of Rs. 2,000/-each before lower judiciary within three months from the date of passing of the judgement and their released and in default of payment of fine as directed above, they shall undergo simple imprisonment for a period of fifteen days.

26. Appeal is partly allowed in the above terms.

27. Office is directed to transmit a copy of this order to the learned Sessions Judge, Mirzapur for compliance.

28. Office is also directed to send back the record of the trial court immediately.

29. Sri Chetan Chaterjee and Miss Nishi Mehrotra, learned Amicus Cuarie have argued this appeal on behalf of appellants, Mukesh @ Jeet Lal @ Jetaye and Hari Narain @ Devganda @ Jhinguri and they shall be paid a sum of Rs. 15,000/- each as remuneration by High Court Legal Aid Committee.

(2023) 3 ILRA 745
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.02.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 5303 of 2008

Shahid ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri S.K. Gupta, Sri Ambrish Kumar Kashyap, Sri Hafeez Khan, Sri S.K. Vidyarthi, Sri S.R. Verma

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code, 1860 – Sections 376 – Punishment for Rape - Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3 (2) (v) - The Code of Criminal Procedure, 1973 - Sections 313, 433 - Appeal against conviction - As per FIR - on 03.12.2006, when the prosecutrix was playing outside the house, accused allured her into his house and committed rape – Trial Court framed charges - Prosecution has examined 12 witnesses - No documentary evidence proved that the injured belongs to SC or ST produced either before Investigating Officer or Sessions Court - No independent witness has been examined – Both prosecutrix and P.W.1 did not know the accused - P.W.1 has denied commission of rape - No internal/external injury was found (Para 2, 3, 5, 6, 9, 10)

Held: Evidence on record depicts the theory of commission of rape on the ground that the prosecutrix belong to a particular community. Neither the FIR nor oral testimony have suggested the same. It is not worth believing that a person who wants to commit sexual offence would enquire from the prosecutrix her name, caste and then commit the unlawful act. The prosecutrix is four years old child and the incident has been properly explained by the prosecutrix and, therefore, there is possibility of such act being committed. Accused has been rightly convicted under Section 376 - 'Reformative theory of punishment' is to be adopted and it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. Hence, acquitted from charges leveled under SC/ST Act. (Para 14, 15, 17, 24, 25)

Appeal is partly allowed. (E-13)

List of Cases cited:

1. Vishnu Vs St. of U.P (Criminal Appeal No. 204 of 2021)

2. Pintu Gupta Vs St. of U.P (Criminal Appeal No. 4083 of 2017)

3. Ved Prakash Vs St. of Har., JIC 1996 SC 18

4. Patan Jamal Vali Vs St. of Andhra Pradesh, 2021 SCC OnLine SC 343

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

6. Deo Narain Mandal Vs St. of UP, (2004) 7 SCC 257

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

8. Jameel Vs St. of UP, (2010) 12 SCC 532

9. Guru Basavraj vs St. of Karn., (2012) 8 SCC 734

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

11. St. of Punj. Vs Bawa Singh, (2015) 3 SCC 441

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

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Ajit Singh, J.)

1. Heard Sri Amrish Kashyap, learned counsel for the accused-appellant and learned A.G.A. for the State.

2. This appeal challenges the judgment and order dated 04.12.2007 passed by Special Judge (SC/ST Act), Kanpur Nagar in Special Sessions Trial No.670 of 2007 (State vs. Shahid) wherein the learned Special Judge has convicted & sentenced accused-appellant, Shahid, under Section 376 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') for life imprisonment and fine of Rs.10,000, further convicting under Section 363 of IPC for imprisonment 5 years rigorous imprisonment & fine of Rs.5000/- and read with Section 3 (2) (v) of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as SC/ST Act) and sentenced him to imprisonment for life with fine of Rs.10,000/- and, in case of default in payment of fine, further to under go one year's simple imprisonment.

3. Brief facts as culled out from the record are that Vijay Kumar, the father of prosecutrix, made a complaint to Police Station Cantt Kanpur Nagar stating that on 03.12.2006, at about 4.00 p.m., when the prosecutrix was playing outside the house, the accused-appellant, Shahid, caught her from behind, Shahid allured him into his house and started committing rape on her. On raising alarm by the prosecutrix, the informant along with his neighbours reached at the place of incident where they saw that accused was committing rape on her, accused ran away from there. It was alleged that the prosecutrix sustained injuries and the informant brought her to the Police Station.

4. After lodging of the F.I.R, the investigation was moved into motion. The prosecutrix was got medically examined. The Investigating Officer, after taking statements of witnesses, submitted charge-sheet against the accused-appellant under Section 376 of IPC and under Section 3 (2) (v) of SC/ST Act.

5. The accused was committed to the Court of Sessions as the case was triable by the Court of Session. The learned Sessions Judge framed charges on the accused. The accused pleaded not guilty and wanted to be tried.

6. So as to bring home the charge, the prosecution has examined 12 witnesses who are as under :

1	Vijay Kumar @ Vijjan	PW1

2	Niketa @ Annu	PW2
3	Dr. Avnish Kumar	PW3
4	Ajayveer Singh	PW4
5	Jyotsna Kumari	PW5
6	Ranveer Singh	PW6
7	Akhlal Ahmad Khan	PW7
8	Ajay Kumar Trivedi	PW8
9	R.P. Gupta	PW9
10	Vikas Ram	PW10
11	A.M. Khan	PW11
12	S.B. Mishra	PW12

7. In support of ocular version following documents were filed:

1	F.I.R.	Ex.Ka.3
2	Written Report	Ex.Ka.1
3	Recovery memo of underwear	Ex. Ka. 9
4	X-ray Report	Ex. Ka.10
5	Discharge - slip	Ex. Ka. 2
6	Injury report	Ex. Ka.5
7	Supplementary report	Ex. Ka.6
8	Medico Legal examination report	Ex. Ka.12
9	Charge sheet	Ex. Ka.7
10	Report of Forensic Science Lab.	Ex. Ka. 11
11	Site Plan With Index	Ex. Ka.8

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 Special Judge convicted the appellant as mentioned aforesaid.

9. As far as commission of offence under Section 3 (2) (v) of SC/ST Act is concerned, it is submitted by learned counsel that the F.I.R. nowhere states that the injured belongs to a particular community. No documentary evidence so as to prove that the injured belongs to Scheduled Caste or Scheduled Tribe was produced either before Investigating Officer or Sessions Court. No independent witness has been examined by the prosecution. It is stated by prosecutrix that she did not know the accused. P.W.1 had stated that he did not know the accused and in his cross examination he had denied the commission of offence and, therefore, no case is made out for commission of offence under Section 3 (2) (v) of SC/ST Act and finding of the learned Special Judge requires to be upturned.

10. As far as commission of offence under Section 376 of IPC is concerned, it is submitted by learned counsel for the appellant that the accused has been falsely implicated in the present case. The medical evidence does not support the prosecution version as no internal/external injury was found on person of the prosecutrix though the F.I.R. and medical examination were prompt. It is further submitted that even P.W.1, in his cross examination has denied the commission of rape and the finding of the Special Judge is based on surmises and conjectures and requires to be upturn. In support of his argument, learned counsel for the appellant has relied on the decision of this Court in Criminal Appeal No. 204 of 2021 **(Vishnu vs. State of U.P.)** decided on 28.1.2021 & in Criminal Appeal No.4083 of 2017 **(Pintu Gupta vs. State of U.P.)** decided on 28.7.2022 and has contended that no ingredients of Section (3) (2) (v) of SC/ST Act & Section 376 of IPC is made out and, therefore, the conviction is required to be set aside.

11. Per contra, learned A.G.A. for the State has submitted that the conviction of the accused is just and proper as ingredients of offence under Section 3 (2) (v) of SC/ST Act and Section 376 are very much proved. It is further submitted by learned A.G.A. that P.W.2, prosecutrix, has stated that before committing the unlawful act, the accused had asked her name, caste and her husband's name and, therefore, finding of the learned Special Judge is just and proper.

12. Before we venture upon to discuss the evidence and the arguments advanced by the learned counsel for the parties, it would be pertinent to discuss Section 375 of IPC which read as under:

*"**3. Punishments for offences of atrocities.--***

(1).....xx.....xx.....

(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,--

(i).....xxx.....

(ii).....xx.....

(iii).....xxx.....

(iv).....xxx.....

(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine."

***[375. Rape.**--A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following de-scriptions:--*

(First) -- Against her will.

(Secondly) --Without her consent.

(Thirdly) -- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly) --With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be law-fully married.

(Fifthly) -- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupe-fying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly) -- With or without her consent, when she is under sixteen years of age. Explanation.--Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Exception) --Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.]

13. The aforesaid provisions of law would now be seen in view of the ocular version as well as the documentary evidence of the prosecution witnesses. P.W.1, in his cross examination, categorically mentions that he has not seen the appellant committing any kind of sexual intercourse with the prosecutrix. P.W.3, whose oral testimony has been considered, also categorically states that he cannot conclusively opine that whether there was commission of sexual intercourse against the will or against the consent of the prosecutrix.

14. The evidence on record highlights the theory of commission of rape on the ground that the prosecutrix belong to a particular community. Neither the F.I.R. nor the oral testimony have remotely suggested the same. So as to attract the provisions of Section 375 read with Section 376 of IPC and Section 3 (2) (v) of SC/ST Act, ingredients of the said offence has to be proved.

15. The judgment shows that the learned Sessions Judge has convicted the accused-appellant though there was no evidence for commission of offence under Section 3 (2) (v) of The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. It is not worth believing that a person who wants to commit sexual offence would enquire from the prosecutrix her name and her caste and then commit the unlawful act. P.W. 1 who is the father of the prosecutrix has stated, he had also stated that he did not know the accused-appellant. The judgment relied by the prosecution before the Court below namely **Ved Prakash vs. State of Haryana, JIC 1996 SC 18** cannot apply to the facts of this case.

16. The learned Session Judge has considered the fact that spermatozoa may or may not be found. The important aspects are (a) the prosecution is a 4 years old child, (b) she has narrated the incident, (c) Medical report and the oral testimony of PW-5 which would not permit us to upturn the judgment of learned Sessions Judge

17. The evidence of the prosecutrix is four years old child cannot be doubted and is a full-proof of the fact that the accused laid her into the home, the manner in which the incident occurred has been properly explained by the prosecutrix and, therefore, the medical evidence of Doctor testifies to this effect that there is possibility of such act being committed. In view of the matter, we are convinced that the appellant has been rightly convicted under Section 376.

18. As far as findings on Section 376 are concerned, there is no finding. As far as commission of offence under Section 3 (2) (v) of SC/ST Act is concerned, only on the ground that the prosecutrix and her family members belong to a particular community, can it be said that the offence has been committed? The answer is, No. We are also fortified in our view by the decision of the Apex Court in **Patan Jamal Vali vs. State of Andhra Pradesh, 2021 SCC OnLine SC 343,** wherein the Apex Court has held as under :

"58. The issue as to whether the offence was committed against a person on the ground that such person is a member of a SC or ST or such property belongs to such member is to be established by the prosecution on the basis of the evidence at the trial. We agree with the Sessions Judge that the prosecution's case would not fail merely because PW1 did not mention in her statement to the police that the offence was committed against her daughter because she was a Scheduled Caste woman. However, there is no separate evidence led by the prosecution to show that the accused committed the offence on the basis of the caste identity of PW2. While it would be reasonable to presume that the accused knew the caste of PW2 since village communities are tightly knit and the accused was also an acquaintance of PW2's family, the knowledge by itself cannot be said to be the basis of the commission of offence, having regard to the language of Section 3(2)(v) as it stood at the time when the offence in the present

case was committed. As we have discussed above, due to the intersectional nature of oppression PW2 faces, it becomes difficult to establish what led to the commission of offence - whether it was her caste, gender or disability. This highlights the limitation of a provision where causation of a wrongful act arises from a single ground or what we refer to as the single axis model.

59 It is pertinent to mention that Section 3(2)(v) was amended by the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, which came into effect on 26 January 2016. The words "on the ground of" under Section 3(2) (v) have been substituted with "knowing that such person is a member of a Scheduled Caste or Scheduled Tribe". This has decreased the threshold of proving that a crime was committed on the basis of the caste identity to a threshold where mere knowledge is sufficient to sustain a conviction. Section 8 which deals with presumptions as to offences was also amended to include clause (c) to provide that if the accused was acquainted with the victim or his family, the court shall presume that the accused was aware of the caste or tribal identity of the victim unless proved otherwise. The amended Section 8 reads as follows:

"8. Presumption as to offences. - In a prosecution for an offence under this Chapter, if it is proved that

(a) the accused rendered [any financial assistance in relation to the offences committed by a person accused of], or reasonably suspected of, committing, an offence under this Chapter, the Special Court shall presume, unless the contrary is proved, that such person had abetted the offence;

(b) a group of persons committed an offence under this Chapter and if it is proved that the offence committed was a sequel to any existing dispute regarding land or any other matter, it shall be presumed that the offence was committed in furtherance of the common intention or in prosecution of the common object.

[(c) the accused was having personal knowledge of the victim or his family, the Court shall presume that the accused was aware of the caste or tribal identity of the victim, unless the contrary is proved.]"

60 The Parliament Standing Committee Report on Atrocities Against Women and Children has observed that, "high acquittal rate motivates and boosts the confidence of dominant and powerful communities for continued perpetration" and recommends inclusion of provisions of SC & ST Act while registering cases of gendered violence against women from SC & ST communities53. However, as we have noted, one of the ways in which offences against SC & ST women fall through the cracks is due to the evidentiary burden that becomes almost impossible to meet in cases of intersectional oppression. This is especially the case when courts tend to read the requirement of "on the ground" under Section 3(2)(v) as "only on the ground of". The current regime under the SC & ST Act, post the amendment, has facilitated the conduct of an inter-sectional analysis under the Act by replacing the causation requirement under Section 3(2)(v) of the Act with a knowledge requirement making the regime sensitive to the kind of evidence that is likely to be generated in cases such as these. 61 However, since Section 3(2) (v) was amended and Clause (c) of Section 8 was inserted by Act 1 of 2016 with effect from 26 January 2016 these amendments would not be applicable to the case at hand. The offence in the present case has taken place before the amendment, on 31 March 2011.

Therefore, we hold that the evidence in the present case does not establish that the offence in the present case was committed on the ground that such person is a member of a SC or ST. The conviction under Section 3(2)(v) would consequently have to be set aside."

19. The decisions cited by learned counsel for the appellant in **Visnu (Supra) and in Pintu Gupta (Supra)** will also apply to the facts of this case. This is a similar case to **Vishnu (Supra)** where the man was languishing in jail for non commission of offence for which he was punished.

20. 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."

21. '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.

22. 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.

23. 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.

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'.

25. We, therefore, hold that it is proved that offence under Sections 376 is made out. The accused-appellant is acquitted from the charges leveled against him under Section 3 (2)(v) of the SC/ST Act. We direct the jail authority concerned to set the accused-appellant free, if not warranted in any other offence.

26. Record and proceedings be sent back to the Trial Court forthwith.

27. This Court is thankful to both the learned advocate for ably assisting the Court and getting this matter decided.

28. This court refuse the sentence to that already undergone in the Jail under Section 376 of the IPC. Accused is acquitted charged under Section 3(2)(v) of the SC/ST Act.

29. We, by this omnibus direction, direct Registrar (Listing) to impress upon the Registry concerned to follow the decision of this Court in **Vishnu (Supra)** which are yet not being followed as even after 2021, the matters are not being listed. Even this matter has been listed only after the counsel for the appellant has filed listing application as the accused is in jail for more than 14 years. His case has not been considered for remission by the jail authorities though 14 years of incarceration is over and there are directions of the Apex Court and this Court. Even if there is no direction of the Courts, under Section 433 of Cr.P.C. the authorities concerned are under an obligation to consider the case of the accused for remission.

(2023) 3 ILRA 753
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.01.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Criminal Appeal No. 7842 of 2017

Ashok ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Arun Kumar Tripathi, Sri Shashank Maurya, Sri K.K. Singh

Counsel for the Respondents:
G.A.

Criminal Law - Indian Penal Code, 1860 – Sections 302 & 304 - Murder - The Code of Criminal Procedure, 1973 - Sections 313 - Evidence Act, 1872 - Section 27 - Appeal against conviction - Prosecution has examined 8 witnesses – Held, all the three witnesses of fact proved their presence at the time of incident - Their St.ments established that incident occured on the issue of collecting sand on roof and the accused inflicted three fatal blows of Takora (axe) from the back on the head of the deceased and he died - The ocular evidence of witnesses and the postmortem report shows that injuries were cause of death and it was homicidal death - St.ment of the witnesses are consistent and there are no major contradictions - All the three witnesses are related to each other and with the deceased, their testimony is trustworthy, as they were the eye-witnesses - Accused has failed to prove any enmity with the deceased or witnesses - Evidence adduced by prosecution has established the case beyond reasonable doubts - Death was not premeditated, accused had knowledge and intention that his act would cause bodily harm to the deceased, but did not want to do away with the deceased – Hence, offence is not punishable u/s 302 of I.P.C. but culpable homicide not amounting to murder, punishable u/s 304 (I) of I.P.C (Para 9, 17, 34, 38, 39)

Appeal is partly allowed. (E-13)

List of Cases cited:

1. Appa Bhai Vs St. of Guj., AIR 1988 S.C. 696

2. Ashok Kumar Chaudhary Vs St. of Bihar, 2008 (61) ACC 972

3. Veeran & ors. Vs St. of M.P. (2011) 5 SCR 300

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

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

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

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

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

9. Jameel vs St. of U.P. , (2010) 12 SCC 532

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

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

12. St. of Punj. Vs Bawa Singh, (2015) 3 SCC 441

13. Raj Bala vs St. of Har., (2016) 1 SCC 463

(Delivered by Hon'ble Mohd. Azhar Husain Idrisi, J.)

1. Heard Sri K.K. Singh, learned Advocate appearing for Sri Shashank

Maurya, learned counsel for the appellant and Sri Nagendra Kumar Srivastava, learned A.G.A. for the State.

2. Though learned counsel for the appellant has made submissions to press upon the bail application on the ground that the appellant has been incarcerating in jail since 2012 and there possibility of disposal of the appeal in near future is very bleak. As far as bail is concerned, we have gone through the record, the judgment impugned and the factual data, however, having regard to the submissions made by the learned counsel for appellant and his period of incarceration, in the interest of justice, it will be appropriate that appeal itself be heard and decided finally on merits. Accordingly, we proceed to decide this appeal finally.

3. This appeal challenges the judgment and order dated 5.8.2015 passed by Special Judge D.A.A./Additional Sessions Judge, Room No.3, Farrukhabad in Sessions Trial No.234 of 2012 (State vs. Ashok) whereby the learned Sessions Judge has convicted accused-appellant, Ashok, under Section 302 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced him to undergo imprisonment for life with fine of Rs.50,000/- and, in case of default in payment of fine further to undergo one year's simple imprisonment.

4. Succinctly, the facts of prosecution story are that a first information report has been lodged on 19.8.2012 at about 13.10 A.M. against the accused/ appellant Ashok under sections 304 IPC by the informant Smt.

Suneeta, for the murder of her husband, divulging the fact that the complainant in association with her husband Sikandar and her two kids Preeti and Vishal, was accumulating sand on the roof of her house. Her real Devar (husband's brother) Ashok, who was having his house just contiguous to her house, intercepted stating that not a single particle of sand should come on his side. On this issue, he started abusing in filthy language and casting threats and intimidation to life and property. The husband of the complainant proceeded to call his father from his field. The accused appellant could not digest his anger and ire and chased him from behind. The complainant, her daughter (Preeti) and her son (Vishal) went ahead on account of fear apprehending that the accused appellant getting to the victim all alone may attack upon his person. The accused/ appellant and the victim reached inside Karaundha garden of Dileep Maurya. There again they ensued querelling and scuffling. The complainant and her children raised shriek and noise and tried to shield the victim. The accused/ appellant (Ashok) was equipped with a Takora (Axe) in his hand, hit the husband of the complainant Sikander, from back side. As a result of which victim sustained fatal injuries on account of piercing the axe in his head. The victim fell down on the ground in a serious condition and the accused appellant fled away from the place of occurrence. The complainant with the help of Vinod, (another brother of victim and the assailant) brought the injured Sikandar at the Lohiya Hospital, Farrukhabad and admitted him there. The injured was examined in the hospital. Thereafter he was referred for treatment at Kanpur. While proceeding to Kanpur, in the way, a little ahead of Kannauj he succumbed to injuries. The corpse of Sikander was brought back to Lohiya Hospital and kept inside the mortuary. On the basis of a writen application (Ext. Ka-

1) by complainant. Case Crime No. 236 of 2013, under Section 304 I.P.C. was registered at P.S. Maudarwaja, Farrukhabad. The details of the incident was entered in the chick FIR (Ext. Ka- 9) and the same was entered in general diary (G.D.) the corbon copy of the same was prepared. The initial investigation was entrusted to S.I. Jag Mohan Singh.

5. On investigation being put into motion the investigating officer recorded the statement of witnesses, prepared site map, gathered from the place of occurrence, in the presence of witnesses, blood stained and plain soil and prepared memos for the same. The accused/ appellant was taken into police custody on 19.08.2012 and his statement was recorded on 19.8.2012 at about 5.00 p.m. The statement of the accused appellant was recorded in police custody. During the course of recording his statement, he unfolded that the axe used in executing the alleged crime was hidden by him beneath a tree in Karaundha garden. On his disclosure, he was taken to the said garden and in the presence of witnesses Balbir and Dhaniram, the said axe (Physical Ext. 1) was discovered at the pointing of the accused/ appellant, after excavating beneath a tree at Karaundha garden. The blood was saturated on the side of edge and the soil was also stuck in the axe at some places. The description of the said axe was scribed in the recovery memo (Ext. Ka- 5) on which the signature of the witnesses were obtained. Recovery memo was prepared by I.O. The investigation officer also prepared site map (Ext. Ka- 6) of the place of recovery.

6. The information about the death (Ext. Ka.15) of the deceased was received from Lohiya Hospital on 19.8.2012. The inquest (Ext. Ka.11), of the deceased Sikander was conducted on 19.8.2012 at 12.30. According to the opinion of the witnesses of the inquest, the death of victim Sikander happened on account of fatal injuries inflicted on his head. However, to know the real cause of death, it is necessary to conduct post-mortem of the deceased body. Therefore, after carrying out the necessary formalities including handing over of letter of C.M.O (Ext.Ka.12), Photo Lash (Ext.Ka.13), Lash Challan (Ext.Ka.14), etc., the body of the deceased Sikander was duly wrapped in the cloth and sealed and taken to the mortuary for autopsy. The documents concerned, were handed over to Constable 663 Ram Nazar and Constable 707 Pratap Bhan. The post mortem of the deceased Sikander was conducted on 19.8.2012 at about 3.00 p.m. by doctor V.V. Pushkar. The post mortem report (Ext. Ka. 2) of the deceased was prepared by the Dr. V.V. Pushkar.

7. Later investigation was transferred to 2nd Investigating Officer S.I. Anoop Kumar. After due investigation and collecting the credible and clinching material and evidence showing the complicity of the accused/ appellant, the charge sheet (Ext. Ka.8) under sections 304 IPC was submitted by Investigating Officer (I.O.) before the learned Chief Judicial Magistrate Farrukhabad, who took cognizance of the offence under section 304 IPC. on 09.10.2012. Since the offence was exclusively triable by the court of Sessions, hence committed to the Court of Sessions Farrukhabad. The learned Court of Sessions transferred it, to the court of Special Judge (D.A.A.) Farrukhabad, for trial.

8. On 05.02. 2013 the learned Additional Sessions Judge framed charge,

against the accused/ appellant under section 304 IPC. Later on 13.12.2013 an alternative charge under Section 302 I.P.C. was also framed. Both the charges were read over and explained to accused/ appellant. He pleaded not guilty and claimed to be tried.

9. To bring the charges home, the prosecution examined as many as eight witnesses who are follows:-

1	Smt. Sunita	PW1
2	Preeti	PW2
3	Dr. V.V. Pushkar	PW3
4	Vishal	PW4
5	S.I. Jagmohan	PW5
6	S.I. Anoop Kumar	PW6
7	HCP 174-Ishwar Dayal	PW7
8	Constable Dhanpal Singh	PW8

10. In support of ocular version, following documents were also filed and proved:-

Sl.No.	Particulars	Exhibit No.	Proved by
1	Written Report (Tahrir)	Ex.Ka.1	P.W. 1
2	Postmortem Report	Ext. Ka. 2	P.W. 3
3	Site Plan - place of occurrence	Ex.Ka.3	P.W. 5
4	Recovery memo blood stained and plain soil	Ex.Ka. 4	P.W. 5
5	Recovery memo of the weapon of crime	Ext. Ka. 5	P.W. 5
6	Site plan place of recovery	Ext.Ka. 6	P.W. 5
7	Arresting memo of accused	Ext. Ka. 7	P.W. 5
8	Charge-sheet	Ext. Ka. 8	P.W. 6
9	Chik F.I.R.	Ext. Ka.- 9	P.W. 7
10	Carbon copy kaimi G.D.	Ext. Ka.-10	P.W. 7
11	Panchayatnama	Ext. Ka.-11	P.W. 8
12	Letter of request to C.M.O.	Ext. Ka. 12	P.W. 8
13	Photo dead body	Ext. Ka. 13	P.W. 8
14	Details of the deceased	Ext. Ka. 14	P.W. 8
15	Death information by the hospital	Ext. Ka. 15	P.W. 8
16	Arresting G.D.	Ext. Ka. 16	P.W. 7
17	Weapon used in committing offence (Axe)	Physical Ext.1	P.W. 5

11. On completion of prosecution evidence, the statement of the accused under Section 313 of Cr.P.C. was recorded wherein he stated that statement of witnesses are false and untrue, he pleaded innocence and taken the defence of enmity for false implication in a manufactured false case. The defence has not adduced any evidence.

12. After hearing arguments on behalf of prosecution and the defence, the learned Additional Sessions Judge convicted the accused/ appellant as mentioned above vide judgement and order dated 05.08.2015. Aggrieved by the said judgement the accused appellant preferred the present appeal.

13. In order to deal with the present appeal, it is pertinent, first, to analyse the prosecution evidence. Prosecution has examined three witnesses of facts namely P.W.1 Smt. Suneeta, who is informant and eye-witness, Pw- 2 Preeti and Pw- 4 Vishal who are also the eye witnesses of facts.

14. In her examination Pw- 1 Smt. Suneeta has stated on oath that she, in association with her husband Sikander and her two children Pw- 2 Preeti and Pw- 4 Vishal, was accumulating sand on the roof of their house. Her Devar (brother of her husband) accused/ appellant Ashok, who was having his house adjacent to her house, intercepted stating that not a single particle of sand should come on his side. On this issue, he started abusing them in filthy language, casting threats and intimidation to their life and property. Her husband proceeded to call his father from the field, but the accused could not digest his anger and ire and followed him. The complainant, her daughter Preeti and son Vishal went ahead on account of fear apprehending that the accused appellant getting the victim all alone, may attack upon his person. The accused appellant and the victim reached inside Karaundha garden of Dileep Maurya, there again the accused appellant and her husband Sikander ensued querelling and scuffling. The complainant and her children raised shriek and noise and tried to shield to the victim. The accused appellant (Ashok) was equipped with Takora (Axe) in his hand, hit the Sikander from his back side on his head. He gave three blows of the axe on his head. Piercing axe in these injuries. As a result of which victim sustained fatal injuries in his head. He fell down on the ground in a serious condition and the accused/ appellant fled away from the place of occurrence, extending threats and intimidation to them. The complainant, with the help of Vinod, her another Devar P.W. 1, brought the injured at the Lohiya Hospital Farrukhabad. The injured was examined there and later referred to Kanpur for treatment. While proceeding to Kanpur, in the way a little ahead of Kannnauj, the victim succumbed to his injuries. The corpse of the deceased Sikander was brought back to Lohiya Hospital. The panchnama of deceased Sikander was conducted there. The complainant got scribed on a paper the information about incident, whereupon her thumb impression was obtained. She proved the Tahrir (written complaint) as Ext. Ka- 1. The I.O. had visited the place of occurrence on her discloser, she aided. And inquest of her husband was conducted at Lohiya Hospital, Farrukhabad.

15. Pw- 2 Preeti and Pw- 4 Vishal are the children of the deceased aged about 16 years and 12 years at the time of recording their evidence in the court respectively. They stated that they were present at the scene of occurrence at the time of incident at about 6.30 a.m on 19.08.2012. Some quarrel had taken place between their father and uncle Ashok on the issue of collection of sand on the roof, whose house is adjacent to their house. The uncle objected the accumulation and threatened that not a single particle of the sand should come towards his side. Thereafter their father went to call his father (their Baba) from the field. They and their mother chased their father on the apprehension that the uncle Ashok may getting to the victim all alone, may attack upon his person. Ashoka followed their father with and Takora, when they reached Karaundha garden of Dileep Mauriya there again Ashoka and their father Sikander ensued quarreally and scuffling. They raised shriek and noise to shield their father. He gave three blows of

axe piercing in the head of their father from the back side. As a result of which their father sustained three fatal injuries in the head. He fell down and uncle Ashok fled away there from. Their mother with the help of uncle Vinod carry their father to the hospital to Ram Manohar Lohiya Hospital, Farrukhabad for treatment. Where from he was sent to Kanpur but in the way he died.

16. The learned counsel for defence throughly cross-examined P.W. 1 Sunita, P.W. 2 Preeti and P.W. 4 Vishal. In their cross-examination all the witnesses reiterated that all of them were present at the place of occurrence at the time of incident. They are eye witnesses of the occurrence. P.W. 1 stated that when her husband left his house the accused followed him with a Takora. Anticipating the apprehension that on getting the deceased all alone may attack upon the deceased. So all of them also followed the deceased, when they reached in the Karaundha Garden there held scuffle between the accused and the deceased. During the scuffle accused gave three blows with the axe on the head of the deceased. She tried to shiled her husband. Her husband fell down and Ashok ran away with the axe. She with help of her dewar Vinod and others took her husband from the scene of incident to Lohiya Hospital. Her husband was bleeding from the head. He died in the way to Kanpur near Kannauj. She saw the accused running at a distance of four sticks. She and her children did not following the Ashok because he had axe in hand. She denied the suggestion that she was not present at the time of occurrenc at the spot. She reached at 11.00 o'clock with the application at the Police Station. Thereafter, she went to the Hospital where her husband's dead body was kept. She had both the children with her and they saw the accused hitting the head of the deceased with an axe. PW. 2 and PW. 4 also corroborated the statement P.W. 1. No major contradictions were found in their statement.

17. Thus, all the above three witnesses of fact proved their presence at the place of occurrence at the time of incident. Their statements establishe that incident occured on the issue of collecting sand on roof and that the accused inflicted three fatal blows of Takora (axe) from the back on the head of the deceased and he died due to these fatal injuries.

18. In corroboration of the prosecution case, prosecution has also examined Pw- 4 Dr. V.V. Pushkar. The doctor stated on oath that he conducted post mortem of Sikander (deceased) on 19.8.2012 at about 3.30 p.m. The dead body was brought in a sealed cover by constable 663 Ram Nazar and 7 07 Home Guard Pratap Bhan. The autopsy of the deceased Sikander was conducted after tallying the seal and receiving of the concerned letter and document.

19. (i)- **Ante-mortem injuries;-** On the post mortem, following ante mortem injuries were found on the person of deceased Sikander-

1- Incise wound 11 cm x 4 cm x cranial cavity deep over left side of head cm above and behind the left ear. Brain matter coming out. Left parietal & occipital bone cut fracture.

2- Incised wound 10 cm x 2 cm x cranial cavity deep over left side of head, 2cm above from injury no.1 underlying bone cut ,fracture, meningis and brain.

3-Incised wound 7 cm x 1 cm x bone deep over left side of head.,3 cm

above from the injury no.2 underlying bone cut fracture.

(ii)- As per doctor's statement, after death, rigor mortis was present over the entire limbs. The body was of average built. Mouth and eyes were closed. Dressing material was present over head. Viggo was present in the right wrist.

(iii)- The doctor opined that the **cause of death of Sikander is shock and haemorrhage, as a result of ante mortem injuries.**

(iv)- P.W. 3 the Dr. V.V. Pushkar also stated that the Postmortem Examination Report was prepared by him in his own writing and signature. He proved P.M.R. as Ext. Ka. 2 and was sent to S.P. Farrukhabad and two others.

(v)- It was also endorsed that aforesaid injuries on the person of Sikander had come on 19.8.2012, by the incising of sharp edge weapon.

20. Thus, medical evidence has supported the ocular evidence and the prosecution case.

21. P.W. 5 Investigating Officer S.I. Jag Mohan Singh has stated that on the disclosure the accused in his statement under Section 161 Cr.P.C. the Takora (axe), weapon used in the incident was recovered beneath a tree in Karaundha Garden, on the pointing of the accused, in the presence of the witnesses Dhani Ram and Balveer, during examination in the court when the weapon was produced he stated that it is the weapon which he recovered on pointing of the accused in Karaundha Garden. This discovery of the fact is relevant and admissible in evidence under Section 27 of Indian Evidence Act. He proved the axe as physical Ext. No. 1.

22. Pw- 7 Ishwer Dyal has proved chick FIR as Ext. Ka- 9. He also proved the carban copy of the G.D. as Ext. Ka- 10 and request letter for postmortem and other papers sent along with seald cover dead body for postmortem. Ext. Ka- 11 to Ka- 14 were also proved by him.

23. Pw- 5, S.I. Jag Mohan Singh the first I.O. of the case. He prepared site plan as Ext. Ka- 3. He also collected blood stained and plain soil and prepared a memo Ext. Ka- 4. He also arrested the accused near Hathiyapur Railway crossing. The arresting memo was also prepared by him which he proved as Ext. Ka- 7. He further stated that he in the presence of witnesses Dhani Ram and Balbir recovered the axe from the garden of Karaundha at the pointing out of the accused. He proved the memo of recovery of axe as Ext. Ka- 5 and also the axe as physical Ext. Ka- 1 in his examination he further stated that he has prepared map of the place of occurrence and place of recovery as Ext. Ka- 3 and Ka- 6. He stated that afterwards the investigation was transferred to Pw- 6 S.I. Anoop Kumar Tiwari.

24. P.W. 6 Anoop Kumar Tiwari stated that he taken over the investigation from P.W. 5 Jag Mohan Singh. After completion of the investigation, he filed charge-sheet which he proved as Ext. Ka- 8.

25. The learned counsel for appellant argued that the witnesses of facts are related to deceased and thus interested witnesses. It is next argued that there were other witnesses also like Vinod etc. available but prosecution did not examined them. Therefore, the testimony of the prosecution witnesses is unworthy of credit, learened A.G.A. refuted the argument. In this behalf it may be mentioned, it is true that P.W. 1 Sunita,

P.W. 2 Kumari Preeti and P.W. 4 Vishal are wife, daghter and son of the deceased Sikander, but, it may be mentioned that they are not only related to the deceased, but also related to the accused/ appellant. However, nothing could be shown by the accused/ appellant that they were nurturing animus and grudge agianst the accused, as such their testimony cannot be discorded merely because of their relationship with the deceased.

26. The learned trial court rightly believed the evidence of prosecution witnesses as the Apex Court in **Appa Bhai Vs. State of Gujarat A.I.R. 1988 S.C. 696 and Ashok Kumar Chaudhary Vs. State of Bihar 2008 (61) ACC 972,** has propounded that in the absence of any independent witness, evidence of related witness could not be discorded. If, the presence of the witness at the time of incident is established by evidence, there testimony cannot be discorded on the basis of their being member of the family of the deceased. The proseuciton has established that the witnesses examined were present at the scene of occurrence at the time of incident and there witnessed accused inflicting three blows of axe from back side on the head of the deceased Sikandar in the garden of Dileep Maurya.

27. Even the testimony of P.W.2 (Priti) and P.W.4 (Vishal). the minor daughter and son of the deceased Sikander was sufficient to prove the guilt against the accused appellant as they in their natural course were capable of understanding the incident, gravity as well as gravamen of the occurrence and were capable of understanding the situations and questions put to them. Hence, the corroboration of such evidence of minors (P.W.2 & 4) with other clinching and trustworthy evidence cannot be ignored. The evidence of minors (P.W.2 and P.W. 4) inspires confidence divulging the incident in a natural and simple manner there has been no inconsistency in the cross-examination of prosecution witnsses 1, 2 and 3 they had narrated the prosecution version in a natural and intrinsic manner without any embellishment.

28. Besides, there is no reason that the witnesses, who were closed relation of deceased Sikandar, would falsely implicate the accused/ appellant, leaving the real culprit. Nothing tangible could be elicited from the evidence of the witnesses in the cross-examination by which the prosecution version could be doubted. Their evidence is trustworthy, reliable and free from all taints and flaws. It is a established law that quality and not the plurality of witnesses are required to prove a fact. The dispensation of justice would be affected and hampered, if, number of witnesses are to be insisted upon. Moreover, Vinod was not an eye witness of the occurrence. He reached at the place of occurrence after the incident was over. So, his non examination as a witness do not affect proseuction case at all. Thus, the learend trial court has rightly accepted the proseuction evidence holding the accused/ appellant guilty of the offence killing the deceased.

29. It may be mentioned that ocular evidence of the prosecution is supported by the medical evidence on record. P.W. 3 Dr. V.V. Pushkar in his cross-examition stated that three encised wound over the head of deceased there was a pool of blood on the person of the victim and victim was succumbed to his injuries due to shock and hamerouge as a result of ante-mortem injuries caused by a sharp cutting weapon.

Moreover, the weapon used in the incident was recovered on the basis of the disclosure of the accused in his statement in the police custody. This part of the statement of the accused was relavant under section 27 of the Indian Evidence Act. It was on his instance the weapon (axe) was recovered in front of the witnesses from Karaundha garden hidden beneath the tree. The weapon was exhibited before the court as physical Ext. 1. The formal witnesses chik and G.D writter and investigating officer also corroborated the prosecution case.

30. From the facts and circumstances of the cases it emnates that the crime had been committed in a very bruttal manner, multiple injuries were inflicted on the vital part of the victim the testimony of the witnesses are trustworthy and reliable. The defence has failed to explain as to how victim received the grave and grim injuries on his vital part of the body (head), except as mentioned in the prosecution version. Thus, the evidence of the prosecution witnesses is consistent with the hypotheis of the guilt of the accused appellant and no other hypothesis. The learned Special Sessions Judge passed the order of conviction and sentence after appreciting the entire evidence on record and has rightly arrived at the conclusion that it was the accused/ appellant who alone committed the serious offence of causing fatal and ghastly injuries to the victim. Thus, the impugned judgment may be sustained and uphold to this extents.

31. The learned counsel for appellant has submitted that the incident occurred at the spur of moment which arose due to sudden quarrel between two brothers. It is submitted that the accused had not premeditated to do away with the deceased.

32. In alternative, it is also submitted that at the most, the death can be homicidal death not amounting to murder and punishable under Section 304-II or Section 304-I of I.P.C. If the Court decides that the accused is guilty under Section 302 of IPC, then the accused may be granted fixed term punishment of incarceration as the death is not a gruesome act on part of accused.

33. Per contra, learned A.G.A. for the State submits that there was no grave and sudden provocation from the side of the deceased and that looking to the gruesomeness of the offence and the evidence of prosecution witnesses, this Court should not show any leniency in the matter. It is further submitted by learned A.G.A. that ingredients of Section 300 of IPC are rightly held to be made out by the learned Sessions Judge who has applied the law to the facts in case.

34. We have considered the ocular evidence of witnesses and the Postmortem report which states that the injuries on the body of the deceased were cause of death and that it was homicidal death. The medical evidence has also supported the ocular evidence. The statement of the witnesses are consistent. There are no major contradictions in their statements and minor contradictions here and there are to be ignored as they did not injure prosecution case at all. Although, all the three witnesses of facts are related to each other and with the deceased but their testimony is trustworthy, as they were the eye-witnesses and there is no reason as to why they would falsely implicate the accused. Accused/ appellant has failed to prove any enmity with the deceased or witnesses. Thus, the evidence adduced by prosecution has established the prosecution case beyond reasonable doubts.Therefore,

we concur with the findings of the trial court.

35. This takes us to the next question whether it was a perpetrated murder or would it fall within any of the exceptions to Section 300 of IPC?

36. It would be relevant to refer to Section 299 of the Indian Penal Code, which reads as under:

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

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

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the 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.

38. From the upshot of the aforesaid discussion, it appears that the death caused by the accused was not premeditated, accused though had knowledge and intention that his act would cause bodily harm to the deceased but did not want to do away with the deceased. Hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. (2011) 5 SCR 300** which have to be also kept in mind.

39. On overall scrutiny of the facts and circumstances of the present case

coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra**, reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka**, reported in **1994 SUPP (1) SCC 304**, we come to the definite conclusion that the death was not premeditated. The precedents discussed by us would permit us to uphold our finding which we conclusively hold that the offence is not punishable under Section 302 of I.P.C. but is culpable homicide not amounting to murder, punishable U/s 304 (Part I) of I.P.C.

40. Now, it is to be seen whether the quantum of sentence is too harsh and requires to be modified. In this regard, we have to analyse the theory of punishment prevailing in India.

41. 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."

42. The term '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.

43. 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.

44. 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.

45. 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.

46. In view of the above, the accused-appellant is sentenced to 10 years rigorous imprisonment.***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."* Fine is reduced to Rs.5000/-. However, the default sentence is maintaned. If 10 year's sentence is already over, the accused-appellant be set free forthwith, if not wanted in any other case. He will deposit the fine within four weeks from the date of release and in case fine is not deposited he will be re-incarcerated to undergo the sentence of default.

47. Resultantly, the appeal is partly allowed. Judgment and order dated 05.08.2015 passed by the learned Special Judge D.A.A./ Additional Sessions Judge Court No. 3, shall stand modified to the aforesaid extent. Record be sent back to the trial court forthwith.

(2023) 3 ILRA 765
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.02.2023

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Revision No. 167 of 2023

Sudha Matanheliya ...Revisionist
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Revisionist:
Nagendra Mohan Singh, Pradeep Kumar Sen

Counsel for the Respondents:
G.A.

Criminal Law- Code of Criminal Procedure, 1973- Sections 156 (3) & 397)-A proposed accused in an application under Section 156 (3) has got no right to be heard either on the application before the Magistrate or in revision before the revisional court-Accused does not have any right to be heard before he is summoned by the Court under the Code of Criminal Procedure and he has got no right to raise any objection till the stage of summoning and resultantly he cannot be conferred with a right to challenge the order passed against him under Section 156 (3) prior to his summoning-If the Magistrate has allowed an application under Section 156 (3) directing the police to register FIR and investigate, revision against such order is not maintainable under Section 397 Cr.P.C.

Revision not maintainable and accordingly dismissed. (E-15)

List of Cases cited:

1. Union of India Vs WIN Chaddha 1993 SCC (Criminal) 1171.

2. Father Thomas Vs St. of U.P. 2011 (72) ACC 564 (Allahabad) (Full Bench)

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

1. Heard learned counsel for appellant, S.P. Tiwari, learned A.G.A. for the State and perused the material available on record.

2. By means of this criminal revision, the revisionist has sought following prayer:-

"Wherefore, it is most respectfully prayed that this Hon'ble Court may graciously be pleased to set aside order dated 27.01.2023 passed by learned Civil Judge (Junior Division)/ F.T.C./J.M. Bahraich in Criminal Case No. 3033 of 2022 whereby application moved by the complainant under Section 156 (3) Cr.P.C. has been allowed.

3. Learned counsel for revisionist has submitted that the order dated 27.01.2023 passed by learned Civil Judge (Junior Division)/ F.T.C./J.M. Bahraich in Criminal Case No. 3033 of 2022 is erroneous and beyond jurisdiction of learned Magistrate. The application moved under Section 156 (3) Cr.P.C. by the complainant with ulterior motive. The dispute relates to the landed property and the order passed by the learned Magistrate for registration of FIR and to investigate the matter is against the principles of law.

4. Mr. S.P. Tiwari, learned A.G.A. for the State has submitted that this revision is not maintainable against the order of allowing application under Section 156 (3) Cr.P.C. as the proposed accused has no

legal right to be heard unless and until summoning order is passed against him.

5. In support of his submission learned A.G.A. has relied upon a judgment of Hon'ble Apex Court in the case of ***Union of India Vs. WIN Chaddha*** reported in ***1993 SCC (Criminal) 1171*** wherein Hon'ble Apex Court has held that a proposed accused in an application under Section 156 (3) Cr.P.C. has got no right to be heard either on the application before the Magistrate or in revision before the revisional court. Hon'ble Apex Court has also affirmed the judgment of this Court in the case of ***Father Thomas Vs. State of U.P.*** reported in ***2011 (72) ACC 564 (Allahabad) (Full Bench)*** wherein this Court has held that an accused does not have any right to be heard before he is summoned by the Court under the Code of Criminal Procedure and he has got no right to raise any objection till the stage of summoning and resultantly he cannot be conferred with a right to challenge the order passed against him under Section 156 (3) Cr.P.C. prior to his summoning. If the Magistrate has allowed an application under Section 156 (3) Cr.P.C. directing the police to register FIR and investigate, revision against such order is not maintainable under Section 397 Cr.P.C.

6. Having heard learned counsel for parties and keeping in view the authority relied upon by the learned A.G.A., I do not find any illegality or infirmity in the impugned judgment and order dated 27.01.2023 passed by learned Civil Judge (Junior Division)/ F.T.C./J.M. Bahraich in Criminal Case No. 3033 of 2022.

7. Therefore, this revision is not maintainable and is accordingly dismissed.

(2023) 3 ILRA 766
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 14.02.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application u/s 482 No. 1743 of 2021

Mohd. Abdul Khaliq ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Akhtar Jahan, Bahar Ali

Counsel for the Opp. Parties:
G.A.

Criminal Law - Uttar Pradesh Cow Slaughter Prevention Act, 1955–Sections 3, 5 & 8 - Criminal Procedure Code, 1973 – Section 482–Prohibit slaughter, sale/transport of cow/beef–Offences punishable with imprisonment and fine–Section 482 Cr.P.C.–Inherent powers of High Court–To prevent abuse of process or secure ends of justice–Quashing of criminal proceedings–Tests: Whether allegations prima facie establish offence, chances of ultimate conviction bleak, useful purpose in continuing proceedings–Cow slaughter–Religious sentiments–Cow revered in Hindu religion–Need to respect religious beliefs in secular society–Quashing at initial stage–Not warranted where materials prima facie disclose commission of offence under special law like Cow Slaughter Act.

Application dismissed. (E-9)

List of Cases cited:

1. R.P. Kapoor Vs St. of Pun., AIR 1960 S.C.866

2. St. of Har. Vs Bhajanlal, 1992 SCC (Crl.)426

3. St. of Bihar Vs P.P. Sharma, 1992 SCC (Crl.)192 and

4. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr.,(Para-10) 2005 SCC (Cri.)283

5. S.W. Palankattkar & ors. Vs St. of Bihar, 2002 (44) ACC 168

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

1. Heard Shri Bahar Ali, the learned counsel for the applicant as well as Shri Prem Prakash, Mrs. Kiran Singh and Shri Hari Shankar Vajpayee, the learned A.G.A.-I for the State and perused the record.

2. The instant application has been filed by the applicant with a prayer to quash the charge sheet No. 424 of 2019 as well as entire proceeding of Case No. 1548 of 2020, State Vs. Mohd. Khaliq, arising out of Case Crime No. 462 of 2018, under Section 3/5/8 of Uttar Pradesh Prevention of Cow Slaughter Act, 1955 (hereinafter referred to as the 'Act 1955'), Police Station Dewa, District Barabanki, pending in the court of learned additional Chief Judicial Magistrate, Court No. 16, Barabanki.

3. The facts of the case in short is that a first information report dated 02.11.2019 was lodged by the at Police Station Dewa, District Barabanki with the allegation that on an information received by informer when A.S.I.-Dharmendra Kumar Yadav and other police personnel reached at Sarsaudi Village near the school they saw one person coming holding a sack, on seeing police personnel that person tried to return back, but the police caught him and on his search beef of cow progeny was found in the sack holding by him. On interrogation the said person told his name Zahoor, he told that he along with the applicant are involved in cow slaughtering and he was going to Lucknow for selling the same.

4. Learned counsel for the applicant submits that there is no chemical analysis report from the veterinary doctor whether seized meat belongs to cow progeny and in the absence of any chemical analysis report, the Investigating Officer submitted charge sheet against the applicant, whereupon the learned Magistrate has also taken cognizance in a routine manner and summoned the applicant for facing trial.

5. Per contra, learned Additional Government Advocates submit that charge sheet was rightly submitted by the Investigating officer and the cognizance taken by the learned Magistrate is also in accordance with law. The name of applicant came into light in the confessional statement of co-accused, Zahoor, who was arrested along with the cow meat, who confessed that he and the applicant were involved in slaughtering of cow, therefore, prima facie offence under Section 3/5/8 of the Act, 1955 is made out against the applicant.

6. After considering the arguments as advanced by the learned counsel for the parties and from the perusal of the charge sheet as well as cognizance order and the F.I.R., offence under Section 3/5/8 of the Act, 1955 is prima facie made out against the applicants. No case is made out for quashing of the proceeding of Criminal Case No. 525 of 2020, under Section 3/5/8 of Act, 1955. It is relevant to quote Section 3, 5, & 8 of Act, 1955 for adjudication of this case :

3. **Prohibition of cow slaughter**.-(1) Except as hereinafter provided, no person shall slaughter or cause to be slaughtered,

or offer or cause to be offered for slaughter-

(a) a cow, or 3

(b) a bull or bullock, unless he has obtained in respect thereof a certificate in writing, from the competent authority of the area in which the bull or bullock is to be slaughtered, certifying that it is fit for slaughter, in any place in Uttar Pradesh; anything contained in any other law for the time being in force or an usage or custom to the contrary notwithstanding.

(2) No bull or bullock, in respect of which a certificate has been issued under sub-section (1) (b) shall be slaughtered at any place other than the place indicated in the certificate.[***]

(3) A certificate under sub-section (1) (b) shall be issued by the competent authority, only after it has, for reasons to be recorded in writing; certified that-

(a) the bull or bullock is over the age of [fifteen years] or

(b) in the case of a bull, it has become permanently unfit and unserviceable for the purpose of breeding and, in the case of bullock, it. has become permanently unfit and unserviceable for the purposes of daughter and any kind of agricultural operation :

Provided that the permanent unfitness or un-serviceability has not been caused deliberately.

(4) The competent authority, shall, before issuing the certificate under sub-section (3) or refusing to issue the same, record its order in writing [***].

(5) The State Government may, at any time, for the purposes of satisfying itself as to the legality or propriety of the action taken under this section call for and examine the record of any case and may pass such order thereon as it may deem fit.

[(6) Subject to the provisions herein contained, and action taken under this section, shall be final and conclusive and shall not be called in question.]

5. Prohibition on sale of beef.-Except as herein excepted and notwithstanding anything contained in any other law for the time being in force, no person shall sell or transport or offer for sale or transport or cause to be sold or transported beef or beef-products in any form except for such medicinal purposes as may be prescribed.

Exception. - A person may sell and serve or cause to be sold and served beef or beef-products for consumption by a bona fide passenger in an air-craft or railway train.

[5A. Regulation on transport of cow, etc.-(1) No person shall transport or offer for transport or cause to be transported any cow, or bull or bullock, the slaughter whereof in any place in Uttar Pradesh is punishable under this Act, from any place within the State to any place outside the State, except under a permit issued by an officer authorised by the State Government in this behalf by notified order and except in accordance with the terms and conditions of such permit.

(2) Such officer shall issue the permit on payment of such fee not exceeding five rupees for every cow, bull or bullock as may be prescribed :

Provided that no fee shall be chargeable where the permit is for transport of the cow, bull or bullock for a limited period not exceeding six months as may be specified in the permit.

(3) Where the person transporting a cow, bull or bullock on a permit for a limited period does not bring back such cow, bull or bullock into the State within the period specified in the permit, he shall be deemed to have contravened the provision of sub-section (1).

(4) The form of permit, the form of application therefor and the procedure for

disposal of such application shall be such as may be prescribed.

(5) The State Government or any officer authorised by it in this behalf by general or special notified order, may, at any time, for the purpose of satisfying itself, or himself, as to the legality or propriety of the action taken under this section, call for and examine the record of any case and pass such orders thereon as it or he may deem fit].

[(6) Where the said conveyance has been confirmed to be related to beef by the competent authority or authorised laboratory under this Act, the driver, operator and owner related to transport, shall be charged with the offence under this Act, unless it is not proved that the transport medium used in crime, despite all its precautions and without its knowledge, has been used by some other person for causing the offence.

(7) The vehicle by which the beef or cow and its progeny is transported in violation of the provisions of this Act and the relevant rules, shall be confiscated and seized by the law enforcement officers. The concerned District Magistrate/Commissioner of Police will do all proceedings of confiscation and release, as the case may be.

(8) The cow and its progeny or the beef transported by the seized vehicle shall also be confiscated and seized by the law enforcement officers. The concerned District Magistrate/ Commissioner will do all proceedings of the confiscation and release, as the case may be.

(9) The expenditure on the maintenance of the seized cows and its progeny shall be recovered from the accused for a period of one year or till the release of the cow and its progeny in favour of the owner thereof whichever is earlier.

(10) Where a person is prosecuted for committing, abetting, or attempting to an offense under Sections 3, 5 and 8 of this Act and the beef or cow-remains in the possession of accused has been proved by the prosecution and transported things are confirmed to be beef by the competent authority or authorised laboratory, then the court shall presume that such person has committed such offence or attempt or abetment of such offence, as the case may be, unless the contrary is proved.

(11) Where the provisions of this Act or the related rules in context of search, acquisition, disposal and seizure are silent, the relevant provisions of the Code of Criminal Procedure, 1973 shall be effective thereto.]

[5B. Whoever causes any physical injury to any cow or its progeny so as to endanger the life thereof such as to mutilate its body or to transport it in any situation whereby endangering the life thereof or with the intention of endangering the life thereof does not provide with food or water shall be punished with imprisonment for a term which shall not be less than one year and which may extend to seven years and with fine which shall not be less than one Lakh rupees and which may extend to three Lakh rupees.]

[8. (1) Whoever contravenes or attempts to contravene or abets the contravention of the provisions of Section 3, Section 5 or Section 5-A shall be guilty of an offence punishable with rigorous imprisonment for a term which shall not be less than three years and which may be extend to ten years and with fine which shall not be less than three Lakh rupees and which may extend to five Lakh rupees.

(2) Whoever after conviction of an offence under this Act is again guilty of an offence under this Act, shall be punished

with double the punishment provided for the said offence for the second conviction.

(3) The names and the photograph of the person accused of the contravention of the provision of Section 5-A shall be published at some prominent place in locality where the accused ordinarily resides or to a public place, if he conceals himself from the law enforcement officers.]

7. Accordingly, the contention of the learned counsel for the applicant that no offence against the applicant is disclosed and the present prosecution has been instituted with a malafide intention for the purposes of harassment, has no force.

8. We are living in a secular country and must have respect for all religions and in Hinduism, the belief and faith is that cow is representative of divine and natural beneficence and should therefore be protected and venerated. The cow has also been associated with various deities, notably Lord Shiva (whose steed is Nandi, a bull) Lord Indra (closely associated with Kamadhenu, the wise-granting cow), Lord Krishna (a cowherd in his youth), and goddesses in general (because of the maternal attributes of many of them). The cow is the most sacred of all the animals of Hinduism. It is known as Kamadhenu, or the divine cow, and the giver of all desires. According to legend, she emerged from the ocean of milk at the time of Samudramanthan or the great churning of the ocean by the gods and demons. She was presented to the seven sages, and in the course of time came into the custody of sage, Vasishta. Her legs symbolise four Vedas; her source of milk is four Purushartha (or objectives, i.e. dharma or righteousness, artha or material wealth, kama or desire and moksha or salvation); her horns symbolise the gods, her face the sun and moon, and her shoulders agni or the god of fire. She has also been described in other forms: *Nanda, Sunanda, Surabhi, Susheela and Sumana.*

9. The origin of the veneration of the cow can be traced to the Vedic period (2nd millennium 7th century BCE). The Indo-European peoples who entered India in the 2nd millennium BCE were pastoralists; cattle had major economic significance that was reflected in their religion. The slaughter of milk- producing cows was increasingly prohibited. It is forbidden in parts of the *Mahabharata*, the great Sanskrit epic, and in the religious and ethical code known as the *Manu-Smirti* ("Tradition of Manu"), and the milk cow was already in the Rigveda said to be *"unslayable"*. The degree of veneration afforded the cow is indicated by the use in rites of healing purification, and penance of the *panchagavya*, the five products of the cow-milk, curd, butter, urine, and dung.

10. **Subsequently, with the rise of the ideal of Ahimsa ("non-injury"), the absence of the desire to harm living creatures, the cow came to symbolize a life of nonviolent generosity.** In addition, because her products supplied nourishment, **the cow was associated with motherhood and Mother Earth** and legislation against cow killing persisted into the 20th century in many princely states.

11. Legends also state that Brahma gave life to priests and cows same time so that the priests could recite religious scriptures while cows could afford ghee(clarified butter) as offering in rituals. **Anyone who kills cows or allows others to kill them is deemed to rot in hell as many years as there are hairs upon his body.** Likewise, the bull is depicted as a

vehicle of Lord Shiva: a symbol of respect for the male cattle.

12. **In the Mahabharata, Bhishma (grandfather of the leaders of warring factions) observes that the cow acts as a surrogate mother by providing milk to human beings for a lifetime, so she is truly the mother of the world**. The Puranas state that nothing is more religious than the gift of cows. Lord Rama was given a gift of many cows.

13. **In the late 19th and 20th century, in India, a movement to protect cows arose that strove to unify the citizens by demanding that the Government of India ban cow slaughter with immediate effect in the country.**

14. **This Court also hope and trust that the Central Government may take appropriate decision to ban cow slaughtering in the country and to declare the same as 'protected national animal'.**

15. From the perusal of the materials on record and looking into the facts of the present case and after considering the arguments made at the bar, it does not appear that no offence has been made out against the applicant.

16. At the stage of issuing process the court below is not expected to examine and assess in detail the material placed on record, only this has to be seen whether prima facie cognizable offence is disclosed or not. The Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases:-**(i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Haryana Vs. Bhajanlal, 1992 SCC (Crl.)426, (iii) State of Bihar Vs. P.P. Sharma, 1992 SCC (Crl.)192 and (iv) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.)283.**

17. From the aforesaid decisions the Apex Court has settled the legal position for quashing of the proceedings at the initial stage. The test to be applied by the court is to whether uncontroverted allegation as made prima facie establishes the offence and the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continue. In **S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168**, it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court under Section 482 Cr.P.C itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) *to give effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice*. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

18. The High Court would not embark upon an inquiry as it is the function of the Trial Judge/Court. **The interference at the threshold of quashing of the charge sheet/criminal proceedings in case in hand cannot be said to be exceptional as it discloses prima facie commission of an offence. In the result, the prayer for quashing of charge sheet/ criminal proceedings of Case No. 1548 of 2020, State Vs. Mohd. Khaliq, arising out of**

Case Crime No. 462 of 2018, under Section 3/5/8 of Uttar Pradesh Prevention of Cow Slaughter Act, 1955, Police Station Dewa, District Barabanki is refused. There is no merit in this application filed by the applicant under Section 482 Cr.P.C.

19. In view of the aforesaid submissions made by the learned counsel for the parties and considering the judgments passed by Hon'ble Supreme Court referred above, this Court finds no merit in the present application and the same is liable to be dismissed.

20. **Accordingly, the present application under Section 482 Cr.P.C. filed by the applicant is dismissed.**

(2023) 3 ILRA 772
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 24.01.2023

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Application u/s 482 No. 9839 of 2022

Chhotakki @ Kiran ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Arvind Kumar Verma

Counsel for the Opp. Parties:
G.A.

Civil Law - Juvenile Justice (Care and Protection of Children) Act-Section 7A-FIR lodged in 2000-Applicant was minor-implicated-later got married and lived separately with her husband-prior to marriage-appeared and enlarged on bail-summons never served upon the Applicant- Application in 2022 moved by Applicant claiming herself juvenile at the time of incident-not considered-impugned-whenever claim of juvenility raised-Court shall make immediate inquiry for determining the age to conclude juvenility-claim can be raised at any stage –even after final disposal of case or after final order passed in an appeal-delay cannot be ground for rejection-impugned order set aside.

Application allowed. (E-9)

List of Cases cited:

Abuzar Hossain @ Gulam Hossain Vs St. of W. B., 2012 (10) SCC489

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard Sri Arvind Kumar Verma, learned counsel for the applicant, Sri Aniruddh Kumar Singh, learned AGA-I for the State.

2. Since pure legal question is involved in this matter, therefore the notice to the opposite party no. 2 is hereby dispensed with.

3. By means of the instant application, the applicant has prayed for quashing of the impugned order of non-bailable warrant dated 27.09.2022 and impugned order dated 07.12.2022, passed by the learned Chief Judicial Magistrate, Sitapur, in Criminal Case No. 3095 of 2001, arising out of case crime no. 172 of 2001, under Sections 498A, 304B of the IPC and Sections 3/4 of the Dowry Prohibition Act, relating to Police Station Pisawan, District Sitapur.

4. Factual matrix of the case is that the applicant was minor (thirteen years of age) at the time of alleged incident, as her date of birth has been shown as 20.07.1988. The opposite party no. 2, Sri Ram Chandra

lodged the first information report, against the present applicant along with the other co-accused persons. Thereafter, the investigation was conducted and the charge-sheet was filed. After the alleged incident, the applicant performed marriage with one Prakash, resident of Village Malhpur Chaubey and started living at her matrimonial house and, thus, she could not receive the summons and, ultimately, when the non-bailable warrant was issued on 27.09.2022, she came to know about the case and, thereafter, approached her counsel, who filed an application before Chief Judicial Magistrate, Sitapur on 14.10.2022 with a prayer that the matter may be referred to the Juvenile Justice Board for trial, as she was thirteen years of age at the time of the incident. On the said application, the Chief Judicial Magistrate, Sitapur passed the order on 07.12.2022, whereby, the prayer has been rejected and order of non-bailable warrant was passed and proclamation under Section 82 CrPC was issued against the applicant. Thus the applicant assailed the order dated 27.09.2022 and 07.12.2022 by way of instant application.

5. Contention of learned counsel for the applicant is that an FIR was lodged by the complainant, Ram Chandra under Section 498A, 304B of the IPC and under Section 3/4 of the Dowry Prohibition Act at Police Station Pisawan, District Sitapur on 04.09.2000 and the present applicant, who was the minor on the date of said incident, has been implicated in the present case due to ulterior motive as the age of the applicant on the date of incident was thirteen years, as per her date of birth. He submits that when this fact came into knowledge that first information report was lodged against the present applicant and all the family members, the applicant surrendered her before the court concerned and she was granted bail by the trial court vide order dated 08.02.2001.

6. Further submission is that the Investigating Officer conducted the investigation and submitted the charge-sheet against the family members of the applicant in Case Crime No. 172 of 2000 and the investigation against the applicant was kept pending but later on, under the influence of the opposite party no. 2, the charge-sheet was also submitted against the applicant on 24.03.2001 assuming her to be major, although it is apparent from the charge-sheet that the present applicant was about thirteen years of age as is mentioned in the charge-sheet itself.

7. He contended that after filing of the charge-sheet against the applicant, the criminal case was registered as Criminal Case No. 3095 of 2001, (State Vs. Chottaki @ Kiran) but neither any notice nor any summon was ever served upon the applicant and the trial court without ensuring the fact as to whether the summon has been served upon the applicant or not, started issuing non-bailable warrants against the applicant and as soon as the fact with respect to the issuance of non-bailable warrant came into knowledge of the applicant, she moved an application on 14.10.2022 before the Chief Judicial Magistrate, Sitapur and while moving the application, the plea has been raised that since the applicant was minor on the date of the incident, thus, the matter may be transferred to the Juvenile Justice Board concerned. He added that the Chief Judicial Magistrate, Sitapur without applying its judicial mind and without properly scrutinizing the materials available on record, rejected the application of the applicant and issued non-bailable warrant

and started the proceeding of proclamation under Section 82 of CrPC.

8. Adding his arguments, he submits that the learned trial court has ignored the provisions of existing Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred as 'the Act, 2000'), as well as the fact that the applicant was minor on the date of incident, thus, he has committed patent illegality.

9. For reference, Section 7A of the Act, 2000 is extracted as under:-

"7A. Procedure to be followed when claim of juvenility is raised before any court.?

(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be: Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect."

10. Referring the abovesaid provisions, he submits that the trial court did not speak even a single word regarding determination of juvenility of the applicant, thus, the provision regarding enquiry for determining the juvenility has clearly been violated. The trial court though noted the argument of the applicant in the impugned order that she was 13 years of age at the time of incident but neither discussion is there nor finding is recorded.

11. He next added that Section 49 of the Act, 2000 deals with the presumption and determination of the age and, thus, it was also incumbent upon the competent authority to enquire about the fact that whether the alleged accused is a child conflict with law or not.

12. He further contended that the procedure for determination of age has specifically been provided under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007. The exhaustive rules with respect to the procedure has been prescribed only to ensure the fact that no juvenile should be tried with other than the procedure prescribed in the Act, 2000 and, thus, he submits that the trial court did not bother to adopt the procedure which was to be followed for determination of the age. Lastly, he submits that since the trial court has at the first hand denied the benefit of juvenility to the present applicant even after application moved by the applicant, therefore, the trial court has not only rejected the application of the applicant but he has also skipped the provisions of law.

13. In support of his contention, he has placed reliance on the judgement rendered in the case of **Abuzar Hossain @ Gulam Hossain Vs. State of West Bengal** reported in **2012 (10) SCC 489** and has

referred paragraph 39.1 of the abovesaid judgement, wherein it has categorically been held that the claim of juvenility can be raised at any stage, even after trial is concluded and appeal is decided.

14. Paragraph 39.1 is extracted as under:-

"39.1 A claim of juvenility may be raised at any stage even after final disposal of the case. It may be raised for the first time before this Court as well after final disposal of the case. The delay in raising the claim of juvenility cannot be a ground for rejection of such claim. The claim of juvenility can be raised in appeal even if not pressed before the trial court and can be raised for the first time before this Court though not pressed before the trial court and in appeal court."

15. Relying upon the aforesaid, he submits that the Hon'ble Apex Court has held that delay in raising the claim of juvanility cannot be a ground for rejection of such claim and the same can be raised even at the stage of appeal, if not pressed before the trial court.

16. Further submission is that since it is clear from the charge-sheet as well as the school leaving certificate, which has been annexed as annexure no. 3 to the application, issued by the Primary School, Dhadhnamau, that the age of the applicant was 13 years at the time of incident as her date of birth is 20.07.1988 and the charge-sheet also mentions the fact that the age of the present applicant was 13 years at the time of incident. He submits that undoubtedly the present applicant was minor at the date of the alleged occurrence and, thus, the Chief Judicial Magistrate, Sitapur has no jurisdiction to proceed with the trial of the applicant and the matter should have been remitted back to the Juvenile Justice Board concerned. He next submits that the order passed by the Chief Judicial Magistrate dated 07.12.2022 is therefore unlawful and against the law propounded by the Apex Court and thus, the same is unsustainable.

17. On the other hand, learned counsel appearing for the State has controverted the contentions of the learned counsel for the applicant and submits that the incident has taken place in the year 2000 and it is an admitted fact that the present applicant, after lodging of the FIR, appeared before the trial court and she was enlarged on bail, which itself discloses that the criminal case was very well in the knowledge of the applicant. He further submits that since the correct address was not informed to the trial court, therefore, summons were sent on the address which was available on record of the trial court and in case of non-appearance, the trial court issued non-bailable warrants and has taken recourse of the other consequential proceedings and when the Police somehow could reach to the place of the present applicant, she, in the compelling circumstances, appeared before the trial court, thus, it shows that the applicant was deliberately trying to avoid the criminal proceedings and was escaping herself since last 20 years, due to which, the trial proceeding has become delayed. He further submits that the present applicant has not come with clean hands before this Court and she has misused the process of law and the liberty of bail granted by the trial court.

18. Addressing the issue, learned counsel for the State submits that since the non-bailable warrant was issued against the applicant and further the proceeding of

Section 82 of CrPC was also initiated and, therefore, once the application was filed by the applicant, the same was dismissed, while discussing in detail all these circumstances and it is not understandable that once the fact was in the knowledge of the applicant that she was minor at the time of the incident, why did she not seek the benefit of the provisions of Section 7A of the Act, 2000, uptil twenty years . Thus, there is no illegality or perversity in the impugned order passed by the Chief Judicial Magistrate, Sitapur and this application is liable to be dismissed.

19. Having heard learned counsel for the parties and after perusal of the records, it emerges that the First Information Report was lodged way-back in the year 2000, wherein, while lodging the First Information Report under Sections 498-A, 304 B of IPC read with Section 3/4 of the Dowry Prohibition Act, the present applicant was implicated. Thereafter, she got married and started living separately with her husband although prior to her marriage, she appeared before the trial court and applied for bail and she was enlarged on bail. It also reveals that the summons were never served upon the applicant as the postal address of the applicant in the record of the trial court was the parental address and the parties did not provide the residential/postal address of the matrimonial place of the applicant. As per the averments of the applicant, the proceedings of non-bailable warrant as well as proclamation under Section 82 of CrPC came into her knowledge, when she appeared before the trial court and submitted an application for declaring her as a juvenile.

20. When this Court examined the order of the learned trial court dated 07.12.2022 impugned in this application, it emerges that an application dated 14.10.2022 was before the trial court, whereby, the applicant claimed her as a juvenile showing her age as 13 years at the time of the incident. The trial court though mentioned the aforesaid application and prayer of the applicant in the order but no finding has been recorded on the core issue of determining the juvenility of the applicant.

21. In the present matter, the application was filed for determination of age and for declaring the applicant as a juvenile/child conflict with law, but the trial court did not consider the same and has issued non-bailable warrant and the proclamation under Section 82 CrPC, ignoring the prayer of the applicant.

22. This Court is not unmindful of the provisions of law as well as the law propounded by the Apex Court with respect to claim of juvenility. From bare reading of Section 7(A) of the Act, 2000, it reveals that '**Whenever**' a claim of juvenility is raised before any Court and the Court is of the opinion that an accused was juvenile on the date of commission of the offence, the Court shall immediately make an inquiry taking necessary evidence for determining the age of person, to come to the conclusion that as to whether such an accused is a juvenile or not.'

23. Section 7(A) of the Act, 2000, emphasise that the claim of juvenility can be raised at any stage even after final disposal of the case before the trial court or after the final order passed in an appeal. It has also been settled that delay in raising the claim of juvenility cannot be a ground for rejection of the claim of juvenility.

24. After the aforesaid discussion it is borne out that intent of the legislative is very clear from bare reading of the

provisions of Section 7(A) of the Act, 2007 as it mentions that, 'whenever a claim of juvenility is raised', and that clearly shows that an absolute opportunity has been accorded to such an accused to set a claim of his or her being juvenile at the time of the incident and further that can be raised before 'any Court' which indicates that the same can be raised even at the Court of appeal as well as the trial court. The claim of the juvenility can be adjudicated in an appeal, even if, the same was not considered before the trial court.

25. So far as the present case is concerned, the matter is at the stage of trial, though the same is of year 2000 and after about delay of 22 years, the applicant is claiming her to be a juvenile but as per the provisions of law, delay cannot be a ground for entertaining such claims but the Magistrate while passing the impugned order, prima facie, seems to be unreasonable and ignorant of the provisions of law as well as the law propounded by the Apex Court with respect to deciding the claim of juvenility. Further there seems to be no lapse or lacuna on the part of the applicant while submitting an application on 14.10.2022.

26. Consequently, the impugned order dated 07.12.2022 passed by the trial court in Case No. 3095 of 2001 arising out of Case Crime No. 172 of 2001, is hereby set aside.

27. The matter is remitted back to the trial court concerned.

28. The applicant is at liberty to file a fresh application within a period of 30 days from the date of receiving of certified copy of this order, before the trial Court and if such an application is filed, the same shall be decided within further period of 45 days strictly in accordance with law.

29. For the aforesaid period, the non-bailable warrant as well as the proclamation under Section 82 of CrPC shall remain stayed.

30. With the aforesaid directions and observations, the application is hereby **allowed.**

(2023) 3 ILRA 777
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.01.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application u/s 482 No. 26037 of 2022

Ruchi Mittal @ Smt. Ruchi Garg
...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Sri Sunil Kumar

Counsel for the Opp. Parties:
G.A., Sri Bhanu Prakash Singh, Sri Vijay Prakash Mishra

Criminal Law - Code of Criminal Procedure - Section 156 (3) & 397-Application u/s 482 against order u/s 156(3) treating application as complaint–Not maintainable–Revision under Section 397 Cr.P.C. is proper remedy.

Application dismissed. (E-9)

List of Cases cited:

1. Atul Pandey @ Param Pragyan Pandey Vs St. of UP & anr., 2021 LawSuiut (All) 603

2. Jagannath Verma & ors. Vs St. of U.P. & anr.,2015 (88)AllCriC 1

3. Lalit Kumari Vs Government Uttar Pradesh, 2014 (84) All CriC 719,

4. Sukhwai Vs St. of U. P., 2008 CrLJ 472,

5. Sakiri Vasu Vs St. of U. P., 2008 (60) AllCriC 689,

6. Mohd. Yusuf Vs Afaq Jahan, 2006 (54) AllCriC 530

7. Gopal Das Sindi Vs St. of Assam, AIR 1961 SC 986

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

1. Heard Sri Sunil Kumar, learned counsel for the applicant, Sri Pankaj Kumar Tripathi, learned AGA for the State and Sri Bhanu Prakash Singh, learned counsel for opposite party no.2.

2. This application has been moved under Section 482 CrPC to set aside the order dated 25.07.2022 passed by ACJM-I, Gautam Budh Nagar in Criminal Misc. Application No.462 of 2021 (old No.343 of 2021, Smt. Ruchi Mittal Vs. Amit Mittal and others), under Section 156(3) CrPC treating the application under Section 156(3) CrPC to be a complaint case. It is also prayed that after setting aside the impugned order, a fresh order directing the police to register the case and start investigation and to submit investigation report. Alternatively, a prayer is also made to direct the ACJM-I, Gautam Budh Nagar to hear and decide the aforementioned application under Section 156(3) CrPC within a stipulated period of time.

3. At the very outset before entering into merit it would be proper to mention that Sri Bhanu Prakash Singh, learned counsel appeared on behalf of opposite party no.2 without any notice about which it is argued by the learned counsel for the applicant that he has no locus to appear and argue in the matter. He also pointed out the ordersheet in which earlier on 17.10.2022 it is observed by a co-ordinate Bench of this Court that it is not a revision and Sri Vijay Prakash Mishra, learned counsel (who appeared on behalf of opposite party no.2) has no locus. However, after closer of the argument the learned counsel for the applicant had not opposed the presence, appearance and argument of Sri Bhanu Prakash Singh, learned counsel who appeared on behalf of opposite party no.2.

4. Learned AGA and the learned counsel appearing for opposite party no.2 argued that an application under Section 482 CrPC is not maintainable. Instead of filing a criminal revision the applicant has filed an application under Section 482 CrPC i.e. the present application which is not maintainable.

5. In the connected affidavit the applicant has given the description of the whole episode and about the cases pending between the parties. Admittedly, the applicant is the legally wedded wife of opposite party no.2, Amit Mittal. Opposite party nos.3 and 4 are the father-in-law and mother-in-law of the applicant. Opposite party no.5 is brother of applicant's husband and opposite party no.6 is the wife of opposite party no.5.

6. On the basis of argument of the parties it transpires that instead of this complaint a divorce petition by opposite party no.2 in Bulandshahr and two criminal cases, one under Section 406 IPC and another under Section 420 IPC are also pending. A case under the Guardians and Wards Act and a case under Section 125 CrPC are also pending between the parties and the

proceeding of cases under Sections 406 and 420 IPC were stayed by this Court. It is also argued by the learned counsel for the applicant that without any right an application under Section 340 CrPC has been moved by the respondent and till now no payment of interim maintenance has been made by the opposite parties. According to him since opposite parties are advocate in civil courts at Bulandshahar and Gautam Budh Nagar, therefore, the applicant in unable to prosecute the complaint and since commission of a cognizable offence has been alleged, hence instead of treating the application as complaint, the concerned Magistrate should have allowed the application and should have passed an order to register and investigate the case. Learned counsel for the applicant also argued that first of all the application under Section 156(3) CrPC was moved in the Court of ACJM-II but the PO found it difficult to decide the application as the opposite party no.1 is the practicing lawyer in Gautam Budh Nagar, therefore, on the request of ACJM-II the case was transferred to the Court of ACJM-I but the PO of Court of ACJM-I also found it difficult and wrote a letter to CJM, Gautam Budh Nagar showing his unwillingness to hear and decide the proceeding of application under Section 156(3) CrPC. The Chief Judicial Magistrate, Gautam Budh Nagar declined to transfer the same. Being helpless, the ACJM-I converted the application under Section 156(3) CrPC into a complaint which would not meet the ends of justice and in the attending circumstances the applicant being a lady would not be able to prosecute the complaint.

7. Learned counsel for the applicant pointing out Section 397(2) CrPC argued that the impugned order is an interlocutory order about which no revision lies.

8. Contrary to that learned AGA relied on the citation in **Atul Pandey @ Param Pragyan Pandey Vs. State of UP and another, 2021 LawSuiut (All) 603** decided by a co-ordinate Bench of this Court and argued that the circumstances expressed by the applicant would not change the form. In aforementioned case the Court citing the judgment in **Jagannath Verma and others Vs. State of UP and another, 2015 (88) AllCriC 1, Lalit Kumari Vs. Government Uttar Pradesh, 2014 (84) All CriC 719, Sukhwai Vs. State of Uttar Pradesh, 2008 CrLJ 472, Sakiri Vasu Vs. State of Uttar Pradesh, 2008 (60) AllCriC 689, Mohd. Yusuf Vs. Afaq Jahan, 2006 (54) AllCriC 530 and in Gopal Das Sindi Vs. State of Assam, AIR 1961 SC 986** concluded that if an application under Section 156(3) CrPC has been rejected or it has been converted into a complaint, the aggrieved party can prefer revision under Section 397 CrPC. It has also been held that an order regarding rejection of such application or conversion of application under Section 156(3) CrPC into a complaint is not an interlocutory order and it can only be challenged by the aggrieved party by filing revision.

9. The facts of this case and the said case are similar in nature. In **Atul Pandey (supra)** an application under Section 156(3) CrPC was moved by Ali Hasan, which was allowed and it was treated as a complaint. Being aggrieved an application under Section 482 CrPC had been moved about which a question regarding its maintainability was raised. Learned Single Judge referring the aforementioned judicial precedents held that in such circumstances an application under Section 482 CrPC is not maintainable. Relevant part of the judgment is as under:-

"16. In the light of the law laid down by the Full Bench of this Court in

Jagannath Verma (supra), I find that the impugned order is revisable in nature. The appropriate remedy against the impugned order available to the applicant is to file a revision under Section 397 Cr.P.C. instead of approaching this Court in its extraordinary jurisdiction by commencing an application under section 482 Cr.P.C. The prospective accused in the case is entitled to be heard.

17. In the wake of the preceding narrative, I find that the law laid down by the Full Bench in Jagannath Verma (supra) is fully applicable to the facts of this case. Judicial discipline prohibits me from entering into the merits of the case made by learned counsel for the applicant.

18. The application under section 482 Cr.P.C. is accordingly dismissed on the ground of existence of alternative remedy of filing a revision under section 397 Cr.P.C. available to the applicant."

10. On the basis of aforementioned discussion, this Court is also in conformity with the principles laid down by the learned Single Judge and is of the opinion that a proceeding under Section 482 CrPC against the impugned order is not maintainable and the applicant should have preferred a revision before the revisional court.

11. Accordingly, this application is dismissed as not maintainable. The applicant is at liberty to institute a revision in the concerned revisional court.

12. Office is directed to return the certified copy of the impugned order to the counsel for the applicant.

(2023) 3 ILRA 780
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.02.2023

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Application u/s 482 No. 39234 of 2022

Suneeta Pandey ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Ravindra Prakash Srivastava

Counsel for the Opp. Parties:
G.A.

Criminal Law - Indian Penal Code – Sections 375 & 376 - Code of Criminal Procedure Code, 1973 - Section 319- Applicant not named in the FIR-nor in charge sheet-but victim St.d her involvement in her St.ment u/s 164 Cr.P.C.-Summoning as additional accused under Section 319 CrPC–impugned -additional accused under Section 319 CrPC be summoned based only on the evidence adduced before it during trial, and not merely on the material collected during investigation by the investigating agency–Woman as accused for gang rape–Permissibility after 2013 amendment–if a woman facilitates the act of gang rape with a group, she can be prosecuted for the offence punishable under Section 376D IPC as the term "person" used therein is not gender specific and includes women.

Application dismissed. (E-9)

List of Cases cited:

1. Priya Patel Vs St. of M.P. & anr., (2006) 3 SCC (Cri.) 96

2. St. of Rajasthan Vs Hemraj & anr. reported in 2009 (12) SCC 402

3. Hardeep Singh Vs St. of Pun. & ors., (2014) 3 SCC 92

4. Manjeet Singh Vs St. of Har. & ors., (2021) SCC Online SC 632

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

1. Heard Sri Ravindra Prakash Srivastava, learned counsel for the applicant and Sri R.P. Mishra, learned A.G.A. for the State as well as perused the record.

2. The present application has been filed by the applicant- Suneeta Pandey for quashing of the impugned order dated 03.12.2018, whereby the applicant has been summoned to face the trial u/s 376-D, 212 IPC in exercise of power conferred under Section 319 Cr.P.C. as well as entire proceedings of Special Criminal (Sexual) Case No.08 of 2016 (State Vs. Fanindra Mani Ojha alias Dablu and others) arising out of Case Crime No.874 of 2015, under section 376-D & 212 I.P.C., Police Station- Kotwali Bansi, District- Siddharth Nagar, pending in the court of Additional District and Sessions Judge- Ist, Siddharth Nagar with a further prayer to stay the further proceedings of the aforesaid case.

3. As per F.I.R., the incident took place on 24.06.2015 and the F.I.R. was lodged against unknown persons on 28.07.2015 bearing Case Crime No. 874 of 2015, under Sections 363 and 366 I.P.C. alleging therein that someone has enticed away the daughter of the informant aged about 15 years and took her with him.

4. Statement of the victim has been recorded under Section 161 and 164 Cr.P.C. The victim in her statement recorded under Section 164 Cr.P.C. has stated that applicant was involved in the alleged incident but the applicant was not named in the charge sheet. Thereafter, opposite party no.2 filed an application under Section 319 Cr.P.C. for summoning the applicant and the court below vide order dated 03.12.2018 has summoned the applicant to face trial for the offence under Sections 376-D and 212 Cr.P.C. It is this order which is subject matter of challenge before this Court.

5. Learned counsel for the applicant submitted that the applicant is a lady hence no offence under Section 376-D I.P.C. is made out against the applicant and she has been wrongly summoned by the trial court. It is further argued that the applicant has been summoned in exercise of powers conferred under Section 319 Cr.P.C. solely relying upon the statement of Victim (P.W-1) as well as some other extraneous documents, which in fact is not sufficient. He contends that in view of the aforesaid facts and circumstances, the impugned order under challenge is vitiated by manifest error of law and amounts to blatant miscarriage of justice, and, therefore, is liable to be quashed.

6. Learned counsel for the applicant has further argued that the trial court has grossly erred in summoning the applicant for the offence punishable under Sectin 376-D IPC and Section 212 IPC. It is argued that a woman cannot commit rape and therefore, she cannot be prosecuted for gang rape because woman cannot be said to have an intention to commit rape. In support of his submission, he relied upon a decision of Hon'ble Supreme Court in **Priya Patel Vs. State of M.P. and another, (2006) 3 SCC (Cri.) 96**. He has further relied upon the judgment of the Apex Court in the case of **State of Rajasthan Vs. Hemraj & Anothe**r reported in **2009 (12) SCC 402**. It is also submitted that the applicant cannot be held guilty even in terms of the explanation to Section 376(2)(g) of IPC.

The extract of Section 375 & 376(2)(g) IPC prior to amendment is as under:-

375. Rape :-A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:--

First.Against her will.

Secondly.Without her consent.

Thirdly.--With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.--With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.--With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.--With or without her consent, when she is under sixteen years of age.

Explanation.--Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.--Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.]

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

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,--

xx xx xx xx xx

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years, Explanation I.--Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

7. On the other hand, learned A.G.A. has opposed the submission of learned counsel for the applicant and submitted that applicant has committed the alleged offence and it cannot be said that being a lady the applicant or a women cannot commit the offence under Section 376-D I.P.C. The judgements relied upon by the learned cousnel for the appicant are of no help as the same are realted to prior to the amendment in the provisions of Sections 375 to 376E IPC.

8. I have considered the submission made by learned counsel for the applicant and the provisions of Section 319 Cr.P.C. and have arrived at a conclusion that no

interference is called for in the impugned order. The scope and ambit of Section 319 of the Code have been elucidated in the case of **Hardeep Singh Vs. State of Punjab and others, (2014) 3 SCC 92** by the Hon'ble Apex Court. It has been held that, all that is required by the Court for invoking its powers under Section 319 Cr.P.C. is to be satisfied that from the evidence adduced before it, the person against whom no charge had been framed, but whose complicity appears to be clear, should be tried together with the accused. The ratio laid down by the Supreme Court in Hardeep Singh's case has been explained by the Hon. Apex Court in the case **Manjeet Singh Vs State of Haryana and others, (2021) SCC Online SC 632**. The Supreme Court after noticing its subsequent judgements on the issue, summarized the scope and ambit of the powers of the Court under Section 319 Cr.P.C. and has held that it is only the material collected by the court during the course of inquiry or trial and not the material collected by the investigating agency during the investigation of the case which can be used, while arraigning an additional accused. The Supreme Court has made it clear that the word "**evidence"** appearing in Section 319 Cr.P.C. means only such evidence as is made before the court in relation to statements and in relation to the documents which can be used by the court for unveiling all facts, other than the material collected during investigation. Of course, the evidence would also include the evidence led during the trial of the case after framing of charges. It is also laid down that besides the evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 of the Cr. P. C.

9. So far as the argument of learned counsel for the aplicant that a woman cannot commit rape and, therefore, she cannot be prosecuted for gang rape is not correct after going through the amended provisions of Section 375 to 376E IPC by Act 13 of 2013 of the Indint Penal Code, 1860.

10. The case of **Priya Patel (Supra)**, was a case of gang rape, where the wife of the appellant facilitated commission of gang rape within the meaning of Section 376(2)(g) IPC. After elaborate discussion on the provisions under Sectin 375 and 376 IPC, it was held therein, amongst other, that a woman cannot be prosecuted for alleged commission of offence of gang rape.

11. However, going through the amended provisions of Section 375 IPC & 376 IPC, the question, whether a female can commit the offence of rape is itself clear by the non-ambiguous language of section 375 of IPC which specifically states that the act of rape can only be done by a "man' and not by "any woman". Therefore, a woman cannot commit rape. But looking through again the amended provision of Section 376-D IPC, which is a distinct and separate offence of Gang Rape-according to which- "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 comitted 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 persons's natural life, and with fine". Thus, from the language used in Section 376-D IPC, it is seen that in order to establish an offence under Section 376-D IPC, the

prosecution has to adduce evidence to indicate that one or more persons had acted in concert and in such an event, if rape had been committed by even one, all the accused will be guilty irrespective of the fact that victim had been raped by one or more of them. In other words this provision embodies a principle of joint liability and the essence of that liability is the existence of common intention that common intention presupposes prior concert which may be determined from the conduct of offenders revealed during the course of action. In such cases, there must be criminal sharing, marking out a certain measure of jointness in the commission of offence. The term "person" used in the Section should not be contrued in a narrow sense. Section 11 I.P.C. defines "person' as it includes any company or association or body of persons whether incorporated or not. The word "person" is also defined in the Shorter Oxford English Dictionary in two ways: firstly, it is defined as "an individual human being" or "a man, woman, or child"; and, secondly, as "the living body of a human being". As such, a women can not commit the offense of rape but if she facilitated the act of rape with a group of people then she may be prosecuted for Gang Rape in view of the amended provisions. Unlike man, a woman can also be held guilty of sexual offences. A woman can also be held guilty of gang rape if she has facilitated the act of rape with a group of person.

12. Keeping in view of the aforesaid facts and law laid down by the Apex Court, I find no scope for interference in the impugned order passed by the trial court at this stage. **The application has no force and is accordingly dismissed.**

(2023) 3 ILRA 784
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.02.2023

BEFORE

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

Application u/s 482 No. 41169 of 2022

Tadaknath & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Ms. Jigyasa Singh

Counsel for the Opp. Parties:
G.A.

Criminal Law - Criminal Procedure Code, 1973 – Sections 190,202,216, 218 & 228–Addition or subtraction of offences–Permissible only by trial court at time of framing charge–Magistrate cannot add or subtract offences at stage of summoning in case based on police report–Proper stage is framing of charge by trial court–In cases based on private complaints, Magistrate has power to add or subtract sections after conducting inquiry under Sections 190/202 Cr.P.C.–Criminal Procedure Code, 1973–Case based on police report vs complaint case–Separate procedures prescribed–Cannot be overlapped or clubbed together–Order of Magistrate summoning accused under sections not included in chargesheet–Unsustainable and liable to be set aside.

Application dismissed. (E-9)

List of Cases cited:

St. of Guj. Vs Girish Radhakrishnan Varde AIR 2014 Supreme Court 620.

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

1. Learned counsel for the applicants is permitted to make necessary correction in the memo of the application during the course of the day.

2. The case is taken up in the revised call.

3. Heard Ms. Jigyasa Singh, learned counsel for the applicant, Mr. Amit Singh Chauhan, learned AGA for the State and perused the records.

4. This application under Section 482 Cr.P.C. has been filed to quash the order passed by learned Sessions Court, Bhadohi-Gyanpur dated 06.06.2019 in Criminal Revision No. 106 of 2018 (Manju Srivastava Vs. State of U.P. and others) as well as summoning order dated 18.10.2022 passed in protest petition by Judicial Magistrate-II, Bhadohi, Gyanpur in Case Crime No. 0125 of 2016, Case No. 5673 of 2016 (State Vs. Tadaknath and others), under sections 302, 427, 447 of Indian Penal Code, Police Station Koirauna, District Bhadohi and the entire criminal proceeding in the aforesaid case crime.

5. This Court without issuing notice to opposite party no. 2, is deciding the issue on purely legal questions in the present matter.

6. The fact of the case is that the opposite party no. 2 has lodged an FIR against the applicants for the offence under section 302, 323, 504, 506, 427 and 447 IPC. After investigation charge sheet has been submitted on 20.09.2016 for the offence under section 323, 504, 506 IPC. Being aggrieved by the charge sheet the opposite party no. 2 filed protest petition as Case No. 5673 of 2016 (Sate Vs. Tadaknath and others) before the concerned Magistrate on 26.10.2016 and the same was opposed by the applicants. The aforesaid petition was dismissed by the learned Judicial Magistrate-II, Bhadohi-Gyanpur vide order dated 02.11.2018, against which the opposite party no. 2 filed revision before the concerned court as Criminal Revision No. 106 of 2018 (Manju Srivastava Vs. State and others). The aforesaid criminal revision was allowed by the learned Sessions Judge, Bhadohi-Gyanpur vide order dated 06.06.2019 and the matter was remanded back to lower court for reconsideration, therefore, the matter was reheard by the concerned Magistrate and vide the order dated 18.10.2022 the protest petition was allowed, summoning the applicants under sections 302, 427 and 447 of Indian Penal Code.

7. Learned counsel for the applicants submits that the Magisrate cannot add or subtract any offence other than the offence for which charge sheet has been filed. The addition or subtraction of any offence is not permissible at the stage of summoning and it is permissible by the trial court only at the time of framing charge. In support of her argument she has relied upon the judgment of Hon'ble Apex Court in Case of ***State of Gujrat Vs. Girish Radhakrishnan Varde AIR 2014 Supreme Court 620.*** The relevant portion of the said judgment of the Apex Court reads as follows:-

"14. The question, therefore, emerges as to whether the complainant/informant/prosecution would be precluded from seeking a remedy if the investigating authorities have failed in their duty by not including all the sections of IPC on which offence can be held to have been made out in spite of the facts disclosed in the FIR. The answer obviously

has to be in the negative as the prosecution cannot be allowed to suffer prejudice by ignoring exclusion of the sections which constitute the offence if the investigating authorities for any reason whatsoever have failed to include all the offence into the chargesheet based on the FIR on which investigation had been conducted. But then a further question arises as to whether this lacunae can be allowed to be filled in by the magistrate before whom the matter comes up for taking cognizance after submission of the chargesheet and as already stated, the magistrate in a case which is based on a police report cannot add or substract sections at the time of taking cognizance as the same would be permissible by the trial court only at the time of framing of charge under section 216, 218 or under section 228 of the Cr.P.C. as the case may be which means that after submission of the chargesheet it will be open for the prosecution to contend before the appropriate trial court at the stage of framing of charge to establish that on the given state of facts the appropriate sections which according to the prosecution should be framed can be allowed to be framed. ***Simultaneously, the accused also has the liberty at this stage to submit whether the charge under a particular provision should be framed or not and this is the appropriate forum in a case based on police report to determine whether the charge can be framed and a particular section can be added or removed depending upon the material collected during investigation as also the facts disclosed in the FIR and the chargesheet.***

15. In the alternative, if a case is based on a complaint lodged before the magistrate under Section 190 or 202 Cr.P.C., the magistrate has been conferred with full authority and jurisdiction to conduct an enquiry into the complaint and thereafter arrive at a conclusion whether cognizance is fit to be taken on the basis of the sections mentioned in the complaint or further sections were to be added or substracted. The Cr.P.C. has clearly engrafted the two channels delineating the powers of the magistrate to conduct an enquiry in a complaint case and police investigation based on the basis of a case registered at a police station where the investigating authorities of the police conducts investigation under Chapter XII and there is absolutely no ambiguity in regard to these procedures.

16. In spite of this unambiguous course of action to be adopted in a case based on police report under Chapter XII and a magisterial complaint under Chapter XIV and XV, when it comes to application of the provisions of the Cr.P.C. in a given case, the affected parties appear to be bogged down often into a confused state of affairs as it has happened in the instant matter since the magisterial powers which is to deal with a case based on a complaint before the magistrate and the police powers based on a police report/FIR has been allowed to overlap and the two separate course of actions are sought to be clubbed which is not the correct procedure as it is not in consonance with the provisions of the Cr.P.C. The affected parties have to apprise themselves that if a case is registered under Section 154 Cr.P.C. by the police based on the FIR and the chargesheet is submitted after investigation, obviously the correct stage as to which sections would apply on the basis of the FIR and the material collected during investigation culminating into the chargesheet, would be determined only at the time framing of charge before the appropriate trial court. In the alternative, if the case arises out of a complaint lodged before the Magistrate, then the procedure

laid down under Sections 190 and 200 of the Cr. P.C. clearly shall have to be followed.

17. Since the instant case is based on the FIR lodged before the police, the correct stage for addition or substraction of the Sections will have to be determined at the time of framing of charge. But the learned single Judge of the High Court in the impugned judgment and order has not assigned reasons with accuracy and clarity for doing so and has made a casual observation by recording that the Trial Court at the appropriate stage will have the power to determine as to which provision is to be applied before the matter is finally sent for trial. The fall out of the Order of the High Court is that the prosecution represented by the appellant -State of Gujarat might be rendered remedy less as setting aside of the order of the Magistrate is likely to give rise to a situation where the prosecution would be left with no remedy for rectification or appreciation of the plea as to whether inclusion or exclusion of additional charges could be permitted. In fact, while upholding the order of the learned Additional District & Sessions Judge, the High Court has further overlooked the fact that the Additional District & Sessions Judge before whom revision was filed against the order of the Chief Judicial Magistrate, could have allowed the revision on the ground of erroneous exercise of jurisdiction by the Chief Judicial Magistrate who permitted to add three more Sections into the chargesheet. But the Additional District & Sessions Judge instead of doing so has straightway quashed the order passed by the Magistrate instead of confining itself to consideration of the question regarding error of jurisdiction and laying down the correct course to be adopted by the magistrate. In fact, the correct course of action should have been laid down by the High Court as also the learned Additional District & Sessions Judge by permitting the appellant - State of Gujarat to raise the question of addition of charges at the time of framing of charge under Section 228 of the Cr. P.C. and should not have passed a blanket order setting aside the order of the Magistrate without laying down the correct course of action to be adopted by the affected parties with the result that three orders came to be passed by the Chief Judicial Magistrate, Additional District & Sessions Judge and the learned Single Judge of the High Court, yet it could not resolve the controversy by highlighting the appropriate course of action to be adopted by the prosecution-State of Gujarat as also the magistrate which permitted addition of sections after submission of chargesheet missing out that the matter did not arise out of a complaint case lodged before the magistrate but a case which arose out of a police report/FIR in a Police Station."

8. Learned AGA could not dispute the aforesaid legal position that the concerned Magistrate cannot entertain the protest petition and summon the applicants under sections in which the charge sheet has not been submitted.

9. In view of the above the summoning order dated 18.10.2022 passed in protest petition by Judicial Magistrate-II, Bhadohi, Gyanpur in Case Crime No. 0125 of 2016, Case No. 5673 of 2016 (State Vs. Tadaknath and others), under sections 302, 427, 447 of Indian Penal Code, Police Station Koirauna, District Bhadohi is hereby set aside.

10. However, the learned Magistrate is at liberty to consider the matter to take

cognizance of other offence against the accused at the time of framing of charges.

11. With the aforesaid direction the application is, accordingly, allowed. There shall be no order as to costs.

(2023) 3 ILRA 788
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.02.2023

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Application u/s 482 No. 41885 of 2022

Prashant Jaiswal ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Sudarshan Singh, Sri Vinay Kumar

Counsel for the Opp. Parties:
G.A.

Criminal Law - Criminal Procedure Code, 1973–Sections 173(5), 175(6) & 207– Documents submitted by Investigating Officer–Accused entitled to be supplied clone copy–Except where document is voluminous under Section 207 proviso–Withholding of documents from accused–Permissible only in limited circumstances like privacy concerns of victim/witness–Court must balance rights and conduct proper inquiry before denying documents.

Criminal Law - Criminal Procedure Code, 1973–Section 327–In-camera trial–Does not prohibit supplying documents to accused for defending himself–Court can restrain publication outside court proceedings–Supplying documents/material to accused–Essential component of right to fair trial –Order denying documents–Must examine material, conduct inquiry, hear parties and pass reasoned order balancing concerns–Mere apprehensions insufficient to curtail supply of documents-order set aside.

Application disposed. (E-9)

List of Cases cited:

1. P. GopalKrishnan @ Dileep Vs St. of Kerala & anr., (2020) 9 SCC 161

2. Shamsher Singh Verma Vs St. of Har., (2016) 15 SCC 485

3. Manu Sharma Vs State (2010) 6 SCC 1

4. V.K. Sasikala Vs State, (2012) 9 SCC 771

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. Heard Shri Sudarshan Singh, learned counsel for the applicant and learned A.G.A. for the State.

2. Challenge has been raised to the order dated 21.11.2022 passed by the learned court below on Paper No. 10-Kha in Session Trial No. 699 of 2022 (State Vs. Prashant Jaiswal), arising out of Case Crime No. 54 of 2021, under Sections - 376, 323, 504, 506 I.P.C. By that order, the learned court below has rejected the application moved by the applicant/accused person. It has thus refused to make available to the applicant a clone copy of the data available on a pen drive submitted by the Investigating Officer as part of the case diary.

3. Submission of learned counsel for the applicant is, the clone copy of the pen drive is necessary to be provided to the applicant to allow him a fair opportunity to confront the prosecution witness with certain parts thereof. Inasmuch as the data on that pen drive is not material referable to Section 173 (6) of the Cr.P.C., rather, it

appears to be data referable to section 173 (5) Cr.P.C., the accused has a perfect right to be supplied a copy of the same in the interests of a fair trial which is directly referable to his fundamental right.

4. As to the reasoning offered by the learned court below, it has been submitted, grave error has been committed by it in assuming a violation of privacy of the victim, if the data on the pen drive is made available to the applicant. In the context, violation of fundamental right of the applicant to a fair trial, he would submit, the concerns of privacy may have been addressed by the learned court below by providing for restrains on the applicant from making public, any part of the data that may be thus made available to the applicant. In any case, a full transcript of the audio transaction ought to have been provided to the applicant. Last, it has been submitted, playback of the audio recording once, may not be enough to allow the applicant and his counsel a full and fair opportunity to formulate the exact questions to be put to the prosecution witness. The right of the defence cannot be curtailed on a vague and nebulous concern regarding privacy of the alleged victim. If allowed, it may seriously impair the impartiality and fairness of the trial proceedings, to the grave prejudice of the applicant.

5. On the other hand, the learned AGA would submit, at present it is not clear if the prosecution has relied and any part of the data/audio transaction claimed to be recorded on the pen-drive. Unless that were done first, the applicant cannot claim a right to be made available such document/material.

6. Having heard learned counsel for the parties and having perused the record, section 173(5) and (6) and section 207 Cr.P.C. read as under:

"173. Report of police officer on completion of investigation.-

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report-

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b)the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject- matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

207. Supply to the accused of copy of police report and other documents.-

In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-

(i)the police report;

(ii)the first information report recorded under section 154;

(iii) The statements recorded under sub- section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made

by the police officer under sub- section (6) of section 173;

(iv) The confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub- section (5) of section 173:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."

7. In **P. GopalKrishnan @ Dileep Vs. State of Kerala and Another, (2020) 9 SCC 161** in the context of material/evidence available on electronic media, the Supreme Court had observed as below:-

" In conclusion, we hold that the contents of the memory card/pen drive being electronic record must be regarded as a document. If the prosecution is relying on the same, ordinarily, the accused must be given a cloned copy thereof to enable him/her to present an effective defence during the trial. However, in cases involving issues such as of privacy of the complainant/witness or his/her identity, the Court may be justified in providing only inspection thereof to the accused and his/her lawyer or expert for presenting effective defence during the trial. The Court may issue suitable directions to balance the interests of both sides"

8. Thus, by way of principle, it has to be recognized, material/evidence available on a pen drive/electronic form is a document. In **Shamsher Singh Verma Vs. State of Haryana, (2016) 15 SCC 485**, it was recognized, a compact disc is a document. Then, being material referable to Section 173(5) Cr.P.C. and not Section 173(6) Cr.P.C., it may be supplied to the accused person as a clone copy of the original. Also, under Section 207 Cr.P.C., the right of the accused to be supplied "any other document or relevant extract thereof forwarded to the Magistrate with the police report under Sub-Section (5) of Section 173 Cr.P.C." may ordinarily be curtailed only if it is voluminous. In that case the Magistrate may allow its inspection instead of supply of a complete copy. The distinction between Section 173 and Section 207 Cr.P.C. was clarified in **Manu Sharma Vs. State (2010) 6 SCC 1.** Therein, it was observed:

"219. The role and obligation of the Prosecutor particularly in relation to disclosure cannot be equated under our law to that prevalent under the English system as aforereferred to. But at the same time, the demand for a fair trial cannot be ignored. It may be of different consequences where a document which has been obtained suspiciously, fraudulently or by causing undue advantage to the accused during investigation such document could be denied in the discretion of the Prosecutor to the accused whether the prosecution relies or not upon such documents, however in other cases the obligation to disclose would be more certain. As already noticed the provisions of Section 207 have a material bearing on

this subject and make an interesting reading. This provision not only require or mandate that the court without delay and free of cost should furnish to the accused copies of the police report, first information report, statements, confessional statements of the persons recorded under Section 161 whom the prosecution wishes to examine as witnesses, of course, excluding any part of a statement or document as contemplated under Section 173(6) of the Code, any other document or relevant extract thereof which has been submitted to the Magistrate by the police under sub-section (5) of Section 173. In contradistinction to the provisions of Section 173, where the legislature has used the expression "documents on which the prosecution relies" are not used under Section 207 of the Code. Therefore, the provisions of Section 207 of the Code will have to be given liberal and relevant meaning so as to achieve its object. Not only this, the documents submitted to the Magistrate along with the report under Section 173(5) would deem to include the documents which have to be sent to the Magistrate during the course of investigation as per the requirement of Section 170(2) of the Code.

220. The right of the accused with regard to disclosure of documents is a limited right but is codified and is the very foundation of a fair investigation and trial. On such matters, the accused cannot claim an indefeasible legal right to claim every document of the police file or even the portions which are permitted to be excluded from the documents annexed to the report under Section 173(2) as per orders of the court. But certain rights of the accused flow both from the codified law as well as from equitable concepts of the constitutional jurisdiction, as substantial variation to such procedure would frustrate the very basis of a fair trial. To claim documents within the purview of scope of Sections 207, 243 read with the provisions of Section 173 in its entirety and power of the court under Section 91 of the Code to summon documents signifies and provides precepts which will govern the right of the accused to claim copies of the statement and documents which the prosecution has collected during investigation and upon which they rely.

221. It will be difficult for the Court to say that the accused has no right to claim copies of the documents or request the Court for production of a document which is part of the general diary subject to satisfying the basic ingredients of law stated therein. A document which has been obtained bona fide and has bearing on the case of the prosecution and in the opinion of the Public Prosecutor, the same should be disclosed to the accused in the interest of justice and fair investigation and trial should be furnished to the accused. Then that document should be disclosed to the accused giving him chance of fair defence, particularly when non-production or disclosure of such a document would affect administration of criminal justice and the defence of the accused prejudicially.

222. The concept of disclosure and duties of the Prosecutor under the English system cannot, in our opinion, be made applicable to the Indian criminal jurisprudence stricto sensu at this stage. However, we are of the considered view that the doctrine of disclosure would have to be given somewhat expanded application. As far as the present case is concerned, we have already noticed that no prejudice had been caused to the right of the accused to fair trial and non-furnishing of the copy of one of the ballistic reports had not hampered the ends of justice. Some shadow of doubt upon veracity of the

document had also been created by the prosecution and the prosecution opted not to rely upon this document. In these circumstances, the right of the accused to disclosure has not received any setback in the facts and circumstances of the case. The accused even did not raise this issue seriously before the trial court."

9. Also, in **V.K. Sasikala Vs. State, (2012) 9 SCC 771**, as issue arose if at the stage of Section 313 Cr.P.C. an accused was entitled to documents not relied by the prosecution. Even such documents were permitted to be examined by the defence. It was then observed:

"13. Without dilating on the said aspect of the matter what has to be taken note of now are the provisions of the Code that deal with a situation/stage after completion of the investigation of a case. In this regard the provisions of Section 173(5) may be specifically noted. The said provision makes it incumbent on the investigating agency to forward/transmit to the court concerned all documents/statements, etc. on which the prosecution proposes to rely in the course of the trial. Section 173(5), however, is subject to the provisions of Section 173(6) which confers a power on the investigating officer to request the court concerned to exclude any part of the statement or documents forwarded under Section 173(5) from the copies to be granted to the accused.

14. The court having jurisdiction to deal with the matter, on receipt of the report and the accompanying documents under Section 173, is next required to decide as to whether cognizance of the offence alleged is to be taken in which event summons for the appearance of the accused before the court is to be issued. On such appearance, under Section 207 CrPC, the court concerned is required to furnish to the accused copies of the following documents:

1. The police report;

2. The first information report recorded under Section 154;

3. The statements recorded under sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of Section 173;

4. The confessions and statements, if any, recorded under Section 164;

5. Any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of Section 173.

15. While the first proviso to Section 207 empowers the court to exclude from the copies to be furnished to the accused such portions as may be covered by Section 173(6), the second proviso to Section 207 empowers the court to provide to the accused an inspection of the documents instead of copies thereof, if, in the opinion of the court it is not practicable to furnish to the accused the copies of the documents because of the voluminous content thereof. We would like to emphasise, at this stage, that while referring to the aforesaid provisions of the Code, we have deliberately used the expression "court" instead of the expression "Magistrate" as under various special enactments the requirement of commitment of a case to a higher court (Court of Session) by the Magistrate as mandated by the Code has been dispensed with and the Special Courts constituted under a special statute have been empowered to receive the report of the investigation along with the relevant

documents directly from the investigating agency and thereafter to take cognizance of the offence, if so required.

17. Seizure of a large number of documents in the course of investigation of a criminal case is a common feature. After completion of the process of investigation and before submission of the report to the court under Section 173 CrPC, a fair amount of application of mind on the part of the investigating agency is inbuilt in the Code. Such application of mind is both with regard to the specific offence(s) that the investigating officer may consider to have been committed by the accused and also the identity and particulars of the specific documents and records, seized in the course of investigation, which supports the conclusion of the investigating officer with regard to the offence(s) allegedly committed. Though it is only such reports which support the prosecution case that are required to be forwarded to the Court under Section 173(5) in every situation where some of the seized papers and documents do not support the prosecution case and, on the contrary, supports the accused, a duty is cast on the investigating officer to evaluate the two sets of documents and materials collected and, if required, to exonerate the accused at that stage itself. However, it is not impossible to visualise a situation whether the investigating officer ignores the part of the seized documents which favour the accused and forwards to the court only those documents which support the prosecution. If such a situation is pointed by the accused and such documents have, in fact, been forwarded to the court would it not be the duty of the court to make available such documents to the accused regardless of the fact whether the same may not have been marked and exhibited by the prosecution? What would happen in a situation where such documents are not forwarded by the investigating officer to the court is a question that does not arise in the present case. What has arisen before us is a situation where evidently the unmarked and unexhibited documents of the case that are being demanded by the accused had been forwarded to the court under Section 173(5) but are not being relied upon by the prosecution. Though the prosecution has tried to cast some cloud on the issue as to whether the unmarked and unexhibited documents are a part of the report under Section 173 CrPC, it is not denied by the prosecution that the said unmarked and unexhibited documents are presently in the custody of the court. Besides, the accused in her application before the learned trial court (IA No. 711 of 2012) had furnished specific details of the said documents and had correlated the same with reference to specific seizure lists prepared by the investigating agency. In such circumstances, it can be safely assumed that what has happened in the present case is that along with the report of investigation a large number of documents have been forwarded to the court out of which the prosecution has relied only on a part thereof leaving the remainder unmarked and unexhibited."

10. Thus, only by way of exception to the general rule, it may be recognized, the Court may be justified to allow for a simple inspection of the documents being relied upon by the prosecution. Statutorily, those exception may arise under section 207(iii) read with section 173(6) Cr.P.C. and section 207(v) read with Section 173(5) Cr.P.C. At the same time, by virtue of the first proviso to section 207, the Magistrate retains discretion to allow any part or portion of the statement to be furnished to the accused, in such event. Also, by virtue of

the second proviso to section 207, the Magistrate may only allow inspection of any document (covered by Section 176(5) of the Cr.P.C.), if it is voluminous.

11. Then, by virtue of the ratio of the decision of the Supreme Court in P. Gopal Krishnan (supra), where issues of privacy of the complainant/witness or his/her identity may be involved as may require balancing of interests of both sides, the Magistrate may only allow for an inspection of a document in place of its whole copy being supplied.

12. Thus, denial of complete copy of a document is an exception to the general rule namely, the accused has a right to be made available the material. To carve an exception to the rule, their must exist just and proper grounds. Those may emanate either from Section 173(6) Cr.P.C. when the police officer may have formed an opinion that disclosure of any statement is either not relevant or its disclosure is not essential in the interest of justice or is inexpedient in the public interest. Yet, by virtue of the first proviso to Section 207 the opinion and the reasons (giving rise to it) would remain subservient to the better wisdom of the learned Magistrate. At that stage, the learned Magistrate may, instead of the entire statement or document, allow for a part or portion of it to be made over to the accused. Second, if the document not covered under Section 173(5) Cr.P.C. is voluminous, then, for that reason the learned Magistrate may allow for its extract to be made over to the accused.

13. Seen in that light, clearly, the exception carved out by the Supreme Court in P. Gopal Krishnan (Supra), is referable to the first proviso to Section 207 Cr.P.C. being not in the interest of justice or inexpedient in public interest. However, that decision to be made by the Magistrate being discretionary, would have to be exercised on a judicious application of mind to the particular/peculiar facts giving rise to serious concerns about violation of privacy etc.

14. When the Court seeks to deny an accused person material gathered during investigation and proposes to only allow him an opportunity to peruse the same from the Court record, the Court is taking a decision that may, potentially have a material being on the fairness and completeness of the trial as also its final outcome. Also, that decision if based on or inspired by reason to protect the privacy of another individual must be well reasoned, both on facts and in law.

15. Therefore, before the Court may do that, it must itself examine the material to be sure that the interest to protect the privacy of a complainant or witness etc. outweighs the requirement to make available to the accused person, the material being relied against him. In that, it may also speak to the concerned witness/complainant and ascertain his views. If necessary, it may entertain formal objections and reply thereto and pass such order as may balance the rights and interests of both sides, without risk of impairing the fairness of trial of proceedings.

16. In the present case that exercise does not appear to have been undergone by the learned court below. It has merely considered the application moved by the applicant and the general concern expressed by the prosecution. If the Court had itself examined the material and thereafter proceeded to pass the order, that

decision would have been founded on facts and would have addressed the genuine concerns of the parties. In that the Court may also have considered if supply of a transcript of the conversation or any portion or part thereof may serve the need of the defence. Certainly, the volume of the document is not an issue here as the entire document would fit on a pen drive.

17. The reasoning of the learned court below based on Section 327 Cr.P.C. may not be correct. That provision basically requires the trial such as this (involving offence under section 376 IPC), to be conducted in camera. Sub-section (3) of section 327 Cr.P.C. prohibits printing or publication of any matter in relation to such proceeding, except with leave of the Court. Plainly, that provision would have no application to the request of the accused person to be made available copy the document existing on the case diary for the purpose of setting up a defence. That provision applies primarily against printing or publication by third party, outside the Court proceedings. In any case, by virtue of Section 327 Cr.P.C., it would remain with the Court to restrain the accused person from making any publication, through any means of any part of such material, outside the Court proceedings.

18. Further another defect appears to exist in the order learned court below inasmuch as in the earlier part of the order it has been suggested that the copy of the desired document had already been made over to the applicant. That part of the reasoning would conflict with the later reasoning that such clone copy of pen-drive is not required to be given to the accused person, arising from concerns of privacy of the victim.

19. Whichever way the matter is looked at, at present the order passed by the learned court below is found to be deficient in reasoning. In view of the discussion made above, the said order cannot be sustained. It is set aside. The matter is remitted to the learned court below to pass a fresh order, keeping in mind the observation made above. Such exercise may be completed within one month from the date of communication of the order to the learned court below.

20. Accordingly, the present application is **disposed of**.

(2023) 3 ILRA 795
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.03.2023

BEFORE

THE HON'BLE BRIJ RAJ SINGH, J.

Crl. Misc. Bail Application No. 3574 of 2023

Sandeep Joshi ...Applicant
Versus
State of U.P. & Ors. ...Respondent

Counsel for the Applicant:
Pradeep Kumar Tripathi

Counsel for the Respondent:
G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 376, 323 & 506 - The Protection of Children From Sexual Offences Act, 2012 - Section 3/4 - Section 40 - Right of child to take assistance of experts, etc. - entitlement of legal assistance through a counsel of their choice or through Legal Services Authority, to the family or guardian of the child - legal assistance is required and the concerned SHO/Special Juvenile Police Unit (SJPU) will inform the victim or the complainant of the case - The Protection of Children From Sexual Offences Rules, 2020 - Rules 4(13) & 4(15) - Procedure

regarding care and protection of child - audi alteram partem .(Para - 4)
Complainant or any person on behalf of child victim – to be made a party to the proceedings - if any person made opposite party in bail application - mode of service upon such a person - Court required to ensure - identity of child victim not disclosed - at any time during course of investigation or trial.**(Para - 3)**
HELD:-Notice should be issued to the complainant/victim to inform them of the date of the registered application filed in High Court.**(Para - 7)**

Bail application pending. (E-7)

List of Cases cited:

Rohit Vs St. of U.P. through Secy. Home Lko. , Bail No.8227 of 2021

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

1. Heard learned counsel for the applicant, Sri Rajesh Kumar Singh learned AGA for the State.

2. Present application for bail is filed by the applicant to enlarge him on bail in case crime No.434 of 2023 under Section 376, 323, 506 IPC and 3/4 of Protection of Children from Sexual Offence Act, PS Hargaon, district Sitapur.

3. Two questions before this Court emerged in the case bearing **Bail No.8227 of 2021 (Rohit. Vs. State of U.P. through Secy. Home Lko.):**

"(i) whether the complainant or any person on behalf of the child victim is to be made a party to the proceedings; and

(ii) if any such person is to be made opposite party in the bail application, what should be the mode of service upon such a person, as the Court is required to ensure that the identity of the child victim is not disclosed at any time during the course of investigation or trial."

4 The Court while discussing the aforesaid two issue, has passed the detailed order and the Court has opined in paragraph-10 of the said case that entitlement of legal assistance through a counsel of their choice is mandatory and also second question has been answered by the Coordinate Bench. While issuing directions, the Court has passed the order that legal assistance is required and the concerned SHO/Special Juvenile Police Unit (SJPU) will inform the victim or the complainant of the case. The relevant paragraphs of the said judgment in the case of Rohit (supra) are quoted below:-

"10. A perusal of Section 40 of the POCSO Act, if made cursorily, would only indicate that it provides entitlement of legal assistance through a counsel of their choice or through Legal Services Authority, to the family or guardian of the child. However, such legal assistance would be meaningless if the family or guardian of the child is not aware of the said legal proceedings. A proper and effective legal assistance can be given to a person only when such a person is made aware of the pending proceedings. If the person is not made aware of the proceedings, no legal assistance can be given to him.

11. The Protection of Children from Sexual Offences Rules, 2020 (for short "the Rules of 2020') are framed to give effect to the purpose of the POCSO Act. Rules 4(13) and 4(15) relevant for the purpose of this case, which read:

"**4. Procedure regarding care and protection of child-**

(13) It shall be the responsibility of the SIPU, or the local police to keep the child and child's parent or guardian or other

person in whom the child has trust and confidence, and where a support person has been assigned, such person, informed about the developments, including the arrest of the accused, applications filed and Court proceedings.

(14) .....

(15) The information to be provided by the SJPU, local police, or support person, to the child and child's parents or guardian or other person in whom the child has trust and confidence, includes but is not limited to the following: -

(i) the availability of public and private emergency and crisis services; (ii) the procedural steps involved in a criminal prosecution;

(iii) the availability of victim's compensation benefits;

(iv) the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation;

(v) the arrest of a suspected offender;

(vi) the filing of charges against a suspected offender;

(vii) the schedule of Court proceedings that the child is either required to attend or is entitled to attend;

(viii) the bail, release or detention status of an offender or suspected offender;

(ix) the rendering of a verdict after trial; and

(x) the sentence imposed on an offender.

X X X

13. Therefore, from the reading of Section 40 of POCSO Act as well as Rule 4(13) and 4(15) of the Rules of 2020, it is clear that this Court is required to ensure that the SJUP or the local police informs the family or guardian of the child and also provide them legal assistance as required with regard to all proceedings, including the bail applications filed by the accused. Thus, it is necessary to implead the complainant, and in case the complainant is not a family member or guardian of the child, then the family member or guardian of the child as opposite party along with the complainant in the bail applications filed before this Court.

14. There is yet another reason to serve notice of the bail application in every POCSO offence case upon the parent/guardian of the child. A perusal of provisions of POCSO Act and Rules of 2020 casts a duty upon every person involved with the matter including the courts to provide circumstance and atmosphere wherein the victim child and his family feels safe and secure. Providing complete knowledge of judicial proceeding and opportunity to participate in the same would be a step in right direction in making the victim child and his family to maintain its faith in the justice delivery system of the society and thus feel safe and secure.

X X X

18. Notice in every case shall be served through Investigating Officer/S.H.O. of the Police Station concerned upon such complainant and/or parent/guardian of the child. The Investigating Officer/S.H.O. of the Police Station concerned shall ensure that identity of the child does not get disclosed in any manner whatsoever during investigation, trial or during service of notice.

X X X

22. Every notice issued to the complainant or to the family/guardian of the child shall also include the aforesaid details in Hindi language to enable him, in case he so desires, to take assistance from the Legal Services Authority."

5. Sri Rajesh Kumar Singh learned AGA-I has made submissions that Section 40 of the POCSO Act, 2012 is statutory

mandate which envisages that the victim has right to represent her cause before the Court. Section 40 of the POCSO Act is quoted below:-

"**40. Right of child to take assistance of experts, etc.**- Subject to the proviso to section 301 of the Code of Criminal Procedure, 1973 (2 of 1974), the family or the guardian of the child shall be entitled to the assistance of a legal counsel of their choice for any offence under this Act:

Provided that if the family or the guardian of the child are unable to afford a legal counsel, the Legal Services Authority shall provide a lawyer to them."

6. On specific query I have been informed by the Sri Rajesh Kumar Singh, learned AGA-I that as soon as notice is received by the Office of the GA, the information is sent to the concerned police station and the concerned police station informs the victim or the complainant as the case may be. However, he has submitted that while giving information, the police informs the complainant/victim that the case is filed in High Court, and this is only information given to the victim or the family member. It is the practice that after ten days of notice, the applications are filed but the victim or the family member does not know the date fixed by the Court only the notice number registered in the G.A. Office is informed without further details of the number of the application registered in the Office of High Court.

7. Section 40 of the Protection of Children from Sexual Offence Act mandates that right of a child to take assistance of a legal practitioner is necessary and I am of the opinion that specific date fixed in the registered application filed in High Court should be informed to the complainant or the victim as the case may be. In my opinion applying the principles of audi alteram partem coupled with Section 40 of the POCSO Act I am of the view that notice is liable to be issued to the complainant/victim.

8. Therefore, I issue notice to O.P. No.2 returnable on or before the date fixed.

9. List this case on 10.4.2023 within top 20 cases.

10. Before parting with the case, I appreciate the legal assistance provided by Sri Rajesh Kumar Singh, learned AGA-I.

(2023) 3 ILRA 798
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.03.2023

BEFORE

THE HON'BLE BRIJ RAJ SINGH, J.

Crl. Misc. Bail Application No. 3794 of 2023

Vishwanath ...Applicant
Versus
State of U.P. ...Respondent

Counsel for the Applicant:
Tripuresh Mishra

Counsel for the Respondent:
G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 323,504,506 & 304 - Four accused - allegation of assault - deceased received one injury on his head - other two injuries received on non-vital parts of the body - one of the accused granted bail - case of applicant at par with case of co-accused - no previous criminal history -- no possibility of

fleeing away from judicial process or tempering with the witnesses. **(Para - 3)**

HELD:-General role of assault assigned to all the accused persons. Injuries mentioned in the report are illegible. A fit case for bail. Directions to Chief medical Officer. Future postmortem report or injury report prepared by the doctor should be in typed format and legible, so that the same can be read easily.**(Para - 6,10)**

Bail application allowed. (E-7)

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

1. Heard Sri Tripuresh Mishra and Ms. Chandrika Rani Upadhyaya, learned counsel for the applicant and Sri Rajesh Kumar Singh, learned A.G.A. for the State.

2. The present bail application has been filed by the applicant with a prayer to enlarge him on bail in Case Crime No. 252 of 2022, under Sections 323,504,506,304 IPC, Police Station- Panchdeora, District-Hardoi.

3. It has been submitted by learned counsel for the applicant that there are four accused against whom allegation of assault has been levelled and the deceased received one injury on his head and other two injuries received on non-vital parts of the body. Learned counsel for the applicant has submitted that general allegation has been levelled against all the accused persons, and one of the accused Harish Chandra has been granted bail by this Court vide order dated 28.02.2023 passed in Criminal Misc. Bail Application No.3114 of 2023. It has also been submitted that the case of the applicant is at par with case of co-accused Harish Chandra. The applicant has no previous criminal history and there is no possibility of fleeing away from the judicial process or tempering with the witnesses and in case, the applicant is enlarged on bail, he shall not misuse the liberty of bail. The applicant is in jail since 28.10.2022.

4. Learned A.G.A. though opposed the prayer for bail but could not dispute the aforesaid facts that the co-accused-Harish Chandra has been granted bail by this Court.

5. Sri Rajhesh Kumar Singh, learned A.G.A. has stated that injury report filed by the doctor concerned is illegible.

6. Without expressing any opinion on the merits of the case and after hearing learned counsel for the parties and looking into overall facts and circumstances of the case as well as the fact that co-accused-Harish Chandra has been granted bail by this Court and general role of assault assigned to all the accused persons , I find it a fit case for bail

7. Let the applicant, namely, **Vishwanath**, be released on bail in the above case crime number on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of Court concerned with the following conditions :-

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

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against

him under Section 229-A of the Indian Penal Code.

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

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

8. It is made clear that the observations made in this order are limited to the purpose of determination of this bail application and will in no way be construed as an expression on the merits of the case. The Trial Court shall be absolutely free to arrive at its independent conclusions on the basis of evidence led unaffected by anything in this order.

9. At this stage, it is to be noted that from perusal of the injury report, it is appears that the injuries mentioned in the report are illegible and the prosecution side as well as the applicant side faces difficulty while going through the injury report.

10. The Court is of the opinion that in future postmortem report or injury report prepared by the doctor should be in typed format and legible, so that the same can be read easily. Therefore, I direct the Principal Secretary, Medical Health and Family Welfare Government of U.P. Lucknow to issue a proper direction to all the Chief Medical Officers of the District that postmortem report as well as injury report will be transcribed in typed format.

11. The Senior Registrar of this Court is directed to forward a copy of this order to the Principal Secretary, Medical Health and Family Welfare Government of U.P. Lucknow forthwith for necessary compliance.

12. This case shall be listed for monitoring after two months as to what action has been taken in pursuance of directions issued by this Court.

13. List this case on 25.05.2023.

(2023) 3 ILRA 800
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.10.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Crl. Misc. Anticipatory Bail Application No. 7977 of 2021
(U/s 438 Cr.P.C.)

Chaudhary Pratap Singh ...Applicant
Versus
State of U.P. & Ors. ...Opp.Parties

Counsel for the Applicant:
Sri Amit Daga

Counsel for the Opp.Parties:
G.A., Sri Akhilesh Mishra, Sri Anshuman Vidhu Chandra, Sri Mehul Khare, Sri Jagdev Singh

A. Criminal Law - Code of Criminal Procedure, 1973-Section 438-Indian Penal Code, 1860-Sections 323 & 376-D-the applicant is said to have promised the

complainant to get her a nice job-When she met with the applicant he committed rape with two persons-NBW and proceedings u/s 82 and 83 Cr.P.C. are already complete and the applicant is having criminal antecedents to his credit-The allegations are of serious nature-The case law of Bhajan Lal do not apply to the present case-The applicant had agitated the provisions of Section 482 Cr.P.C. twice at High Court but failed, the same is not disclosed by the applicant in the anticipatory bail application-applicant has not come with clean hands-The applicant failed to consider the requirements of law of investigation and also the consideration made by the Apex Court in various judgments in this regard.(Para 1 to 17)

The bail application is rejected. (E-6)

List of Cases cited:

Shivam Vs. St. of U.P. & anr.. (2021) AirOnline All 484

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard Sri Amit Daga, learned counsel for the applicant, Sri Mehul Khare, learned counsel for the complainant and Sri Vibhav Anand Singh, learned A.G.A. for the State as well as perused the record.

2. The present application has been moved seeking anticipatory bail in Criminal Complaint Case no. 1407 of 2018, under Sections 323, 376-D IPC, Police Station- Bhopa, District- Muzaffarnagar, with the prayer to enlarge the applicant on anticipatory bail.

PROSECUTION STORY:-

3. The complainant Smt. Sangeeta Kaur W/o Dulli Singh had filed a complaint before the Magistrate concerned on 16.11.2016 with the allegation that the complainant is a dalit lady and she was very well conversant with the family of Sushil Chaudhary S/o Dharmveer Singh. The said Sushil is said to have introduced the complainant to one Pratap Singh (applicant) S/o Govind Singh of District Udham Singh Nagar, Uttarakhand. It was told to the complainant that the applicant is the Chairman of Urban Bank Kashipur and also the Manager of Kisan Inter College, Kundeshwari, District Udham Singh Nagar, Uttarakhand and the applicant is said to have promised the complainant to get her a nice job. On 24.9.2016 the said Sushil Chaudhary told the husband of complainant that on 25.9.2016 his relative had to come to Morna, Muzaffar Nagar for some personal work. The complainant is said to have reached the Morna Petrol Pump, Muzaffar Nagar, at 12 noon of 25.9.2016. The applicant is said to have come by car No. UK 18 6677 alongwith Sushil and one Deepak of Gurgaon. The husband of complainant is said to have left for his house leaving her behind. The complainant accompanied the applicant and the said persons in their car towards Shukrtaal, Muzaffar Nagar. The applicant and his colleagues got drunk on the way. The applicant is said to have started misbehaving with the complainant. On her protest, she was beaten up and abused and all the aforesaid persons are said to have committed gang rape with her. The applicant is said to have video recorded the same in his mobile. After the said act the complainant is said to have been thrown at Partapur byepass, Meerut. After reaching her house, the complainant informed her husband about the incident, who went to the police station the next day but the police did not take any action whatsoever. The complaint case was filed as such.

RIVAL CONTENTIONS:-

4. Learned counsel for the applicant has stated that the niece of the applicant namely, Priyanka D/o Lalit Kumar had solemnized a love marriage with one Vipul Kumar many years ago. The applicant had opposed the said love marriage of his niece Priyanka. With the passage of time, the brother of the applicant i.e. father of Priyanka accepted the said love marriage of his daughter and his relations with her husband Vipul Kumar became cordial thereon. Learned counsel has further stated that the said Vipul Kumar, husband of his niece is having criminal antecedents as in all, nine cases are pending against him at various places in West UP and Udham Singh Nagar, Uttarakhand. The said son-in-law, Vipul Kumar, tried his best to grab the ancestral property of the applicant and his brothers. Learned counsel has further stated that the aforesaid complaint has been filed at the behest of the said niece and her husband Vipul Kumar just to pressurize the applicant, so that he may not hinder them in getting the property of the applicant transferred to him.

5. Learned counsel has further stated that the complainant herein had moved an application alongwith the affidavit before the trial court on 20.4.2017 to not to proceed against the accused applicant as the person who had committed rape with her was some other person with the same name Pratap Singh. The said application is annexed as Annexure-12 to the affidavit. Learned counsel has further stated that the complainant and her husband Dulli Singh had moved an application supported with the affidavit before the trial court on 17.1.2018 stating therein that the statement of the complainant recorded under Section 164 Cr.P.C. on record of the trial court is false as the same has been recorded at the instance of Priyanka and her husband Vipul. The said application is annexed as Annexure No. 16 to the affidavit.

6. Learned counsel has further stated that the complainant had further moved an application before the trial court on 22.1.2018 to close the proceedings of complaint case against all the accused persons by rejecting the summoning order. Learned counsel has further stated that the complainant again moved an application before the trial court on 7.2.2018 for providing police security as she felt danger to her life.

7. Learned counsel has further stated that the trial court on 3.8.2018 had passed an order asking the complainant to issue process against each accused person as she had levelled allegations against two different persons with same name Pratap Singh. The said order of the trial court was challenged by the complainant before the revisional court in Criminal Revision No. 245 of 2018 and the same was dismissed on merits.

8. Learned counsel has stated that the trial court has issued non-bailable warrant against the applicant and other accused persons on 2.3.2021 without giving any cogent reasons for it.

9. Learned counsel has submitted that the applicant had lodged an FIR at police station, Kashipur District Udham Singh Nagar, Uttarakhand under Sections 386, 388, 389 and 120-B IPC against the complainant and she was arrested as accused and her statement was recorded under Section 164 Cr.P.C. wherein the complainant has categorically stated that the applicant and Sushil had not committed any kind of sexual assault with her and a false case has been filed against them.

10. Learned counsel has further argued that after thorough investigation, a charge sheet was submitted against four accused persons including the complainant.

11. Learned counsel has further submitted that the complainant herein is used to filing frivolous FIRs as she had filed an FIR at P.S. Gajraula, District J.P. Nagar, under Sections 452, 342, 506 IPC and 3(2)(Va) SC/ST Act at Case Crime No. 169 of 2018. It has been stated that in the said FIR, a closure report was filed by the police and even the complainant had filed the application before the Magistrate concerned to accept the said closure report which was accepted by it on 14.7.2018. Another witness produced in the present complaint case namely, Sumit Kumar, had also lodged an FIR No. 273 of 2019, at P.S. Kotwali Mandi, District Saharanpur under Sections 328 and 506 IPC, in which also, the closure report was filed and he had filed a protest petition to the said closure report. Despite the said protest petition dated 23.11.2020 the court was pleased to accept the closure report vide order dated 20.2.2021. Another close friend of the complainant, Smt. Usha had also filed an FIR at P.S. Simbhaoli, District Hapur as FIR No. 308 of 2019 in which the final report has been submitted before the trial court, which is pending adjudication. The said Vipul Kumar had also filed a complaint case against the applicant in the court of A.C.J.M.-I, Bijnor on 16.3.2020, which was dismissed vide order dated 4.3.2021 by the trial court. Learned counsel has next stated that all the cases against the applicant have been filed out of vengeance and the parties are inimical to each other and there are various cases and cross cases filed against each other.

12. Learned counsel has next stated that the applicant has a criminal history of five cases, which has been explained. He has placed reliance on the judgements of the Apex Court in *Criminal Appeal No. 577 of 2017 (Arising out of SLP (Crl.) No. 287 of 2017 and State of Haryana and others vs. Bhajan Lal and others 1992 Supp (1) Supreme Court Cases 335*.

13. Per contra, learned counsel for the complainant, Sri Mehul Khare, has vehemently opposed the bail application and has stated that the applicant has not come with clean hands as he had challenged the summoning order by filing a Application u/s 482 Cr.P.C. No. 13983 of 2017. The said petition was dismissed by this Court vide order dated 5.5.2017.

14. Learned counsel has next stated that another application U/S 482 Cr.P.C. No. 42944 of 2017 was also filed before the applicant which was again dismissed. Learned counsel has further stated that the applicant had filed a special leave petition before the Supreme Court which was also dismissed vide order dated 6.4.2018.

15. Learned counsel for the complainant has stated that applicant is a powerful person of the locality. Learned counsel has also stated that NBW was issued against the applicant on 2.3.2021 and the proceedings under Section 82 and 83 Cr.P.C. have been completed against the applicant. The applicant is not entitled for anticipatory bail in light of the judgement of this Court passed in Shivam vs. State of U.P. and another reported in AirOnline 2021 All 484, and also the fact that the applicant is having criminal antecedents. The allegations in FIR are serious in nature.

CONCLUSION:-

16. The aforesaid case is squarely covered by paragraph 45 of the judgement

of this Court passed in ***Shivam vs. State of U.P. and another (supra),*** as it is an admitted fact that the applicant had agitated the provisions of Section 482 Cr.P.C. at this Court twice and failed. Paragraph 45 of the judgement is being quoted hereinbelow:-

"45) When the anticipatory bail is sought by an accused after submission of charge-sheet against him, the following particulars are required to be given in the anticipatory bail application to arrive at correct conclusion whether the charge-sheet submitted against the accused can withstand the requirements of law of investigation as considered above and also the consideration made by the Apex Court in various judgements in this regard :-

(i) The charge-sheet along with the entire material collected by the Investigating Officer should be made part of the anticipatory bail application;

(ii) Clear pleading with reference to the material on record should be made stating under which sub-paragraph of paragraph 41 stated hereinabove, the case of the applicant is covered;

(iii) Clear pleading should also be made that the case of the applicant is not barred by paragraph 43 mentioned aforesaid;

(iv) There should be clear averment in the affidavit in support of the anticipatory bail application that the applicant has not challenged the charge-sheet before this Court in any proceeding;

(v) In case the applicant has approached this Court by way of any other proceedings after submission of charge-sheet and has obtained any order in any proceedings, the same shall be disclosed in the anticipatory bail application; and (vi) Clear pleading should be made in the anticipatory bail application that after submission of charge-sheet, the applicant has not approached any court and no such proceeding is pending."

17. The N.B.W. and proceedings under Sections 82 and 83 Cr.P.C. are already complete and the applicant is having criminal antecedents to his credit. The allegations against the applicant are of serious nature. The case law of *Bhajan Lal (supra)* do not apply to the present case.

18. On due consideration to the arguments advanced by learned counsel for the parties and considering the nature of accusations and antecedents of the applicant and the case laws produced by learned counsel for applicant, I do not find that the applicant is entitled to be released on anticipatory bail in this case.

19. In view of the above, the anticipatory bail application of the applicant is **rejected**.

(2023) 3 ILRA 804
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.11.2022

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Crl. Misc. Anticipatory Bail Application No. 9023 of 2022

Dr. Archana Gupta ...Applicant
Versus
State of U.P. ...Respondent

Counsel for the Applicant:
Sri Puneet Bhadauria

Counsel for the Respondent:
G.A., Sri Kuldeep Singh Yadav

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 438 -

Anticipatory Bail - Indian Penal Code, 1860 - Sections 419, 420 ,467, 468 & 471 - when the accused is 'absconding' and declared as a 'proclaimed offender' - there is no question of granting anticipatory bail - when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail.(Para - 7)

Charge-sheet filed against applicant - willfully absented herself before trial court - due to this trial against applicant could not commence - process U/s 82 CrPC initiated against applicant - declared an absconder - anticipatory bail rejected by sessions court.**(Para - 8)**

HELD:-Accusation against applicant well founded. Applicant not entitled to anticipatory bail due to her declaration as an absconder/proclaimed offender in terms of Section 82 of the Code. **(Para - 8)**

Anticipatory bail application rejected. (E-7)

List of Cases cited:-

Prem Shankar Prasad Vs St. of Bihar , Criminal Appeal No. 1209 of 2021

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

1. Heard learned counsel for the applicant, learned A.G.A. for the State and learned counsel for the first informant.

2. The present application under Section 438 Cr.P.C. has been filed by the applicant seeking anticipatory bail apprehending arrest in Case Crime No. 460 of 2017, under Sections-419/420/467/468/471 IPC, Police Station Jaswant Nagar, District Etawah.

3. Learned counsel for the applicant has submitted that the applicant is innocent and has falsely been implicated in the present case. Learned counsel further submits that as per the allegations in the FIR that the first informant is the owner and in actual physical possession over the Araji Gata No. 151/1 measuring area 0.5320 hectare out of 2.3960 hectare situated at Mauja Rajmau, Tehsil- Jawant Nagar, Etawah and her name is duly recorded in the Revenue Records. With intention to grab her property, the applicant has executed an agreement to sale to one anonymous lady Prabha Devi, W/o Ramchandra and thereafter on 21.4.2017, he has executed sale deed in her favour and as such, on the basis of forged and fictitious sale deed the applicant wanted to grab the property of the first informant.

4. The counsel for the applicant further submits that the whole prosecution story is totally false and concocted. The applicant purchased the land from one Prabha Devi, W/o Ramchandra after verifying the revenue records. The first agreement to sale was executed between the parties till then there was no dispute raised by anyone with regard to the property in question. At present, the applicant is in actual physical possession of the property in question and when she started to raise construction thereon for her hospital, the first informant demanded hush money. The first informant is a prominent lady and was the Village Pradhan of the erstwhile session and when the applicant refused to do so, then the first informant lodged the FIR on the basis of false and fictitious grounds with allegations that the sale deed was executed through impersonation. It is further submitted that the actual name of the first informant is Kanthsri @ Prabha Devi, W/o Ramchandra @ Rambabu. Thereafter the first informant filed civil suit for cancellation of sale deed

of the property in question by means of Original Suit No. 433/2017 which is pending before the Civil Judge (J.D.), Etawah. In fact, the applicant herself subjected to a fraud committed by the first informant herself against which the applicant herself lodged an FIR registered as case crime no. 484/2017, U/s 420/406/467/468 against the first informant and others on 2.7.2017.

5. The learned counsel for the applicant further submits that the applicant is the bonafide purchaser. Earlier after filing of the charge-sheet against the applicant, she approached this Court by means of Application U/s 482 CrPC No. 25709 of 2019 which is still pending before this Court and till today no interim order has been passed and ultimately, the applicant moved the anticipatory bail application before the sessions court concerned but the same was duly rejected. It is further submitted that during course of investigation, the applicant has been protected from arresting till filing of charge-sheet by a coordinate bench of this Court passed in Crl. Misc. Writ Petition No. 19374 of 2017 vide order dated 18.9.2017. There is civil dispute between the parties. During course of investigation, the applicant fully cooperated with the investigation. But the Investigating Officer without collecting any cogent and credible evidence submitted the charge-sheet against the applicant. It is further submitted that proceedings U/s 82 CrPC was initiated against the applicant in a routine manner. The applicant is ready to cooperate with the trial.

6. The learned counsel for the applicant further submits that insofar as the maintainability of the anticipatory bail after issuance of process U/s 82 CrPC is concerned, the counsel for the applicant relies upon the judgement of this Court passed in Crl. Misc. Anticipatory Bail Application No. 4645 of 2022. The relevant portion of which is being reproduced hereunder:

"25. The Apex Court has restrained the proclaimed offender to seek anticipatory bail. The person who is not following the process of law and deliberately avoiding the investigation despite all necessary steps have been taken by the investigating officer to apprise him to cooperate with the process of investigation, e.g. summons have been served but to no avail, thereafter bailable warrants have been served but again he / she is not cooperating with the investigation for no plausible and cogent reasons, lastly non-bailable warrant has / have been served but there is no heed thereon, then the investigation officer has got no option except to seek proclamation u/s 82 / 83 Cr.P.C. It is also relevant to note here that the court concerned must ensure before taking any coercive steps that all the aforesaid proceed, i.e. summons, bailable warrants and non-bailable warrants have been duly served upon the person and he / she is deliberately avoiding the same. Issuing summons, bailable warrant and non-bailable warrants would not suffice but what is most important is its service upon the person because unless and until such process is served no further coercive step should be taken in view of the dictum of Apex Court in re: Inder Mohan Goswami (supra) inasmuch as these coercive steps are directly related with the liberty of the person which is protected under Article 21 of the Constitution of India.

26. Therefore, if the aforesaid process is avoided by the person, any appropriate

application for seeking proclamation can be filed by the investigating officer supporting with an affidavit to apprise the court concerned as to how despite the summon, bailable warrant and non-bailable warrant having been served upon the person he / she is deliberately avoiding to cooperate with the investigation and the court after having proper satisfaction on the averments of such application may issue proclamation. Only under these circumstances that person may be declared as proclaimed offender and his / her anticipatory bail application should not be heard. In other words, before filing anticipatory bail that person should be proclaimed offender and his / her anticipatory bail application will loose the right of hearing on merits."

7. Learned AGA as well as the counsel for the first informant vehemently opposed the prayer of the applicant and submitted that the charge-sheet has already been submitted against the applicant in the year 2018 and the case is pending since then. After filing of charge-sheet, the applicant deliberately absented herself from the proceedings. Consequently, the process U/s 82 CrPC has been initiated against the applicant on 22.2.2022 and she has been declared an absconder. It is also submitted that the applicant approached the learned court below for seeking anticipatory bail much later after having been declared as absconder and the anticipatory bail application was rejected by the sessions court on 18.8.2022. Due to non-cooperation of the applicant, the trial is still pending before the trial court. Sufficient evidence is available against the applicant. There is no ground for false implication of the applicant. Thus, the application of the applicant is liable to be rejected. He further relies upon the judgement of the Apex Court in the case of ***Prem Shankar Prasad vs. State of Bihar decided on 21.10.2021 in Criminal Appeal No. 1209 of 2021***. The relevant para of which is being reproduced hereunder:

"16. Recently, in Lavesh v. State (NCT of Delhi) [(2012) 8 SCC 730] , this Court (of which both of us were parties) considered the scope of granting relief under Section 438 vis--vis a person who was declared as an absconder or proclaimed offender in terms of Section 82 of the Code. In para 12, this Court held as under : (SCC p. 733)

"12. From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and was declared as 'absconder'. Normally, when the accused is 'absconding' and declared as a 'proclaimed offender', there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail."

8. Considering the entire facts and circumstances of the case, I am of the view that the accusation against the applicant is well founded. After filing of the charge-sheet against the applicant, she wilfully absented herself before the trial court and due to this, till today trial against the applicant could not commence. Moreover, it is clear from the above decision that if anyone is declared as an absconder/proclaimed offender in terms of Section 82 of the Code, he is not entitled to the relief of anticipatory bail. Thus, this is not a fit case for anticipatory bail as per law

propounded by the Apex Court. Consequently, the application U/s 438 CrPC is hereby ***rejected***.

(2023) 3 ILRA 808
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.10.2022

BEFORE

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

Crl. Misc. Anticipatory Bail Application No. 10800 of 2022
(U/s 438 Cr.P.C.)

Akhlakh Ahmad ...Applicant
Versus
State of U.P. ...Opp.Party

Counsel for the Applicant:
Sri Tawvab Ahmed Khan

Counsel for the Opp.Party:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Sections 41A & 438 - Anticipatory Bail - Indian Penal Code, 1860 - Sections 365, 342 & 420 - Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act 2021 - Section 3, 5(1) - no person shall convert, either directly or otherwise, any other person from one religion to another by use or practice of misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means - No person shall abet, convince or conspire such conversion - Pre-arrest bail is to strike a balance between the individual's right to personal freedom and the right of the investigating agency to interrogate the accused as to the material so far collected and to collect more information which may lead to recovery of relevant information. (Para - 12)

Complainant was promised employment by co-accused - taken to a Madarssa and a mosque - pressure was exerted upon him to convert his religion - managed to escape - Allegations made in FIR - applicant involved in forcing people to convert their religion.**(Para - 8,12)**

HELD:-Prima Facie, offence made out against applicant. Other co-accused persons already granted regular bail. Grant of anticipatory bail may hamper the custodial interrogation and will lead to nondisclosure of useful information and material facts and information. No case for exercising its discretionary power under section 438 Code of Criminal Procedure made out in favour of applicant. **(Para - 12,13)**

Anticipatory bail application rejected. (E-7)

List of Cases cited:-

1. P. Chidambaram Vs Directorate of Enforcement, (2019) 9 SCC 24

2. Sadhna Chaudhary Vs St. of Raj. & anr., 2022 (237) AIC 205 (SC)

3. Sushila Aggarwal & ors. Vs St. (NCT of Delhi) & anr., (2020) 5 SCC Page 1 (106)

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

1. Heard Mr. Tawvab Ahmed Khan, learned counsel for the applicant, Mr. K.P. Pathak, learned A.G.A. for the State and perused the record.

2. The present application has been moved seeking anticipatory bail in **Case Crime No. 408 of 2022, under Sections 365, 342, 420 IPC and Section 3, 5(1) of Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act 2021, P.S.-Kotwali, District-Fatehpur**, with the prayer that in the event of arrest, applicant may be released on bail.

3. As per contents of first information report, the complainant has alleged that he was promised employment by co-accused

Arman Ali whereafter he was taken to a Madarssa and a mosque and pressure was exerted upon him to convert his religion but some how he managed to escape.

4. Learned counsel for the applicant submits that the applicant is innocent and he has an apprehension that he may be arrested in the above-mentioned case, whereas there is no credible evidence against him. He further submits that the applicant has been falsely implicated in the present case due to ulterior motive. The applicant has franchisee of M/s Glaze Trading India Pvt. Ltd. and one of the agent of the company, i.e. Arman Ali was entrusted the work of increasing the number of agents for which Arman Ali informed that he has deposited an amount of Rs.10,000/- for fooding and lodging to one Irshad and another agent, however, as they never wanted to continue as agent of the aforesaid company and demanded the money back, when the same was not returned, a false and frivolous case has been made out against the applicant including the other accused persons. He further submits that the applicant has criminal history of two cases, which has satisfactorily been explained in para 19 of the affidavit in support of bail application. The applicant undertakes to co-operate during investigation and trial and he would appear as and when required by the investigating agency or Court. It has been stated that in case, the applicant is granted anticipatory bail, he shall not misuse the liberty of bail and will co-operate during investigation and would obey all conditions of bail.

5. *Per contra*, learned AGA opposed the prayer for granted anticipatory bail to the applicant by contending that the applicant is named in the FIR. He further submits that a notice under Section 41A of Cr.P.C. was sent by the investigating officer of the present case on 21.09.2022, but the applicant failed to appear before the Investigating Officer and as such had not co-operated with the investigation. He further submits that the case does not fall under the category of section 438 Cr.P.C. Therefore, the relief as prayed cannot be granted.

6. Considering the submissions made by learned counsel for the parties and perused the record, this Court finds that from the allegations made in the FIR, prima facie offence is made out against the applicant. Having regard to nature of allegations and stage of investigation, held, investigating agency must be given sufficient freedom in process of investigation.

7. Object of section 438 of the Code of Criminal Procedure, is that a person should not be unnecessarily harassed or humiliated in order to satisfy personal vendetta or grudge of complainant or any other person operating the things directly or from behind the curtains. It is well settled that discretionary power conferred by the legislature on this court can-not be put in a straitjacket formula, but such discretionary power either grant or refusal of anticipatory bail has to be exercised carefully in appropriate cases with circumspection on the basis of the available material after evaluating the facts of the particular case and considering other relevant factors (nature and gravity of accusation, role attributed to accused, conduct of accused, criminal antecedents, possibility of the applicant to flee from Justice , apprehension of tampering of the witnesses or threat to the complainant, impact of grant of anticipatory bail in investigation,

trial or society, etc.) with meticulous precision maintaining balance between the conflicting interest, namely, sanctity of individual liberty and interest of society.

8. Grant of anticipatory bail may hamper the custodial interrogation and will lead to nondisclosure of useful information and material facts and information. In the case of ***P. Chidambaram vs. Directorate of Enforcement, reported in (2019) 9 SCC 24***, the Apex Court held as under:-

"74. ***Ordinarily, arrest is a part of the process of the investigation intended to secure several purposes. There may be circumstances in which the accused may provide information leading to discovery of material facts and relevant information. Grant of anticipatory bail may hamper theinvestigation. Pre-arrest bail is to strike a balance between the individual's right to personal freedom and the right of the investigating agency to interrogate the accused as to the material so far collected and to collect more information which may lead to recovery of relevant information.*** *In State Rep.By The CBI v. Anil Sharma(1997) 7 SCC 187, the Supreme Court held as under:-*

"6. We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favourable order underSection 438of the Code. In a case like this effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders."

81. ***Grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the accused and in collecting the useful information and also the materials which might have been concealed. Success in such interrogation would elude if*** **the accused knows that he is protected by the order of the court. ....."**

9. In another judgment of Apex Court in case of ***Sadhna Chaudhary Vs. State of Rajasthan & Anr., reported in 2022 (237) AIC 205 (SC)***, the Apex Court had held as under:-

"14. Law on the applicability or grant of anticipatory bail under section 438 Cr.P.C. may be briefly summarised as under:

14.1. In Shri Gurbaksh Singh Sibbia and Others v. State of Punjab1, a Constitution Bench of this Court, Chief Justice Y.V. Chandrachud, speaking for the Court dealt with in detail on the considerations for grant of anticipatory bail.

14.2. In Siddharam Satlingappa Mhetre vs. State of Maharashtra and Others2; this Court relying upon the Constitution Bench judgment in Shri Gurbaksh Singh Sibbia laid down in

paragraph 112 of the report the following factors and parameters to be considered while dealing with an application for anticipatory bail:

"(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or other offences;

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution because overimplication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witnesses or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

14.3. In yet another recent Constitution Bench judgment in the case of Sushila Aggarwal and Others vs. State (NCT of Delhi) and Another3, in paragraph 85 of the report Justice Ravindra Bhatt laid down the guiding principles in dealing with applications under Section 438. Justice M.R. Shah had authored a separate opinion. Justice Arun Misra, Justice Indira Banerjee and Justice Vineet Saran agreed with both the opinions. The concluding guiding factors stated in paragraphs 92, 92.1 to 92.9 are reproduced hereunder:

"92. This Court, in the light of the above discussion in the two judgments, and in the light of the answers to the reference, hereby clarifies that the following need to be kept in mind by courts, dealing with applications under Section 438 CrPC.

92.1. Consistent with the judgment in Shri Gurbaksh Singh Sibbia and others v. State of Punjab4, when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate

the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.

92.2. It may be advisable for the court, which is approached with an application under Section 438, depending on the seriousness of the threat (of arrest) to issue notice to the public prosecutor and obtain facts, even while granting limited interim anticipatory bail.

92.3. Nothing in Section 438 Cr. PC, compels or obliges courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc.

The courts would be justified - and ought to impose conditions spelt out in Section 437 (3), Cr.P.C. [by virtue of Section 438 (2)]. The need to impose other restrictive conditions, would have to be judged on a casebycase basis, and depending upon the materials produced by the state or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.

92.4. Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.

92.5. Anticipatory bail granted can, depending on the conduct and behaviour of the accused, continue after filing of the chargesheet till end of trial.

92.6. An order of anticipatory bail should not be "blanket" in the sense that it should not enable the accused to commit further offences and claim relief of indefinite protection from arrest. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence.

92.7. An order of anticipatory bail does not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted prearrest bail.

92.8. The observations in Sibbia regarding "limited custody" or "deemed custody" to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e deemed custody). In such event, there is no question (or necessity) of asking the accused to

separately surrender and seek regular bail. Sibbia (supra) had observed that "if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v Deoman Upadhyaya."

92.9. It is open to the police or the investigating agency to move the court concerned, which grants anticipatory bail, for a direction under Section 439 (2) to arrest the accused, in the event of violation of any term, such as absconding, non cooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc."

10. In the case of ***Sushila Aggarwal and others Vs. State (NCT OF Delhi) and another (supra),*** the Hon'ble Supreme Court has observed as under:-

"At this stage, it would be essential to clear the air on the observations made in some of the later cases about whether Section 438 is an essential element of Article 21. Some judgments, notably Ram Kishna Balothia, (1995) 3 SCC 221 and Jai Prakash Singh, (2012) 4 SCC 379 held that the provision for anticipatory bail is not an essential ingredient of Article 21, particularly in the context of imposition of limitations on the discretion of the courts while granting anticipatory bail, either limiting the relief in point of time, or some other restriction in respect of the nature of the offence, or the happening of an event. Such obsevations are contrary to the broad terms of the power declared by the Constitution Bench in Sibbia case. The larger Bench had specifically held that an "overgenerious 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.(Para 54)"

"The reason for enactment ofSection 438CrPC was parliamentary acceptance of the crucial underpinning of personal liberty in a free and democratic country. Parliament wished to foster respect for personal liberty and accord primacy to a fundamental tenet of criminal jurisprudence, that everyone is presumed to be innocent till he or she is found guilty. Life and liberty are the cherished attributes of every individual. The urge for freedom is natural to each human being. Section 438 is procedural provision concerned with the personal liberty of each individual, who is entitled to the benefit of the presumption of innocence. As 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 not imposed by the legislature. (Para 56)"

"Application for anticipatory bail:

Consistent with the judgment in Gurbaksh Singh Sibbia, (1980) 2 SCC 565, when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the corut which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any

condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest. (Paras 92.1 and 85.1)"

11. Whether to grant anticipatory bail or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the Court. Further, anticipatory bail would depend on the conduct and behaviour of the accused, continue after filing of the chargesheet till end of trial and order of anticipatory bail does not in any matter limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted pre-arrest bail.

12. From perusal of the records, it appears that the applicant is the named accused and the allegation against the applicant relates to Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021, which is a serious offence punishable upto ten years imprisonment and fine of Rs.50,000/-. The Act said that "no person shall convert, either directly or otherwise, any other person from one religion to another by use or practice of misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means. No person shall abet, convince or conspire such conversion". From the allegations made in the FIR, the applicant is involved in forcing people to convert their religion. Prima Facie, offence is made out against the applicant. The other co-accused persons, namely, Alim, Mohsin, Yaseen, Yaseen Mansoori @ Gulam Yaseen Mansoori and Arman Ali have already been granted regular bail by the Co-ordinate Bench of this Court.

13. In the light of above, looking to the facts and circumstances of this case, submissions of learned counsel for the parties, taking into consideration the role assigned to the applicant as per prosecution case, gravity and nature of accusation as well as reasons mentioned above, this Court is of the view that no case for exercising its discretionary power under section 438 Code of Criminal Procedure is made out in favour of applicant.

14. Accordingly this application under section 438 Cr.P.C. is **rejected** with liberty to avail appropriate remedy as provided under the law.

15. It is clarified that observations made in this order at this stage is limited for the purpose of determination of this anticipatory bail application and will in no way be construed as an expression on the merits of the case. The investigating officer of this case shall be absolutely free to arrive at its independent conclusions according to law on the basis of materials/evidences on record.

(2023) 3 ILRA 814
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.01.2023

BEFORE

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

Crl. Misc. Anticipatory Bail Application No. 10958 of 2022
(U/s 438 Cr.P.C.)

Sohit Kumar & Ors. ...Applicant
Versus
State of U.P. & Anr. ...Opp.Parties

Counsel for the Applicant:
Sri Gaurav Kakkar

Counsel for the Opp.Parties:
G.A., Sri Manoj Kumar Tripathi, Sri Vinod Kumar Tripathi

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 438 - anticipatory bail - Indian Penal Code, 1860 - Sections 323, 325, 354, 452, 504 & 506 , The Schedule Castes And The Schedule Tribes (Prevention of Atrocities) Act , 1989 - Section Section 3(2)(V)a, 3(1)r , 3(1)s , 18, 18A - Anticipatory bail in a crime where an offence under SC/ST Act is alleged can be granted only if the Court is satisfied that the allegations levelled do not prima facie make out a case under SC/ST Act - a person against whom a warrant has been issued and, is absconding or concealing himself in order to avoid execution of warrants, is not entitled to the relief of anticipatory bail.(Para - 12,17)

Sudden fight between persons of two groups - caste indicative words used knowingly - applicants not available for interrogation and investigation - applicants are avoiding to face trial - non-bailable warrants were issued against them. **(Para -7,17)**

HELD:-Offence under SC/ST Act made out against the applicants . A person against whom a warrant has been issued and, is absconding or concealing himself in order to avoid execution of warrants, is not entitled to the relief of anticipatory bail. **(Para -17)**

Anticipatory bail application rejected. (E-7)

List of Cases cited:

1. Prathvi Raj Chauhan Vs U.O.I. & ors. , (2020) 4 SCC 727

2. P. Chidambaram Vs Directorate of Enforcement, , (2019) 9 SCC 24

3. Sadhna Chaudhary Vs St. of Raj. & anr., , 2022 (237) AIC 205 (SC)

4. Prem Shankar Prasad Vs The St. of Bihar & anr. , AIR (2021) SC 5125

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

1. Heard Mr. Gaurav Kakkar, learned counsel for the applicants, Mr. Manoj Kumar Tripathi, learned counsel for the opposite party no.2, Mr. Amit Singh Chauhan, learned A.G.A. for the State and perused the record.

2. The present application has been moved seeking anticipatory bail in **S.T. No.145 of 2022 arising out of Case Crime No. 840 of 2021, under Sections 452, 354, 323, 325, 504, 506 IPC and Section 3(2)(V)a, 3(1)r and 3(1)s of S.C./S.T. Act, P.S.-Kotwali Shahar, District-Bijnor,** with the prayer that in the event of arrest, applicants may be released on bail.

3. A preliminary objection for admissibility of jurisdiction of the aforesaid bail application vide concurrent jurisdiction enshrined in Section 438 of Cr.P.C. has been raised by learned counsel for the opposite parties.

4. While answering the preliminary objection, the learned counsel for the applicant submits that there can be no absolute bar against grant of anticipatory bail in cases under the SC/ST Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide. As per the settled law of the Apex Court passed in case of ***Prathvi Raj Chauhan vs. Union of India & Others reported in (2020) 4 SCC 727***, if the complaint does not make out a *prima facie* case for the applicability of the provisions of the SC/ST Act, 1989, the bar created by Sections 18 and 18A(i) shall not

apply. The only caveat is that the power has to be used sparingly and is not to be used so as to convert the jurisdiction into that under Section 438 of the Code of Criminal Procedure.

5. Thus, while entering into the merits of the case to see whether the bar under Section 18 and 18A(i) of the SC/ST Act is applicable to the present case, the applicant counsel has placed the following facts:-

i) An FIR has been lodged by Smt. Sunita on 08.12.2021 at about 13:50 p.m. against the present applicants and one Anil Kumar alleging therein that the victim's husband has a grocery shop and while asking for the goods, Anil Kumar, the named accused entered the shop and when the victim restrained him from entering the shop, asking him to stand outside the shop, finding her to be all alone in the shop, with bad intention, caught hold of the victim and tried to outrage her modesty. The aforesaid accused person used caste indicative words like "*Chamar Chatta*". Alarm was raised by the victim, on which her son, Manish and brother-in-law, Dinesh reached the shop and thereafter, the aforesaid accused, Anil Kumar called other co-accused persons, who are the applicants in the present case and all of them with common intention entered the house of the victim having rod, danda and sharp edged weapon in their hands and assaulted the victim and her family members. The accused Anil Kumar was carrying countrymade pistol whereas Sohit (applicant no.1) was having iron rod. The accused Akash and Akshay (applicant nos.2 &3 respectively) had carried danda with them. The aforesaid accused persons with intention to kill the victim, her son and brother-in-law assaulted them. On hearing the noise of the victim and her family members, people gathered there to save the aforestated persons. Thereafter, the accused persons while running away from the place used caste indicating words.

ii) The FIR has been lodged after a delay of about one month and three days without giving any plausible explanation for the same, which falsifies the entire story.

iii) Only general allegations have been made against the applicants in the first information report.

iv) It was a sudden fight between the parties and there is no motive or intention on part of the applicants to cause injury to the injured.

v) Perusal of the statement of the victim under Section 164 Cr.P.C. goes to show that no offence under Section S.C./S.T. Act is made out against the applicants.

vi) The applicants have been falsely implicated in the present case due to village party bandi as has been emphasized in para 24 of the affidavit in support of bail application.

vii) Offence under Section SC/ST Act is not attracted against the applicants because as per Section 3(2) (Va) of SC/ST Act, such offence would be made out only when caste indicative words are used against a person or property knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member.

viii) In the present case, it was a sudden fight between two group of persons, therefore, in case any such words have been used, it was by chance, not knowing that the victim belongs to the SC/ST community.

6. On the cumulative strength of the aforesaid submissions, learned counsel for the applicant submits that the applicants are innocent and they have an apprehension

that they may be arrested in the above-mentioned case, whereas there is no credible evidence against them. He further submits that the applicants have been falsely implicated in the present case due to party bandi. The offence under Section 325 IPC is bailable. The applicants undertake to co-operate during investigation and trial and they would appear as and when required by the investigating agency or Court. It has been stated that in case, the applicants are granted anticipatory bail, they shall not misuse the liberty of bail and will co-operate during investigation and would obey all conditions of bail.

7. *Per contra,* learned AGA as well as learned counsel for the opposite party no.2 opposed the prayer for granted anticipatory bail to the applicants by contending that the applicants are named in the FIR. From the submissions made by learned counsel for the applicants that it was a sudden fight between persons of the two groups, is self indicated of the fact that caste indicative words have been used knowingly. From perusal of the FIR itself, it is clear that offence under Section SC/ST Act has made out.

8. They further submits that from the material as collected by the Investigating Officer, credible, clinching as well as documentary evidences showing the complicity of commission of the crime has been found, therefore, the charge sheet has been submitted against the applicants on 24.12.2021 under Sections 452, 354, 323, 325, 504, 506 IPC and Section 3(2)(V)a, 3(1)r and 3(1)s of S.C./S.T. Act. Thereafter, on the basis of the aforesaid charge sheet, cognizance has been taken by the concerned court below on 04.03.2022. They further submits that as the charge sheet has been submitted against the applicants including the sections of SC/ST Act, therefore, the present anticipatory bail application is not maintainable as in view of Section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, provisions of Section 438 Cr.P.C. are not applicable pertaining to offence committed under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

9. So far as the merits of the case are concerned, in the present case, two persons, namely, Manish and Dinesh sustained injury and they have been medically examined on 06.11.2021. From perusal of the X-ray report of the Manish and Dinesh, it is clear that they have sustained fracture. The applicants are avoiding to face trial, therefore, non-bailable warrants have already been issued against them. They further submits that the case does not fall under the category of section 438 Cr.P.C. Therefore, the relief as prayed cannot be granted.

10. Considering the submissions made by learned counsel for the parties and perused the record, this Court finds that from the allegations made in the FIR, prima facie offence is made out against the applicants.

11. For ready reference, the provisions of Sections 18 and 18-A and Section 3 (1) (Dha) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 are reproduced below:-

"18. Section 438 of the Code not to apply to persons committing an offence under the Act.*--Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an*

accusation of having committed an offence under this Act.

***18-A. No enquiry or approval required.**--(1) For the purposes of this Act--*

(a) preliminary enquiry shall not be required for registration of a first information report against any person; or

(b) the investigating officer shall not require approval for the arrest, if necessary, of any person,against whom an accusation of having committed an offence under this Act has been made, and no procedure other than that provided under this Act or the Code shall apply.

(2)The provisions of Section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court.

Section 3 (1) (s) of SC/ST Act-- abuses any member of a Schedule caste or a Scheduled Tribe by caste name in any place within public view."

12. The legal position is that an anticipatory bail in a crime where an offence under SC/ST Act is alleged can be granted only if the Court is satisfied that the allegations levelled do not prima facie make out a case under SC/ST Act. The position of law remains same even after the enactment of Section 18A of the Act. The Apex Court in the case of ***Prathvi Raj Chauhan vs. Union of India & Others reported in (2020) 4 SCC 727***, has observed as under:-

"11. Concerning the applicability of provisions of Section 438 CrPC, it shall not apply to the cases under the 1989 Act. However, if the complaint does not make out a prima facie case for applicability of the provisions of the 1989 Act, the bar created by Sections 18 and 18-A(i) shall not apply. We have clarified this aspect while deciding the review petitions."

13. From perusal of the FIR itself, it is clear that the offence under SC/ST At is made out against the applicants. Therefore, the present anticipatory bail application is not maintainable in view of Section 18 (2) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 wherein it has been mentioned that provisions of Section 438 Cr.P.C. are not applicable pertaining to offence committed under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

14. So far as the merits of the case, it would be appropriate to refer Section 438 Cr.P.C., which is reproduced herein below:-

"438. Direction for grant of bail to person apprehending arrest.

(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including-

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case

so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub- section (3) of section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, be shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub- section (1)."

15. Grant of anticipatory bail may hamper the custodial interrogation and will lead to nondisclosure of useful information and material facts and information. In the case of ***P. Chidambaram vs. Directorate of Enforcement, reported in (2019) 9 SCC 24***, the Apex Court held as under:-

"74. ***Ordinarily, arrest is a part of the process of the investigation intended to secure several purposes. There may be circumstances in which the accused may provide information leading to discovery of material facts and relevant information. Grant of anticipatory bail may hamper the investigation. Pre-arrest bail is to strike a balance between the individual's right to personal freedom and the right of the investigating agency to interrogate the accused as to the material so far collected and to collect more information which may lead to recovery of relevant information. In State Rep. By The CBI v. Anil Sharma (1997) 7 SCC 187, the Supreme Court held as under:-***

"6. We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favourable order under Section 438 of the Code. In a case like this effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders."

81. ***Grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the accused and in collecting the useful information and also the materials which might have been concealed. Success in such interrogation would elude if the accused knows that he is protected by the order of the court. ....."***

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14.2. In Siddharam Satlingappa Mhetre vs. State of Maharashtra and Others2; this Court relying upon the Constitution Bench judgment in Shri Gurbaksh Singh Sibbia laid down in paragraph 112 of the report the following factors and parameters to be considered while dealing with an application for anticipatory bail:

"(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or other offences;

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution because overimplication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witnesses or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

14.3. In yet another recent Constitution Bench judgment in the case of Sushila Aggarwal and Others vs. State (NCT of Delhi) and Another3, in paragraph 85 of the report Justice Ravindra Bhatt laid down the guiding principles in dealing with applications under Section 438. Justice M.R. Shah had authored a separate opinion. Justice Arun Misra, Justice Indira Banerjee and Justice Vineet Saran agreed with both the opinions. *The concluding guiding factors stated in paragraphs 92, 92.1 to 92.9 are reproduced hereunder:*

"92. This Court, in the light of the above discussion in the two judgments, and

in the light of the answers to the reference, hereby clarifies that the following need to be kept in mind by courts, dealing with applications under Section 438 CrPC.

92.1. Consistent with the judgment in Shri Gurbaksh Singh Sibbia and others v. State of Punjab4, when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.

92.2. It may be advisable for the court, which is approached with an application under Section 438, depending on the seriousness of the threat (of arrest) to issue notice to the public prosecutor and obtain facts, even while granting limited interim anticipatory bail.

92.3. Nothing in Section 438 Cr. PC, compels or obliges courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc.

The courts would be justified - and ought to impose conditions spelt out in Section 437 (3), Cr.P.C. [by virtue of Section 438 (2)]. The need to impose other restrictive conditions, would have to be judged on a casebycase basis, and depending upon the materials produced by the state or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.

92.4. Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.

92.5. Anticipatory bail granted can, depending on the conduct and behaviour of the accused, continue after filing of the chargesheet till end of trial.

92.6. An order of anticipatory bail should not be "blanket" in the sense that it should not enable the accused to commit further offences and claim relief of indefinite protection from arrest. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence.

92.7. An order of anticipatory bail does not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted prearrest bail.

92.8. The observations in Sibbia regarding "limited custody" or "deemed custody" to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail. Sibbia (supra) had observed that "if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v Deoman Upadhyaya."

92.9. It is open to the police or the investigating agency to move the court concerned, which grants anticipatory bail, for a direction under Section 439 (2) to arrest the accused, in the event of violation of any term, such as absconding, non cooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc."

17. From these materials and information, it is clear that the present applicants were not available for interrogation and investigation and non-bailable warrants were issued against them, therefore, a person against whom a warrant has been issued and, is absconding or concealing himself in order to avoid execution of warrants, is not entitled to the relief of anticipatory bail. The aforesaid has been held by the Apex Court in the case of ***Prem Shankar Prasad vs. The State of Bihar and another reported in AIR (2021) SC 5125.*** Relevant paragraph no.16 of the afroresaid judgment is as under:-

*"16. Recently, in **Lavesh v. State (NCT of Delhi) [(2012) 8 SCC 730]** , this Court (of which both of us were parties) considered the scope of granting relief under Section 438 vis-à-vis a person who was declared as an absconder or proclaimed offender in terms of Section 82 of the Code. In para 12, this Court held as under : (SCC p. 733) "12. From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and was declared as 'absconder'. Normally, when the accused is 'absconding' and declared as a 'proclaimed offender', there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail."*

It is clear from the above decision that if anyone is declared as an absconder/proclaimed offender in terms of Section 82 of the Code, he is not entitled to the relief of anticipatory bail."

Thus the High court has committed an error in granting anticipatory bail to respondent No.2 - accused ignoring the proceedings under Section 8283 of Cr.PC."

18. In the light of above, looking to the facts and circumstances of this case, submissions of learned counsel for the

parties, taking into consideration the role assigned to the applicants as per prosecution case, gravity and nature of accusation as well as reasons mentioned above, this Court is of the view that no case for exercising its discretionary power under section 438 Code of Criminal Procedure is made out in favour of applicant.

19. Accordingly this application under section 438 Cr.P.C. is rejected with liberty to avail appropriate remedy as provided under the law.

20. It is clarified that observations made in this order at this stage is limited for the purpose of determination of this anticipatory bail application and will in no way be construed as an expression on the merits of the case. The investigating officer of this case shall be absolutely free to arrive at its independent conclusions according to law on the basis of materials/evidences on record.

(2023) 3 ILRA 823
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.02.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

Crl. Misc. Bail Application No. 55026 of 2021
with
Crl. Misc. Bail Applications No. 38452 of 2021, 42694 of 2021, 50905 of 2021, 38124 of 2021, 10907 of 2022, 45095 of 2021, 2135 of 2022, 55734 of 2021

Monish ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Sri Shiv Prakash Tiwari

Counsel for the Respondent:
G.A.

(A) Criminal Law- The Juvenile Justice (Care and Protection of Children) Act, 2015 - Section 94 - Presumption and determination of age, The Juvenile Justice (Care and Protection of Children) Rules, 2007 - Rule 12(3) - Procedure to be followed in determination of Age , Juvenile Justice (Care and Protection of Children) Act, 2000 - Section 49 , The Juvenile Justice (Care and Protection of Children) Model Rules, 2016 - Rule 54 (18) (iv) - Procedure in cases of offences against children - The Protection of Children from Sexual Offences Act, 2012 - Sections ¾ , Section 29 , Section 34 - Procedure in case of commission of offence by child and determination of age by Special Court - Indian Penal Code, 1860 -Sections 376, 506 , The Schedule Castes And The Schedule Tribes (Prevention of Atrocities) Act , 1989 - Sections 3(2)(v), 3(2)(va), 3(1)(2) of SC/ST Act - The Code of criminal procedure, 1973 - Sections 161,164 - Engagement of fundamental rights in bail jurisprudence is a constant in constitutional law. (Para -71)

Applicant (major) committed inappropriate sexual acts with victim (minor) - prosecution case set out in FIR - victim is 15 years old, but her age is 13 years and 3 months - material inconsistencies in the age related evidence – victim falsely shown as minor - applicant and victim were intimate -F.I.R. is a result of an opposition of victim's parents - applicant not a flight risk - applicant always cooperated with investigation – applicant on interim bail. (Para - 2, 96)

(B) The Juvenile Justice (Care and Protection of Children) Act, 2015 - Section 94 - Presumption and determination of age - at the stage of bail - Whether age of the victim will be determined in accordance with Section 94 of the JJ Act, 2015? - If not - manner of assessing the age of a victim in a bail application under the POCSO Act when a challenge is laid to it by an accused – HELD - Section 94 of the JJ Act, 2015 should not be applied to bail

applications, as it would violate the right of bail of the accused - manner of consideration of age of a victim in a bail application under the POCSO Act should be guided by the line of enquiry and relevant factors - JJ Act, 2015 requires the consideration of age related documents such as school certificates, date of birth certificates, and medical reports for age determination - accused has a right to assail the veracity of the victim's age .(Para - 13, 91, 92, 93)

(C) The Protection of Children from Sexual Offences Act, 2012 - Section 29 - presumption of culpable intent under Section 29 of the POCSO Act, 2012 - Whether attracted against the accused at the stage of bail? - HELD - not applicable at pretrial bails - court must consider the defence of the accused at all stages of prosecution.(Para -13,94)

HELD:-Court obligated to independently evaluate the challenge laid to the victim's age - assessment of age in a bail order is tentative - based on probative value of documents - not advisable to lay down an inflexible or straitjacket formula for grant of bail. Applicant is a law abiding citizen who has cooperated with the investigation and is not a flight risk. No evidence of forceful entry in the house of victim. Victim does not have any criminal history apart from the instant case.**(Para - 93)**

Bail application allowed. (E-7)

List of Cases cited:

1. Bhola Bhagat Vs St. of Bihar , (1997) 8 SCC 720

2. Jitendra Ram Vs St. of Jhar. , (2006) 9 SCC 428

3. Babloo Pasi Vs St. of Jhar. , (2008) 13 SCC 133

4. Jabar Singh Vs Dinesh & anr. , (2010) 3 SCC 757

5. Prakash Rai Vs St. of Bihar, (2008) 15 SCC 223

6. Ravinder Singh Gorkhi Vs St. of U.P. , (2006) 5 SCC 584

7. Gopinath Ghosh Vs St. of W.B. , 1984 Supp SCC 228

8. Bhoop Ram Vs St. of U.P. , (1989) 3 SCC 1

9. Bhola Bhagat Vs St. of Bihar , (1997) 8 SCC 720

10. Hari Ram Vs St. of Raj. , (2009) 13 SCC 211

11. Abuzar Hossain @ Gulam Hossain Vs St. of W.B. , (2012) 10 SCC 489

12. Mahadeo Vs St. of Mah. & anr. , (2013) 14 SCC 637

13. St. of M.P. Vs Anoop Singh, (2015) 7 SCC 773

14. Jarnail Singh Vs St. of Har. , (2013) 7 SCC 263

15. Parag Bhati (Juvenile) through Legal Guardian-Mother-Rajni Bhati Vs St. of U.P. & anr. , (2016) 12 SCC 744

16. Ashwani Kumar Saxena Vs St. of M.P. , (2012) 9 SCC 750

17. Abuzar Hussain @ Gulam Hossain Vs St. of W.B. , 2012 (10) SCC 489

18. Sanjeev Kumar Gupta Vs The St. of U.P. & anr. , (2019) 12 SCC 370

19. Ram Vijay Singh Vs St. of U.P. , Criminal Appeal No. 175 of 2021

20. Rishipal Singh Solanki Vs St. of U.P. & ors. , (2022) 8 SCC 602

21. Mukarrab & ors. Vs St. of U.P. , (2017) 2 SCC 210

22. Noor Aga Vs St. of Punj. , (2008) 16 SCC 417

23. Tofan Singh Vs St. of T.N. , (2021) 4 SCC 1

24. St. of Bihar Vs Rajballav Prasad @ Rajballav Prasad Yadav ,(2017) 2 SCC 178

25. Sahid Hossain Biswas Vs St. of W.B. , 2017 SCC Online Cal 5023

26. Navin Dhaniram Baraiye Vs The St. of Mah., 2018 SCC Online Bom 1281

27. Joy V.S. Vs St. of Kerala , 2019 SCC Online Ker 783

28. Dharmander Singh Vs St. (Govt. of NCT of Delhi) , 2020 SCC Online Del 1267

29. Maneka Gandhi Vs U.O.I. , (1978) 4 SCC 494

30. Narendra Singh Vs St. of M.P , (2004) 10 SCC 699

31. Ranjitsing Brahmajeetsing Sharma Vs St. of Mah. , 2005 (5) SCC 294

32. Gudikanti Narasimhulu & ors. Vs P.P., H.C. of A.P. , (1978) 1 SCC 240

33. Hussain & anr. Vs U.O.I. ,(2017) 5 SCC 702

34. Emperor Vs H.L. Hutchinson & anr. , AIR 1931 All 356

35. Ranjitsingh Brahmajeetsing Sharma Vs St. of Mah. , (2005) 5 SCC 294

36. Nikesh Tarachand Shah Vs U.O.I. & anr. , (2018) 11 SCC 1

37. Maneka Gandhi Vs U.O.I. , (1978) 4 SCC 494

38. Arnab Manoranjan Goswami Vs St. of Mah. & ors.,2020 SCC Online 964

(Delivered by Hon'ble Ajay Bhanot, J.)

1. The judgement is being structured in the following conceptual framework to facilitate the discussion:

I. Introduction:

2. The prosecution case is briefly this. The victim is a minor. The applicant committed inappropriate sexual acts with her. The applicant is a major.

3. Shri S. P. Tiwari, learned counsel for the applicant has assailed the age of the victim as shown in the prosecution case and has made these submissions:

(i). A false date of birth was got recorded in the school registers by the parents of the victim to give her an advantage in life.

(ii). Various documents like Pariwar Register and Aadhar card which reflect her

true age and contradict the prosecution case have not been produced.

(iii). The pathological report reflects that the victim is 17 years of age.

(iv). The victim is in fact a major. However, no medical examination to determine her age as per the latest scientific criteria and medical protocol was got done by expert doctors as it would falsify the prosecution case.

(v). Inconsistencies in the age of the victim as stated in the F.I.R., the statement of the victim under Section 161 Cr.P.C., Section 164 Cr.P.C., school certificate and the age in the pathological report discredit the prosecution case regarding the victim's minority.

4. In Ashish Haldhar Vs. State of UP (Criminal Misc. Bail Application No. 10907 of 2022), it is contended by Shri Safiullah, learned counsel for the applicant that the age of the victim as per the radiological/medical report is 18 years. However, the school certificate records her age 13 years 06 months and 27 days. The victim in her statements under Sections 161 Cr.P.C. and Section 164 Cr.P.C. has asserted that she is 18 years of age. The F.I.R. as well as the statement of the first informant depict the age of the victim as 14 years.

5. Similar discrepancies in respect of the age of the victim are exist in other connected bail applications as well.

6. Shri Rishi Chaddha, learned Additional Government Advocate for the State contends that Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 20151 contemplates that the age depicted in the documents enumerated therein is conclusive and the same cannot be put to challenge in bail proceedings. Further, the offence is disclosed in the F.I.R. which alone is sufficient to trigger the presumption of guilt under Section 29 of the Protection of Children from Sexual Offences Act, 20122.

7. A number of members of the Bar submit that these two larger questions of law crop up regularly in bail applications under the POCSO Act, 2012. The issue needs to be decided in order to end the ambiguity in law.

8. The same questions of law arise in all the companion bail applications.

9. At this stage, the Court requested the members of the Bar to assist the Court on the questions of law.

10. Apart from the counsels for the applicants, Shri Nazrul Islam Jafri, learned Senior Counsel assisted by Ms. Nasira Adil; Shri Vinay Saran, learned Senior Counsel assisted by Shri Saumitra Dwivedi, learned counsel; Shri Shwetashwa Agrawal, learned counsel; Shri Rajiv Lochan Shukla, learned counsel and Ms. Gunjan Jadwani, learned counsel kindly volunteered to assist the Court.

11. On behalf of the State Shri Rishi Chaddha, learned Additional Government Advocate for the State has made his submissions.

II. Submissions on behalf of learned counsel for the applicants and learned members of the Bar:

12. Learned counsel for the applicant and other members of the Bar have contended that:

(i). Age of a victim has to be factored in while considering a bail application under POCSO Act offences.

(ii). The accused can challenge the age of a victim in bail proceedings.

(iii). Attention is called to the liberal interpretation of the enquiry under Section 94 of the JJ Act, 2015 by authorities in point.

(iv). The presumptions under Section 94 of the JJ Act, 2015 and Section 29 of the POCSO Act, 2012 can not prejudice the rights of an accused at the stage of bail.

(v). A large number of cases under the POCSO Act relate to runaway couples, and arise from family opposition to such relationships. In bail application excluding evidence or limiting the challenge to the age of the victim which is often on the borderline of majority and at times false, would result in miscarriage of justice for the accused.

Submissions on behalf of the State by learned AGA:

(i). POCSO Act is a special Act where the legislature has made stringent provisions to protect the interests of victims who are minors.

(ii). Section 94 of the JJ Act, 2015 shall be strictly interpreted and applied at the bail stage to implement the intent of the legislature.

(iii). The presumption of Section 29 of the POCSO Act, 2012 is triggered at the lodgement of the F.I.R. otherwise its purpose will be defeated.

(iv). The legislative intent was clearly to restrict the right of bail considering the gravity of the offences.

III. Issues arising for consideration:

13. Following questions of law thus arise for consideration in the bail application and the other companion bail applications:

I. Whether at the stage of bail the age of the victim will be determined in accordance with Section 94 of the JJ Act, 2015? If not what is the manner of assessing the age of a victim in a bail application under the POCSO Act when a challenge is laid to it by an accused?

II. Whether the presumption of culpable intent under Section 29 of the POCSO Act, 2012 is attracted against the accused at the stage of bail?

IV. Statutory Schemes:

14. The determination of age of a child victim under the POCSO Act has to be made in accordance with the procedure for determination of age contemplated in Section 94 of the JJ Act, 2015 read with Rule 54 (18) (iv) of the Juvenile Justice (Care and Protection of Children) Model Rules, 20163. The provisions state thus:

"94. Presumption and determination of age. (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining--

(i) the date of birth certificate from the school, or the matriculation or equivalent

certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of(i)and(ii)above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

Rule 54 (18) (iv) of the J.J. Rules, 2016:

"54. Procedure in cases of offences against children.- (18) (iv) For the age determination of the victim, in relation to offences against children under the Act, the same procedures mandated for the Board and the Committee under section 94 of the Act to be followed."

15. The procedure for determination of age of a child is provided in Section 34 of the POCSO Act, 2012. The provision is being extracted hereinunder:

"34. Procedure in case of commission of offence by child and determination of age by Special Court. (1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of1[the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016)].

(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.

(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a personas determined by it under sub-section (2) was not the correct age of that person."

16. Section 49 of Juvenile Justice (Care and Protection of Children) Act, 20004 read with Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 20075 are reproduced below:

"49. Presumption and determination of age.--

(1). Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be.

(2). No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a juvenile or the child, and the age recorded by the competent authority to be the age of person so brought before it, shall for the purpose of this Act,

be deemed to be the true age of that person."

Rule 12(3) of JJ Rules, 2007:

"12. Procedure to be followed in determination of Age: (3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining--

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

V. Section 94 of JJ Act : Case Laws:

17. Organic development of legal discourse is a salient feature of statutory enactments and judicial precedents dealing with juveniles in conflict with law and child victims of crime. JJ Act, 2000 read with JJ Rules, 2007 which preceded the current enactment will aid the understanding of evolution of law, and assist the interpretation of the extant statutes.

18. While interpreting the scope and purpose of Section 32 of the Juvenile Justice Act, 1986, a provision in pari materia with Section 49 of the JJ Act, 2000, the Supreme Court in **Bhola Bhagat v. State of Bihar**6 observed thus:

"18. ..when a plea is raised on behalf of an accused that he was a "child" within the meaning of the definition of the expression under the Act, **it becomes obligatory for the court, in case it entertains any doubt about the age as claimed by the accused, to hold an inquiry itself for determination of the question of age of the accused or cause an enquiry to be held and seek a report regarding the same, if necessary, by asking the parties to lead evidence in that regard.** Keeping in view the beneficial nature of the socially oriented legislation, it is an obligation of the court where such a plea is raised to examine that plea with care and it cannot fold its hands and without returning a positive finding regarding that plea, deny the benefit of the provisions of an accused. The court must hold an enquiry and return a finding regarding the age, one way or the other..." (emphasis supplied)

19. **Jitendra Ram v. State of Jharkhand**7 clarified that an unentitled person cannot be dealt with leniently only on the plea of delinquency advanced by the accused. The issue of juvenility according to **Jitendra Ram (supra)** had to be judged in the facts and circumstances of each case on merits.

20. Rule 22 of the Jharkhand Juvenile Justice (Care and Protection of Children) Rules, 2003 which is in pari materia with Rule 12 of the JJ Rules, 2007, was in issue in **Babloo Pasi v. State of Jharkhand**8. The Supreme Court in **Babloo Pasi (supra)** declined to lay down a universal formula for age determination, and instead reiterated the need to judge every case on the basis of materials and evidences before the Court by holding as under:

"22. **It is well settled that it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person.** The date of birth is to be determined on the basis of material on record and on appreciation of evidence adduced by the parties. **The Medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence."**

(emphasis supplied)

21. Evidentiary value of documents like date of birth entry in school registers and manner of proving medical board opinions were appraised in the following manner in **Babloo Pasi (supra)**:

"27. ...Section 35 of the said Act lays down that an entry in any public or other official book, register, record, stating a fact in issue or relevant fact made by a public servant in the discharge of his official duty especially enjoined by the law of the country is itself a relevant fact.

28. It is trite that to render a document admissible under Section 35, three conditions have to be satisfied, namely: (i) entry that is relied on must be one in a public or other official book, register or record; (ii) it must be an entry stating a fact in issue or a relevant fact, and (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially enjoined by law. **An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded.** (emphasis supplied)

29.Therefore, on facts at hand, in the absence of evidence to show on what material the entry in the Voters List in the name of the accused was made, a mere production of a copy of the Voters List, though a public document, in terms of Section 35, was not sufficient to prove the age of the accused. Similarly, though a reference to the report of the Medical Board, showing the age of the accused as 17-18 years, has been made but there is no indication in the order whether the Board had summoned any of the members of the Medical Board and recorded their statement. It also appears that the physical appearance of the accused, has weighed with the Board in coming to the afore-noted conclusion, which again may not be a decisive factor to determine the age of a delinquent."

(emphasis supplied)

22. The issue of age determination under the scheme of JJ Act, 2000 read with JJ Rules, 2007 was examined in **Jabar**

Singh v. Dinesh and another9 in light of Section 35 of the Evidence Act by stating forth:

"27... The entry of date of birth of Respondent No.1 in the admission form, the school records and transfer certificates did not satisfy the conditions laid down in Section 35 of the Evidence Act inasmuch as the entry was not in any public or official register and was not made either by a public servant in the discharge of his official duty or by any person in performance of a duty specially enjoined by the law of the country and, therefore, the entry was not relevant under Section 35 of the Evidence Act for the purpose of determining the age of Respondent No.1 at the time of commission of the alleged offence."

23. **Jabar Singh (supra)** also reprised the law laid down in **Jyoti Prakash Rai v. State of Bihar**10 and **Ravinder Singh Gorkhi v. State of U.P**.11 that age has to be determined under the said statutes in the facts and circumstances of each case and upon evaluation of evidence before the Court.

24. In **Jitendra Singh (supra)** the Supreme Court reiterated its earlier decisions in **Gopinath Ghosh v. State of West Benga**l12, **Bhoop Ram v. State of U.P.**13, **Bhola Bhagat v. State of Bihar**14, and **Hari Ram v. State of Rajasthan**15 and did not limit the scope of an inquiry into age determination after a prima facie case for such inquiry was made out by stating:

"9.The burden of making out a prima facie case for directing an enquiry has been in our opinion discharged in the instant case inasmuch as the appellant has filed along with the application a copy of the school leaving certificate and the marksheet which mentions the date of birth of the appellant to be 24-5-1988. The medical examination to which the High Court has referred in its order granting bail to the appellant also suggests the age of the appellant being 17 years on the date of the examination. These documents are sufficient at this stage for directing an enquiry and verification of the facts.

10. We may all the same hasten to add that the material referred to above is yet to be verified and its genuineness and credibility determined. There are no doubt certain telltale circumstances that may raise a suspicion about the genuineness of the documents relied upon by the appellant. For instance, the deceased Asha Devi who was married to the appellant was according to Dr. Ashok Kumar Shukla, Pathologist, District Hospital, Rae Bareilly aged 19 years at the time of her death. This would mean as though the appellant husband was much younger to his wife which is not the usual practice in the Indian context and may happen but infrequently. So also the fact that the appellant obtained the school leaving certificate as late as on 17-11-2009 i.e. after the conclusion of the trial and disposal of the first appeal by the High Court, may call for a close scrutiny and examination of the relevant school record to determine whether the same is free from any suspicion, fabrication or manipulation. It is also alleged that the electoral rolls showed the age of the accused to be around 20 years while the extract from the panchayat register showed him to be 19 years old.

11. All these aspects would call for close and careful scrutiny by the court below while determining the age of the appellant. The date of birth of appellant Jitendra Singh's siblings and his parents may also

throw considerable light upon these aspects and may have to be looked into for a proper determination of the question. Suffice it to say while for the present we consider it to be a case fit for directing an enquiry, that direction should not be taken as an expression of any final opinion as regards the true and correct age of the appellant which matter shall have to be independently examined on the basis of the relevant material."

25. Delineating the process of satisfaction to order an enquiry into juvenility and the ambit of such an enquiry, the Supreme Court in **Abuzar Hossain alias Gulam Hossain v. State of West Bengal**16, set forth thus:

"39.2.For making a claim with regard to juvenility after conviction, the claimant must produce some material which may prima facie satisfy the court that an inquiry into the claim of juvenility is necessary. Initial burden has to be discharged by the person who claims juvenility.

39.3 **As to what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rule 12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry under Rule 12.** The statement recorded under Section 313 of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voters' list, etc. obtained after conviction would depend on the facts and circumstances of each case and no hard and fast rule can be prescribed that they must be prima facie accepted or rejected. In Akbar Sheikh2 and Pawan8 these documents were not found prima facie credible while in Jitendra Singh10 the documents viz., school leaving certificate, marksheet and the medical report were treated sufficient for directing an inquiry and verification of the appellant's age. If such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes of Section 7A and order an enquiry for determination of the age of the delinquent.

(emphasis supplied)

48. **If one were to adopt a wooden approach, one could say nothing short of a certificate, whether from the school or a municipal authority would satisfy the court's conscience, before directing an enquiry. But, then directing an enquiry is not the same thing as declaring the accused to be a juvenile. The standard of proof required is different for both. In the former, the court simply records a prima facie conclusion. In the latter the court makes a declaration on evidence, that it scrutinises and accepts only if it is worthy of such acceptance.** The approach at the stage of directing the enquiry has of necessity to be more liberal, lest, there is avoidable miscarriage of justice. Suffice it to say that while affidavits may not be generally accepted as a good enough basis for directing an enquiry, that they are not so accepted is not a rule of law but a rule of prudence. The Court would, therefore, in each case weigh the relevant factors, insist upon filing of better affidavits if the need so arises, and even direct, any additional information considered relevant including information regarding the age of the

parents, the age of siblings and the like, to be furnished before it decides on a case to case basis whether or not an enquiry under Section 7A ought to be conducted. It will eventually depend on how the court evaluates such material for a prima facie conclusion that the Court may or may not direct an enquiry."

(emphasis supplied)

26. The Supreme Court in **Mahadeo v. State of Maharasthra and another**17 applied Rule 12(3)(b) of JJ Rules, 2007 for determination of age of a victim and held:

"12. .....Under Rule 12 (3) (b), it is specifically provided that only in the absence of alternative methods described under 12 (3) (a) (i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the **age of a juvenile, in our considered opinion, the same yardstick can be rightly followed by the Courts for the purpose of ascertaining the age of a victim as well.**

(emphasis supplied)

13. In the light of our above reasoning, in the case on hand, there were certificates issued by the school in which the prosecutrix did her Vth standard and in the school leaving certificate issued by the said school under Exhibit 54, the date of birth of the prosecutrix has been clearly noted as 20.05.1990, and this document was also proved by PW-11. Apart from the transfer certificate as well as the admission form maintained by the primary school Latur, where the prosecutrix had her initial education, also confirmed the date of birth as 20.5.1990. The reliance placed upon the said evidence by the Courts below to arrive at the age of the prosecutrix to hold that the prosecutrix was below 18 years of age at the time of the occurrence was perfectly justified and we do not find any good grounds to interfere with the same."

27. The ratio in Mahadeo (supra) was followed in the **State of Madhya Pradesh v. Anoop Singh**18.

28. However, while applying JJ Rules, 2007 to determine the age of a victim, the Supreme Court in **Jarnail Singh v. State of Haryana**19 took a strict view of the provisions and narrowed the scope of the enquiry to determine the victim's age by holding:

"23.Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is

available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion."

29. An accused person could not access protection under JJ Act, 2000, if the intent was only to cheat justice. **Parag Bhati (Juvenile) through Legal Guardian-Mother-Rajni Bhati v. State of Uttar Pradesh and another**20, cautioned that:

"34. It is no doubt true that if there is a clear and unambiguous case in favour of the juvenile accused that he was a minor below the age of 18 years on the date of the incident and the documentary evidence at least prima facie proves the same, he would be entitled for this special protection under the Juvenile Justice Act. **But when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording as to whether an accused is a juvenile or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of protecting the confidence of common man in the institution entrusted with the administration of justice.**

(emphasis supplied)

35. The benefit of the principle of benevolent legislation attached to the JJ Act would thus apply to only such cases wherein the accused is held to be a juvenile on the basis of at least prima facie evidence regarding his minority as the benefit of the possibilities of two views in regard to the age of the alleged accused who is involved in grave and serious offence which he committed and gave effect to it in a well-planned manner reflecting his maturity of mind rather than innocence indicating that his plea of juvenility is more in the nature of a shield to dodge or dupe the arms of law, cannot be allowed to come to his rescue."

30. Relying on the ratio of **Abuzar Hossain (supra)**, it was held in **Parag Bhati (supra)**, that contradictory evidence was sufficient to cause an inquiry into the issue of age of the accused :

"36. It is settled position of law that if the matriculation or equivalent certificates are available and there is no other material to prove the correctness, the date of birth mentioned in the matriculation certificate has to be treated as a conclusive proof of the date of birth of the accused. **However, if there is any doubt or a contradictory stand is being taken by the accused which raises a doubt on the correctness of the date of birth then as laid down by this Court in Abuzar Hossain (supra), an enquiry for determination of the age of the accused is permissible which has been done in the present case."**

(emphasis supplied)

31. A discordant view was taken by a two judge Bench of the Supreme Court in **Ashwani Kumar Saxena Vs. State of M.P.**21 which restricted the jurisdiction of the court and prohibited a detailed enquiry into determination of age in view of the provisions of JJ Act, 2000 read with JJ Rules, 2007.

32. However, the precedential value of **Ashwani Kumar Saxena (supra)** has to be viewed in light of these facts. The holdings of a three Judge Bench of the Supreme Court in **Abuzar Hussain alias Gulam Hossain Vs. State of West Bengal**22 was not referred to the Supreme Court in **Ashwani Kumar Saxena (supra). Jabar Singh (supra)**, a coordinate Bench judgement continues to be good law. Finally an integrated view of the controversy was taken in **Sanjeev Kumar Gupta Vs. The State of Uttar Pradesh and another**23.

33. **Sanjeev Kumar Gupta (supra)** adopted a liberal approach and widened the scope of an enquiry determining the age consistent with the holding in **Abuzar Hossain (supra)**, but opposed to a more constricted enquiry as contemplated in **Ashwani Kumar Saxena (supra) or Jarnail Singh (supra)** on the following footing:

"15. The above decision in Abuzar Hossain alias Gulam Hossain (supra) was rendered on 10 October 2012. Though the earlier decision in Ashwani Kumar Saxena (supra) was not cited before the Court, it appears from the above extract that the three judge Bench observed that the credibility and acceptability of the documents, including the school leaving certificate, would depend on the facts and circumstances of each case and no hard and fast rule as such could be laid down. Concurring with the judgment of Justice RM Lodha, Justice TS Thakur (as the learned Chief Justice then was) observed that directing an inquiry is not the same thing as declaring the accused to be a juvenile. In the former the Court simply records a prima facie conclusion while in the latter a declaration is made on thebasis of evidence. ***Hence the approach at the stage of directing the inquiry has to be more liberal."***

(emphasis supplied)

34. After extracting Section 94 of the JJ Act, 2015 in **Sanjeev Kumar Gupta (supra)** discussed the distinctions between JJ Act, 2015 and JJ Act, 2000 read with JJ Rules, 2007:

"17...Clause (i) ofSection 94(2) places the date of birth certificate from the school and the matriculation or equivalent certificate from the concerned examination board inthe same category (namely (i) above). In the absence thereof category (ii) provides for obtaining the birth certificate of the corporation, municipal authority or panchayat. It is only in the absence of (i) and (ii) that age determination by means of medical analysis is provided. Section 94(2)(a)(i)indicates a significant change over the provisions which were contained in Rule 12(3)(a) of the Rules of 2007 made under the Act of 2000. Under Rule 12(3)(a)(i) the matriculation or equivalent certificate was given precedence and it was only in the event of the certificate not being available that the date of birth certificate from the school first attended, could be obtained. InSection 94(2)(i)both the date of birth certificate from the school as well as the matriculation or equivalent certificate are placed in the same category."

35. Similarly an enlarged scope of the age determination enquiry under Section 94

of the JJ Act, 2015 was iterated by the Supreme Court in **Ram Vijay Singh v. State of Uttar Pradesh**24:

"16. Apart from the said fact, there is an application submitted by the appellant himself for obtaining an Arms Licence prior to the date of the incident. In such application, he has given his date of birth as 30.12.1961 which would make him of 21 years of age on the date of the incident i.e. 20.7.1982. **The Court is not precluded from taking into consideration any other relevant and trustworthy material to determine the age as all the three eventualities mentioned in sub-section (2) ofSection 94of the Act are either not available or are not found to be reliable and trustworthy**. Since there is a document signed by the appellant much before the date of occurrence, therefore, we are of the opinion that the appellant cannot be treated to be juvenile on the date of incident as he was more than 21 years of age as per his application submitted to obtain the Arms Licence."

(emphasis supplied)

36. More recently the parameters of enquiry for determination of age under the JJ Act, 2015 arose for consideration before the Supreme Court in **Rishipal Singh Solanki v. State of Uttar Pradesh and others**25.

37. **Rishipal Singh Solanki (supra)** first noticed the contrasting features of the J.J.Act, 2015 and J.J. Rules, 2007:

"29. The difference in the procedure under the two enactments could be discerned as under:

"29.1. As per JJ Act, 2015 in the absence of requisite documents as mentioned in Sub-section (2) of Section 94(a)and (b), there is provision for determination of the age by an ossification test or any other medical age related test to be conducted on the orders of the Committee or the JJ Board as perSection 94of the said Act; whereas, under Rule 12 of the JJ Rules, 2007, in the absence of relevant documents, a medical opinion had to be sought from a duly constituted Medical Board which would declare the age of the juvenile or child. Rule 12 of the JJ Rules, 2007 has been provided under sub-section 2of section 94 of the JJ Act, 2015 as a substantive provision.

29.3. Under Section 49 of the JJ Act, 2000, where it appeared to a competent authority that a person brought before it was a juvenile or a child, then such authority could, after making an inquiry and taking such evidence as was necessary, record a finding as to the juvenility of such person and state the age of such person as nearly as may be. Sub-section (2) ofSection 49stated that no order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order had been made is not a juvenile and the age recorded by the competent authority to be the age of person so brought before it, for the purpose of the Act, be deemed to be the true age of that person.

30. But, under Section 94 of the JJ Act, 2015, which also deals with presumption and determination of age, the Committee or the JJ Board has to record such observation stating the age of the child as nearly as may be and proceed with the inquiry without waiting for furtherconfirmation of the age. It is only when the Committee or the JJ Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, it can undertake the process of age determination, by seeking evidence.

31. Sub-section (3) ofSection 94states that the age recorded by the Committee or the JJ Board to be the age of the persons so brought before it shall, for the purpose of the Act, be deemed to be the true age of that person. Thus, there is a finality attached to the determination of the age recorded and it is only in a case where reasonable grounds exist for doubt as to whether the person brought before the Committee or the Board is a child or not, that a process of age determination by seeking evidence has to be undertaken."

38. Thereafter, upon analysis of cases in point **Rishipal Singh (supra)** thus sums up the law:

"33.2.3. When an application claiming juvenility is made under section 94 of the JJ Act, 2015 before the JJ Board when the matter regarding the alleged commission of offence is pending before a Court, then the procedure contemplated under section 94 of the JJ Act, 2015 would apply. Under the said provision if the JJ Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Board shall undertake the process of age determination by seeking evidence and the age recorded by the JJ Board to be the age of the person so brought before it shall, for the purpose of the JJ Act, 2015, be deemed to be true age of that person. Hence the degree of proof required in such a proceeding before the JJ Board, when an application is filed seeking a claim ofjuvenility when the trial is before the concerned criminal court, is higher than when an inquiry is made by a court before which the case regarding the commission of the offence is pending (vide section 9 of the JJ Act, 2015).

33.3. That when a claim for juvenility is raised, the burden is on the person raising the claim to satisfy the Court to discharge the initial burden. However, the documents mentioned in Rule 12(3)(a)(i), (ii), and (iii) of the JJ Rules 2007 made under the JJ Act, 2000 or sub-section (2) of section 94 of JJ Act, 2015, shall be sufficient for prima facie satisfaction of the Court. On the basis of the aforesaid documents a presumption of juvenility may be raised.

33.4. The said presumption is however not conclusive proof of the age of juvenility and the same may be rebutted by contra evidence let in by the opposite side.

33.5. That the procedure of an inquiry by a Court is not the same thing as declaring the age of the person as a juvenile sought before the JJ Board when the case is pending for trial before the concerned criminal court. In case of an inquiry, the Court records a prima facie conclusion but when there is a determination of age as per sub-section (2) ofsection 94of 2015 Act, a declaration is made on the basis of evidence. Also the age recorded by the JJ Board shall be deemed to be the true age of the person brought before it. Thus, the standard of proof in an inquiry is different from that required in a proceeding where the determination and declaration of the age of a person has to be made on the basis of evidence scrutinised and accepted only if worthy of such acceptance.

33.6. That it is neither feasible nor desirable to lay down an abstract formula todetermine the age of a person. It has to be on the basis of the material on record and on appreciation of evidence adduced by the parties in each case.

33.7. This Court has observed that a hyper-technical approach should not be adopted when evidence is adduced on behalf of the accused in support of the plea that he was a juvenile.

33.8. If two views are possible on the same evidence, the court should lean in

favour of holding the accused to be a juvenile in borderline cases. This is in order to ensure that the benefit of the JJ Act, 2015 is made applicable to the juvenile in conflict with law. At the same time, the Court should ensure that the JJ Act, 2015 is not misused by persons to escape punishment after having committed serious offences.

33.9. That when the determination of age is on the basis of evidence such as school records, it is necessary that the same would have to be considered as perSection 35of the Indian Evidence Act, inasmuch as any public or official document maintained in the discharge of official duty would have greater credibility than private documents.

33.10. Any document which is in consonance with public documents, such as matriculation certificate, could be accepted by the Court or the JJ Board provided such public document is credible and authentic as per the provisions of theIndian Evidence Actviz.,section 35and other provisions.

33.11. Ossification Test cannot be the sole criterion for age determination and a mechanical view regarding the age of a person cannot be adopted solely on the basis of medical opinion by radiological examination. Such evidence is notconclusive evidence but only a very useful guiding factor to be considered in the absence of documents mentioned in Section 94(2) of the JJ Act, 2015."

39. Social realities and absence of reliable age related documents on many occasions were underlined in **Mukarrab and others v. State of Uttar Pradesh**26.

"10. Age determination is essential to find out whether or not the person claiming to be a child is below the cut-off age prescribed for application of the Juvenile Justice Act. The issue of age determination is of utmost importance as very few children subjected to the provisions of the Juvenile Justice Act have a birth certificate. As juvenile in conflict with law usually do not have any documentary evidence, age determination, cannot be easily ascertained, specially in borderline cases. Medical examination leaves a margin of about two years on either side even if ossification test of multiple joints is conducted.

11. Time and again, the questions arise: How to determine age in the absence of birth certificate? Should documentary evidence be preferred over medical evidence? How to use the medical evidence? Is the standard of proof, a proof beyond reasonable doubt or can the age be determined by preponderance of evidence? Should the person whose age cannot be determined exactly, be given the benefit of doubt and be treated as a child? In the absence of a birth certificate issued soon after birth by the concerned authority, determination of age becomes a very difficult task providing a lot of discretion to the Judges to pick and choose evidence. In different cases, different evidence has been used to determine the age of the accused.

22. A reading of the above decision in Darga Ram alias Gunga's case shows that courts need to be aware of the fact that age determination of the concerned persons cannot be certainly ascertained in the absence of original and valid documentary proof and there would always lie a possibility that the age of the concerned person may vary plus or minus two years. Even in the presence of medical opinion, the Court showed a tilt towards the juvenility of the accused. However, it is pertinent to note that such an approach in Darga Ram alias Gunga's case was taken in the specific facts and circumstances of that particular case and any attempt of

generalising the said approach could not be justifiably entertained."

40. Clearly the courts do not resist introduction of evidence beyond the documents enumerated in Section 94 of the JJ Act, 2015 to arrive at the truth and to serve justice the facts and circumstances of a case so require.

VI. The Two Presumptions:

a. Presumption of correctness of age related documents under Section 94 of the JJ Act, 2015:

b. Presumptions under Section 29 of the POCSO Act, 2012:

41. The controversy has to seen from another perspective as well. Section 94 of the J.J. Act, 2015 creates a hierarchy of documents which corresponds to the degree of reliability. From a bare reading, the provision envisages that where a document higher in the said pecking order is available, the documents lower in the statutory preference shall not be received in evidence.

42. Such an embargo on receiving evidence is made on the foot of the concept of presumption of facts. In the context of the JJ Act, 2015, it means that when a document higher on the preferential scale of Section 94 of the J.J. Act, 2015 is produced, it is presumed to be correct and sufficient to establish the age of the victim. Thus the need for any other evidence is obviated and reception of further evidence is proscribed.

43. The second presumption relevant to the current controversy is engrafted in Sections 29 and 30 of POCSO Act, 2012. The provision reads as under:

"29. **Presumption as to certain offences:** Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

30. Presumption of culpable mental state. (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability."

44. The concept of presumptions in evidential law is applied by the legislature to dispense with the proof of certain facts. The discussion will benefit from judicial precedents which analyse the first principles of law of presumptions and its applicability in the context of various statutes.

45. Noticing the presumptions with regard to the culpable mental state of the accused in NDPS Act, the Supreme Court in **Noor Aga v. State of Punjab**27 emphatically protected the norms on fair trial and the rights of an accused by holding:

"57. It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any courtbut it is well

settled that suspicion, however high may be, can under no circumstances, be held to be a substitute for legal evidence.

58. Sections 35and54of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability' on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours ofSection 35of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

(emphasis supplied)

59. With a view to bring within its purview the requirements ofSection 54of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to thegeneral rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt.

60. **Whether the burden on the accused is a legal burden or an evidentiary burden would depend on the statute in question.** The purport and object thereof must also be taken into consideration in determining the said question. It must pass the test of doctrine of proportionality. The difficulties faced by the prosecution in certain cases may be held to be sufficient to arrive at an opinion that the burden on the accused is an evidentiary burden and not merely a legal burden. **The trial must be fair. The accused must be provided with opportunities to effectively defend himself."**

(emphasis supplied)

46. The judgement of **Noor Aga (supra)** was affirmed by the majority view in the three Judge judgement rendered by the Supreme Court in **Tofan Singh Vs. State of Tamil Nadu.**28

47. The presumption of culpable mental state under Section 29 of POCSO Act, 2012 shall now be adverted to. The discussion will commence with the brief observations made in **State of Bihar Vs. Rajballav Prasad alias Rajballav Prasad Yadav**29:

"22. Further, while making a general statement of law that the accused is innocent, till proved guilty, the provisions of Section 29 of thePocsoAct have not been taken into consideration, which reads follows:

"29.Presumption as to certain offences.--Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

48. The conditions precedent for applying the statutory presumption of culpable intent against an accused were

enumerated after a scholarly foundation by Joymalya Bagchi, J. in **Sahid Hossain Biswas v. State of West Bengal**30:

"23. A conjoint reading of the statutory provision in the light of the definitions, as aforesaid, would show that in a prosecution under the POCSO Act an accused is to prove `the contrary', that is, he has to prove that he has not committed the offence and he is innocent. It is trite law that negative cannot be proved [see Sait Tarajee Khimchand v. Yelamarti Satyam, (1972) 4 SCC 562, Para-15]. In order to prove a contrary fact, the fact whose opposite is sought to be established must be proposed first. **It is, therefore, an essential prerequisite that the foundational facts of the prosecution case must be established by leading evidence before the aforesaid statutory presumption is triggered in to shift the onus on the accused to prove the contrary.**

(emphasis supplied)

24. Once the foundation of the prosecution case is laid by leading legally admissible evidence, it becomes incumbent on the accused to establish from the evidence on record that he has not committed the offence or to show from the circumstances of a particular case that a man of ordinary prudence would most probably draw an inference of innocence in his favour. The accused may achieve such an end by leading defence evidence or by discrediting prosecution witnesses through effective cross-examination or by exposing the patent absurdities or inherent infirmities in their version by an analysis of the special features of the case. However, the aforesaid statutory presumption cannot be read to mean that the prosecution version is to be treated as gospel truth in every case. The presumption does not take away the essential duty of the Court to analyse the evidence on record in the light of the special features of a particular case, eg. patent absurdities or inherent infirmities in the prosecution version or existence of entrenched enmity between the accused and the victim giving rise to an irresistible inference of falsehood in the prosecution case while determining whether the accused has discharged his onus and established his innocence in the given facts of a case. To hold otherwise, would compel the Court to mechanically accept the mere ipse dixit of the prosecution and give a stamp of judicial approval to every prosecution, howsoever, patently absurd or inherently improbable it may be."

(emphasis supplied)

49. The time honoured and time tested rule of evidence that no presumption is absolute, and every presumption is rebuttable forms the basis of the judgement rendered by Manish Pitale, J. in **Navin Dhaniram Baraiye v. The State of Maharashtra**31, while interpreting the scope of presumption of culpable intent under Section 29 of the POCSO Act :

"18. A perusal of the above quoted provision does show that it is for the accused to prove the contrary and in case he fails to do so, the presumption would operate against him leading to his conviction under the provisions of the POCSO Act. It cannot be disputed that no presumption is absolute and every presumption is rebuttable. It cannot be countenanced that the presumption under Section 29 of the POCSO Act is absolute. It would come into operation only when the prosecution is first able to establish facts that would form the foundation for the

presumption under Section 29 of the POCSO Act to operate. **Otherwise, all that the prosecution would be required to do is to file a charge sheet against the accused under the provisions of the said Act and then claim that the evidence of the prosecution witnesses would have to be accepted as gospel truth and further that the entire burden would be on the accused to prove to the contrary. Such a position of law or interpretation of the presumption under Section 29 of the POCSO Act cannot be accepted as it wouldclearly violate the constitutional mandate that no person shall be deprived of liberty except in accordance with procedure established by law.**

(emphasis supplied)

24. The above quoted views of the Courts elucidate the position of law insofar as presumption under Section 29 of the POCSO Act is concerned. It becomes clear that although the provision states that the Court shall presume that the accused has committed the offence for which he is charged under the POCSO Act, unless the contrary is proved, the presumption would operate only upon the prosecution first proving foundational facts against the accused, beyond reasonable doubt. Unless the prosecution is able to prove foundational facts in the context of the allegations made against the accused under the POCSO Act, the presumption under Section29 of the said Act would not operate against the accused. **Even if the prosecution establishes such facts and the presumption is raised against the accused, he can rebut the same either by discrediting prosecution witnesses through cross-examination demonstrating that the prosecution case is improbable or absurd or the accused could lead evidence to prove his defence, in order to rebut the presumption. In either case, the accused is required to rebut the presumption on the touchstone of preponderance of probability."**

(emphasis supplied)

50. The Kerala High Court in **Joy V.S. v. State of Kerala**32, highlighted the limitations of the statutory presumption under Section 29 of the POCSO Act, 2012 in the backdrop of **Rajballav Prasad (supra)** by observing:

"10. This court is not oblivious toSection 29of the Act which contains a legislative mandate that the court shall presume commission of the offences by the accused unless the contrary is proved.Section 29of the Act states that where a person is prosecuted for committing or abetting or attempting to commit any offence underSections 3,5,7and9of the Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. The court shall take into consideration the presumption underSection 29of the Act while dealing with an application for bail filed by a person who is accused of the aforesaid offences under the Act (See: State of Bihar v. Rajvallav Prasad, (2017) 2 SCC 178 : AIR 2017 SC 630).

11. **However, the statutory presumption underSection 29 of the Act does not mean that the prosecution version has to be accepted as gospel truth in every case. The presumption does not mean that the court cannot take into consideration the special features of a particular case.** Patent absurdities or inherent infirmities or improbabilities in the prosecution version may lead to an irresistible inference of falsehood in the prosecution case. The presumption would come into play only

when the prosecution is able to bring on record facts that would form the foundation for the presumption. Otherwise, all that the prosecution would be required to do is to raise some allegations against the accused and to claim that the case projected by it is true. **The courts must be on guard to see that the application of the presumption, without adverting to essential facts, shall not lead to any injustice. The presumption underSection 29of the Act is not absolute. The statutory presumption would get activated or triggered only if the prosecution proves the essential basic facts. If the accused is able to create serious doubt on the veracity of the prosecution case or the accused brings on record materials which would render the prosecution version highly improbable, the presumption would get weakened.** As held by the Apex Court inSiddharam Satlingappa Mhetre v. State of Maharashtra, frivolity in prosecution should always be considered and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of anticipatory bail. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. It should necessarily depend on facts and circumstances of each case in consonance with the legislative intention."

(emphasis supplied)

51. The following questions were framed by the Delhi High Court while determining the scope of Section 29 of the POCSO Act, 2012 and the stage of its applicability in **Dharmander Singh v. State (Govt. of NCT of Delhi)**33:

"41...iii. When and at what stage does the 'presumption of guilt' as engrafted insection 29get triggered ? and

iv. Does the presumption apply only at the stage of trial or does it also apply when a bail plea is being considered ?

v. Does the applicability or rigour ofsection 29depend on whether a bail plea is being considered before or after charges have been framed ?"

52. Bhambhani, J. in **Dharmander Singh (supra),** summed up the law in the following manner:

"50. Drawing from the verdict of the Supreme Court and the views taken by the various High Courts in the above cases, in essence, the position is that to rebut a presumption, first, the presumptive proposition must itself be formulated based on relevant and credible material ; and second, the accused must know what presumption he has to rebut. It is not enough to say that the accused has been implicated by the police on charges undersections 3,5,7, and/or 9 of the POSCO Act. At the very least, the charges should have been framed by court against the accused under one or more of those sections for the presumption to arise; and mere implication by the police is not enough.

51. Only when the trial court frames charges, does it form a prima facie opinion that there is a case for the accused to answer and defend. **At the stage of framing charges, the trial court may decide not to frame charges against an accused under any of the sections mentioned insection 29but under some other provision; or, it may not frame charges against all accused persons under those sections. So, the presumption undersection 29cannot arise before charges are framed. (emphasis supplied)**

52. **If the presumption of guilt is taken to arise even before charges are framed, say when a court is considering a bail application, then the court will have to afford to the accused an opportunity to prove that he has not committed the offence; which would require the court to conduct a mini-trial, even when it is only considering a bail plea. What then would remain to be done during the trial itself ? In the opinion of this court it is not the purport ofsection 29that a mini-trial should be conducted at the stage of deciding a bail application.** No such concept is known to law. Requiring production and analysis of evidence to form an opinion on the merits of the allegations; and toexpress a view on such evidence, is certainly not within the remit of a court considering a bail plea.

(emphasis supplied)

53. Reprising the fundamental tenets of criminal jurisprudence and processual landmarks in constitutional law, **Dharmander Singh (supra)** explained the ratio of **Rajballav Prasad (supra)** by holding:

"66. Thatsection 29has been engrafted in the POCSO Act does not mean that the presumption of innocence, which is a foundational tenet of criminal jurisprudence, is to be thrown to the winds. If section 29is so interpreted as to apply it to the stage even before charges are framed, it would not pass constitutional muster sinceArticle 21of our Constitution requires that all substantive as well as procedural provisions must be reasonable, just and fair, as held inter alia in Maneka Gandhi (supra). Such interpretation ofsection 29would also render the right of the accused to a fair trial nugatory and dead letter, which would again do violence to the constitutional guarantee contained inArticle 21.

67. Applyingsection 29to bail proceedings at a stage before charges are framed, would in effect mean that the accused must prove that he has not committed the offence even before he is told the precise offence he is charged with, which would do violence to all legal rationality.

68. In view of the above discussion and after considering the opinion of the Supreme Court and the views taken by the other High Courts, this court is persuaded to hold that the presumption of guilt engrafted insection 29gets triggered and applies only once trial begins, that is after charges are framed against the accused but not before that. The significance of the opening words ofsection 29"where a person is prosecuted" is that until charges are framed, the person is not being prosecuted but is being investigated or is in the process of being charged. Accordingly, if a bail plea is considered at any stage prior to framing of charges,section 29has no application since upto that stage an accused is not being prosecuted.

69. Therefore, if a bail plea is being considered before charges have been framed,section 29has no application ; and the grant or refusal of bail is to be decided on the usual and ordinary settled principles.

70. Now coming to a scenario where a bail plea is being considered at a stage after charges have been framed, in keeping with the observations of the Supreme Court in Rajballav Prasad (supra), the presumption of guilt contained insection 29would get triggered and will have to be "taken into consideration".

71. However, the dilemma would remain as to how the presumption of guilt contained insection 29is to be applied even after charges have been framed, when the

accused has not been given the opportunity to rebut such presumption. Whensection 29engrafts the presumption of guilt against the accused, it also affords an opportunity to the accused to rebut the presumption by proving to the contrary. It cannot possibly be that the court should invoke half the provision ofsection 29while ignoring the other half, much less to the detriment of the accused. But even after charges are framed, the accused does not get the opportunity to rebut the presumption or to prove the contrary by leading defence evidence, until prosecution evidence is concluded. It would be anathema to fundamental criminal jurisprudence to ask the accused to disclose his defence; or, worse still, to adduce evidence in his defence even before the prosecution has marshalled its evidence. Again therefore, even for a stage after charges have been framed,section 29cannot be applied in absolute terms to a bail plea without doing violence to the 'due process' and 'fair trial' tenets read intoArticle 21of our Constitution.

74. As always, when faced with such dilemma, the court must apply the golden principle of balancing rights. In the opinion of this court therefore, at the stage of considering a bail plea after charges have been framed, the impact ofsection 29would only be to raise the threshold of satisfaction required before a court grants bail. What this means is that the court would consider the evidence placed by the prosecution along with the charge-sheet, provided it is admissible in law, more favorably for the prosecution and evaluate, though without requiring proof of evidence, whether the evidence so placed is credible or whether it ex facie appears that the evidence will not sustain the weight of guilt."

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

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

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

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

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

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

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

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

evidences in the facts and circumstances of a case.

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

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

VII. Norms of fair procedure in criminal jurisprudence and presumptions under Section 94 of JJ Act and Section 29 of the POCSO Act:

55. Fair trial is the right of an accused and defines the credibility of the criminal justice system. The right of an accused to fair trial and bail also flows from settled canons of criminal jurisprudence and constitutional imperative of fair procedure enshrined in Article 21 of the Constitution of India (***see Maneka Gandhi vs. Union of India***34). Also see **Dharmender Singh (supra)** which imports holdings on constitutional processual jurisprudence into criminal trial procedures and bails to uphold the rights of an accused.

56. Some of the established norms of fair trial distilled from authorities on criminal and constitutional processual jurisprudence are these. An accused is innocent till he is proven guilty in accordance with law. In fact "presumption of innocence is a human right". (See ***Narendra Singh v. State of M.P***35 and ***Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra***36). The burden of proving the charge against an accused lies on the prosecution. The prosecution cannot be relieved of such burden in a casual manner. The standards of proving guilt in a criminal case is to prove the incriminating fact beyond reasonable doubt. Full opportunity has to be afforded to an accused to adduce admissible evidence in his defence. The courts have a duty to ensure fairness of a trial.

57. Upon appraising evidence in case multiple conclusions can be drawn, the one in favour of an accused shall be preferred by the court. Similarly, while interpreting a criminal provision if more than one view is possible, the court shall adopt the interpretation favourable to the accused.

58. Juveniles in conflict with law are treated as a separate class by the legislature. The JJ Act, 2015 is alert to the plight of juvenile offenders and also addresses issues raised in prosecution of juveniles. The enactment is reformative in intent and ameliorative in its content. The JJ Act, 2015 clips procedure and limits evidence to shorten the period of trial and to soften the rigours of criminal prosecution for a juvenile offender. Such measures are intended to pave the way for the successful integration of juvenile offenders as responsible citizens in the society.

59. Adult offenders being prosecuted under the POCSO Act are not similarly placed by the legislature as juvenile accused.

60. Section 94 of the JJ Act, 2015 was devised for juveniles in conflict with law but it is also applied to determine the age of child victims of sexual offences committed by adult accused. While determining a POCSO victim's age under Section 94 of

the J. J. Act, 2015, it has to be acknowledged that there is a difference in the claim of juvenility raised by the accused, and the claim of minority of a victim set up by the prosecution.

61. Interpretation of the provisions of Section 94 of the JJ Act, 2015 read with Rule 54(18)(iv) of the JJ Rules, 2016 has to be made in a manner that it does not lead to miscarriage of justice for adult offenders accused under the POCSO Act. Section 94 of the JJ Act, 2015, abridges the age determination procedure to benefit juvenile offenders, but its purpose is not to undermine the rights of adult accused.

62. Under the JJ Act, 2015 age of a juvenile offender is determined by "seeking evidence only if the Board/Committee entertains reasonable doubt as to whether person brought before it is a child or not" [See Rishipal Singh (supra)]. However, the age of a child victim has to be established by evidence beyond reasonable doubt in the first instance before charges can be brought home against an adult accused under the POCSO Act.

63. Benefit of two years margin of error in medical determination of age is given to juvenile offenders [See **para 33.8 Rishipal Singh (supra)**]. But such relaxation cannot be given while considering a medical report determining the age of a victim in a manner prejudicial to the right of the adult accused.

64. Section 94 of the JJ Act, 2015 does not lighten the burden of the prosecution to prove primary facts by adducing evidence which reaches the standard of "beyond reasonable doubt". The primary facts to trigger the presumption in the context of the age of a victim are the age related documents mentioned in Section 94 of the J J Act, 2015.

65. Once the said documents are proved "beyond reasonable doubt" the prosecution may invoke the presumption of correctness of age recorded therein and contest introduction of further evidence. However, even at that stage the court may of its own volition or at the instance of the accused decline such plea and receive additional evidence to seek out true facts and serve justice. The courts also have an obligation to ensure that best evidence is produced at the trial.

66. Rights of an accused to assail the prosecution evidences relating to the age of the victim or to adduce further evidence to rebut the prosecution case can not be infringed.

67. Section 29 of the POCSO Act, 2012 creates a presumption of culpable intent against the accused person. The provision cannot be read to mean that the accused shall be presumed to be guilty at the lodgement of the F.I.R. or criminal complaint till proven innocent at the trial. The presumption of innocence which is a fundamental tenet of criminal jurisprudence cannot be turned on its head by a faulty interpretation of the provision. The prosecution has to establish primary facts after attaining the required standards of evidence to trigger the presumption of culpable intent.

VIII. Right of Bail:

a. Constitutional Perspectives:

68. The right to bail is derived from statute but cannot be isolated from constitutional oversight.

69. Good authority has long entrenched the right of an accused to seek

bail in the charter of fundamental rights assured by the Constitution of India.

70. Bail jurisprudence was firmly embedded in the constitutional regime of fundamental rights in ***Gudikanti Narasimhulu and Others Vs. Public Prosecutor, High Court of Andhra Pradesh***37. Casting an enduring proposition of law in eloquent speech, V.R. Krishna Iyer, J. held:

"1. Bail or jail?" -- at the pre-trial or post-conviction stage -- belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the Bench, otherwise called judicial discretion. The Code is cryptic on this topic and the Court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. As Chamber Judge in this summit court I have to deal with this uncanalised case-flow, ad hoc response to the docket being the flickering candle light. So it is desirable that the subject is disposed of on basic principle, not improvised brevity draped as discretion. Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorize impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law". The last four words of Article 21 are the life of that human right."

71. Engagement of fundamental rights in bail jurisprudence is a constant in constitutional law.

72. The nexus of fundamental liberties of the citizens and the right of bail came to the fore in ***Hussain and another Vs. Union of India***38, when the Supreme Court was alerted to the issue of delay in consideration of grant of bail applications in the courts. In Hussain (supra), it was enjoined:

"22. Timeline for disposal of bail applications ought to be fixed by the High Court."

"29.1.1.Bail applications be disposed of normally within one week;"

73. Nearer home the Allahabad High Court in ***Emperor Vs. H.L. Hutchinson and another***39 stated that grant of bail is the rule and refusal is the exception on the foot of the following reasons:

"11. The principle to be deduced from sections 496 and 497 of the Criminal Procedure Code, therefore, is that grant of bail is the rule and refusal is the exception. That this must be so is not at all difficult to see. An accused person is presumed under the law to be innocent till his guilt is proved. As a presumably innocent person he is entitled to freedom and every opportunity to look after his own case. It goes without saying that an accused person, if he enjoys freedom, will be in a much better position to look after his case and to properly defend himself than if he were in custody. One of the complaints made by the applicants in this case is that their letters

sent from the custody have been opened and inspected and censored, and, therefore, they were not in a position to conduct their defence with the aid of such friends as may he outside the prison. As I have said, it is obvious that a presumably innocent person should have his freedom to enable him to establish his innocence."

74. The Supreme Court set its face against restrictions on the power of the courts to grant bail in ***Ranjitsingh Brahmajeetsing Sharmav.State of Maharashtra***40 by observing:

"38.We are furthermore of the opinion that the restrictions on the power of the court to grant bail should not be pushed too far."

75. Constitutionality of onerous conditions for grant of bail imposed by Section 45 of the Money Laundering Act, 2002 was in issue in ***Nikesh Tarachand Shah Vs. Union of India and another***41. This narrative will profit from a detailed consideration of the judgment.

76. The Supreme Court in ***Nikesh Tarachand (supra)*** predicated its conclusions by delving into the jurisprudential origins of bails:

"18.What is important to learn from this history is that Clause 39 of the Magna Carta was subsequently extended to pre-trial imprisonment, so that persons could be enlarged on bail to secure their attendance for the ensuing trial. It may only be added that one century after the Bill of Rights, the US Constitution borrowed the language of the Bill of Rights when the principle of habeas corpus found its way into Article 1 Section 9 of the US Constitution, followed by the Eighth Amendment to the Constitution which expressly states that, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". We may only add that the Eighth Amendment has been read into Article 21 by a Division Bench of this Court inRajesh Kumarv.State[Rajesh Kumarv.State, (2011) 13 SCC 706 : (2012) 2 SCC (Cri) 836] at paras 60 and 61."

77. The enquiry into the constitutional validity of the assailed provisions began with the tests for violation of Article 14 "both in its discriminatory aspect and its manifestly arbitrary aspect".

78. The discussion then proceeded to probe the effect of Article 21 of the Constitution of India on the offending provisions for grant of bail. This enquiry was overlaid with a consideration of authorities "on the concept of due process in our constitutional jurisprudence whenever the court has to deal with a question affecting life and liberty of citizens".

79. Finally in ***Nikesh Tarachand (supra)***, the onerous conditions for grant of bail in Section 45 (1) of the Prevention of Money Laundering Act, 2002, were declared unconstitutional being violative of Articles 14 and 21 of the Constitution of India:

"46.We must not forget that Section 45 is a drastic provision which turns on its head the presumption of innocence which is fundamental to a person accused of any offence. Before application of a section which makes drastic inroads into the fundamental right of personal liberty guaranteed by Article 21 of the Constitution of India,

we must be doubly sure that such provision furthers a compelling State interest for tackling serious crime. Absent any such compelling State interest, the indiscriminate application of the provisions of Section 45 will certainly violate Article 21 of the Constitution. Provisions akin to Section 45 have only been upheld on the ground that there is a compelling State interest in tackling crimes of an extremely heinous nature." (emphasis supplied)

80. The following statement of law propounded in ***Maneka Gandhi vs. Union of India***42 will fortify this narrative:

"81... Procedure established by law", with its lethal potentiality, will reduce life and liberty to a precarious plaything if we do not ex necessitate import into those weighty words an adjectival rule of law, civilised in its soul, fair in its heart and fixing those imperatives of procedural protection absent which the processual tail will wag the substantive head. Can the sacred essence of the human right to secure which the struggle for liberation, with "do or die" patriotism, was launched be sapped by formalistic and pharisaic prescriptions, regardless of essential standards? An enacted apparition is a constitutional illusion. Processual justice is writ patently on Article 21. It is too grave to be circumvented by a black letter ritual processed through the legislature."

81. In **Arnab Manoranjan Goswami Vs. State of Maharashtra and Others**,43 the status of liberty in our constitutional value system, realities of the criminal justice process, and nature of the right of bail came up squarely for consideration.

82. The Supreme Court in **Arnab Goswami (supra)** was cognizant of the tendency to misuse criminal law and held unequivocally that the courts have to ensure that criminal law does not become "weapon for the selective harassment of the citizens".

83. The self imposed fetters on grant of bail under Article 226 of the Constitution of India were removed. The first principles of writ jurisdiction for upholding the fundamental liberties of the citizens were reiterated:

"63....However, the High Court should not foreclose itself from the exercise of the power when a citizen has been arbitrarily deprived of their personal liberty in an excess of state power.

64.While considering an application for the grant of bail under Article 226 in a suitable case, the High Court must consider the settled factors which emerge from the precedents of this Court."

84. Reinforcing the connection between the concept of liberty and the process of criminal law, the Supreme Court in **Arnab Goswami (supra),** discussed the attributes of liberty and delineated the duties of courts:

"67. Human liberty is a precious constitutional value, which is undoubtedly subject to regulation by validly enacted legislation..... Courts must be alive to the need to safeguard the public interest in ensuring that the due enforcement of criminal law is not obstructed. The fair investigation of crime is an aid to it. Equally it is the duty of courts across the spectrum - the district judiciary, the High Courts and the Supreme Court - to ensure that the criminal law does not become a weapon for the selective harassment of citizens. Courts should be alive to both

ends of the spectrum - the need to ensure the proper enforcement of criminal law on the one hand and the need, on the other, of ensuring that the law does not become a ruse for targeted harassment. Liberty across human eras is as tenuous as tenuous can be. Liberty survives by the vigilance of her citizens, on the cacophony of the media and in the dusty corridors of courts alive to the rule of (and not by) law. Yet, much too often, liberty is a casualty when one of these components is found wanting."

"68...Our courts must ensure that they continue to remain the first line of defense against the deprivation of the liberty of citizens. Deprivation of liberty even for a single day is one day too many. We must always be mindful of the deeper systemic implications of our decisions."

85. In view of the constitutional moorings of the right of bail, curtailment of the said right cannot be permitted in absence of an express statutory mandate or contrary to the constitutional scheme. Nor can restrictions of on right of bail be readily inferred from a statute if other interpretations are possible.

VIII. b. Parameters of bail under the POCSO Act:

86. The Court while examining a bail application has to balance and reconcile diverse objectives, namely, the imperative of constitutional liberties of an accused, the necessity of bringing an offender to fair and speedy justice, and the mandate of upholding the law. In POCSO cases the victim has a statutory right to be heard.

87. Parameters of bail are well settled by judicial precedents and practices achieve the aforesaid aims in full measure.

88. Bails under POCSO Act offences have to be considered under Section 439 Cr.P.C. and in accordance with the settled parameters of grant of bail which include nature and gravity of the offences, and the likelihood of an accused having committed the offence. The possibility of the accused reoffending, influencing witnesses and tampering with evidence or being a flight risk are also relevant factors to be considered while deciding a bail application.

89. In POCSO Act related offences the age of a victim is a critical factor which will influence the decision to grant bail.

90. No provisions circumscribing the right of bail can be distilled from the scheme of POCSO Act. The existing norms of bail jurisprudence are sufficient to effectively implement the POCSO Act and to serve justice. Of course, the threshold of satisfaction of the Court while granting bail may vary in the facts and circumstances of each case.

IX. Bails under POCSO Act : Conclusions:

a. Section 94 of the JJ Act, 2015 & bails under POCSO Act:

91. Applying the provisions of Section 94 of the JJ Act, 2015, at the stage of bail would result in consequences not intended by the legislature. In bail proceedings curtailing the rights of an accused to assail the age of the victim stated in the prosecution case on the foot of correctness of documents enumerated in Section 94 of the JJ Act, 2015, would be contrary to the scheme of the POCSO Act and violate the right of bail of the accused.

92. It would also be outrightly unfair to an accused to cause his imprisonment on the foot of documents and evidences which he can not freely challenge in a bail proceeding.

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

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

II. The line of enquiry and relevant factors to assess the age of the victim in a bail application under the POCSO Act offences are these. The consideration of the age related documents mentioned in Section 94 of the JJ Act, 2015 i.e. school certificate (including matriculation), date of birth certificate issued by a local body, and medical report for age determination as produced by the prosecution is a good start point in the process.

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

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

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

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

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

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

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

IX. b. Conclusions : Sections 29 and 30 of POCSO Act & bails under the POCSO Act:

94. The consideration of presumption of culpable intent under Sections 29 and 30 of the POCSO Act and as contemplated in **Rajballav (supra)** at the stage of bail shall be governed by the principles of evidential law as regard presumptions and the holdings in **Tofan Singh (supra), Joy V.S. (supra), Navin Dhaniram Baraiye (supra), Dharmander Singh (supra) and Sahid Hossain Biswas (supra)** and shall be made in the following manner:

1. Presumption of culpable intent under Section 29 of the POCSO Act, 2012 will be attracted only in the manner and stage discussed earlier in the judgement.

2. Presumption of culpable intent of the accused under Sections 29 of the POCSO Act, 2012 shall not apply at the stage of pretrial bails.

3. With each passing stage of trial, the threshold of satisfaction of the court to grant bail will be enhanced depending on the facts and circumstances of a case and the evidences introduced at the trial.

4. At all stages of prosecution the right of an accused to tender his defence or to assail the presumption of culpable intent cannot be restricted. The court has to consider the defence of the accused against the presumption of culpable intent to commit the offence.

X. Order on Bail Application:

95. By means of this bail application the applicant has prayed to be enlarged on bail in Case Crime No. 445 of 2021 at Police Station Majhola, District Moradabad, under Sections 376, 506 IPC and Sections 3/4 POCSO Act and Sections 3(2)(v), 3(2)(va), 3(1)(2) of SC/ST Act.

96. The applicant is on interim bail granted by this Court on 01.04.2022.

97. The following arguments made by Shri S. P. Tiwari, learned counsel on behalf of the applicant, which could not be satisfactorily refuted by Shri Rishi Chaddha, learned AGA from the record, entitle the applicant for grant of bail:

(i). The prosecution case set out in the FIR states that the age of the victim is 15 years.

(ii). The victim in her statement under Section 161 Cr.P.C. has stated that she is 16 years of age. As per the transfer certificate issued by the school her age is 13 years and 3 months.

(iii). There are material inconsistencies in the age related evidence relied on by the prosecution which discredits the prosecution case.

(iv). The victim has been falsely shown as minor only to aggravate the offence and cause the imprisonment of the applicant under the stringent provisions of the POCSO Act.

(v). The victim is infact a major. Medical examination to determine the correct age of the victim as per the latest scientific and medical protocol by eminent doctors from a reputed institution was not got done as it would falsify the prosecution case.

(vi). The applicant and the victim were intimate.

(vii). The F.I.R. is a result of an opposition of the victim's parents to her relationship with the applicant.

(viii). The statement of the victim is tutored and made at the behest of her parents only to deflect attention from the conduct of the victim and to save the failing prosecution.

(ix). No medical evidence corroborates forceful assault.

(x). There is no evidence of forceful entry in the house of the victim. The victim was a consenting party.

(xi). The applicant does not have any criminal history apart from the instant case.

(xii). The applicant is not a flight risk. The applicant being a law abiding citizen has always cooperated with the investigation and undertakes to cooperate with the court proceedings. There is no possibility of his influencing witnesses, tampering with the evidence or reoffending.

98. In the light of the preceding discussion and without making any observations on the merits of the case, the bail application is allowed.

99. Let the applicant- **Monish** be released on bail in the aforesaid case crime number, on furnishing a personal bond and

two sureties each in the like amount to the satisfaction of the court below. The following conditions be imposed in the interest of justice:-

(i) The applicant will not tamper with the evidence or influence any witness during the trial.

(ii) The applicant will appear before the trial court on the date fixed, unless personal presence is exempted.

(2023) 3 ILRA 854
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Civil Revision No. 185 of 2017

Sushil Kumar Kathooriya ...Revisionist
Versus
Span Infrdevelopers Pvt. Ltd. ...Respondent

Counsel for the Revisionist:
Sri Santosh Kumar Mishra

Counsel for the Respondent:
Sri Tarun Agarwal, Sri Kshitij Shailendra

Civil Law - Constitution of India - Article 226, - Civil Procedure Code - Order - 7, Rule - 11, 11(d) - Specific Relief Act, - Section - 31, 38 - Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 - Section - 229-B, 331- Civil Revision - defendant revisionist is a third party - questioning the impugned order - court below rejected the Application of revisionist preferred under Order 7 Rule 11 of CPC, claiming that the suit was barred by the U.P.Z.A. & L.R. Act and the Specific Relief Act - Suit for permanent injunction - filed on the basis of agreement to sale & letter of possession - court finds that, defendant is not claiming ownership over the property in the suit - and a suit for permanent injunction can be maintained on the basis of possession and possessory title - held, when there is a mixed question of fact and law, it can only be decided after taking evidences of the parties - therefore, impugned order does not suffer from any illegality or infirmity - accordingly, the revision is liable to be dismissed. (Para - 13, 14, 15)

Civil Revision Dismissed. (E-11)

List of Cases cited: -

1. Kamla & ors. Vs K.T. Ishwara & ors., (2008) 12 SCC 661,

2. Iqbal Basith & ors. Vs N. Subbalakshmi & ors., (2021) 2 SCC 718,

3. Rame Gowda (dead) by L.Rs Vs M V Naidu (dead) by L.Rs & ors., (2204) 1 SCC 769,

4. Anathula Sudhakar Vs P. Buchi Reddy, (2008) 4 SCC 594,

5. Nair Service Society Ltd. Vs K.C. Alexander & ors., (1968) 3 SCR 163 : AIR 1968 SC 1165,

6. Popat and Ketecha Property Vs SBI Staff Assessment, (2005) 7 SCC 510

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

1. This revision has been preferred against the order dated 23.1.2017 passed by Civil Judge (S.D.) Bareilly, in original suit no. 12 of 2017 (Span Infra Developers Pvt. Limited Vs. Sushil Kumar Kathooriya) by which learned Court below has rejected the application 36A moved by the defendants under Order 7 Rule 11 CPC.

2. In brief, facts of the case are that the plaintiff Span Infra Developers-opposite party no. 1 filed the aforesaid suit against the defendant-revisionist for a relief of permanent injunction in respect of property shown by letters (अ न ग ब) in the

plaint map. As per the plaint, 1/5th of the total area of gata no. 14 area 4 bigha 7 biswa, gata no. 15 area 9 biswa, gata no. 16 area 17 biswa, gata no. 17 rakabai 10 biswa, gata no. 18 area 13 biswa, gata no. 19 area 13 biswa, gata no. 20/1 area 13 biswa, gata no. 21 area 9 biswa, gata no. 22/1 area 8 biswa, gata no. 23/1, area 1 bigha, gata no. 24/1 area 2 biswa 10 biswansi total 30100 yard of i.e. 6020 square yard was under the ownership and in possession of Laxmi Sahakari Awas Samiti Ltd. through Satish Kumar Agrawal as secretary. This land was purchased by three sale-deeds from its previous owners in the year 1986 and the name of the society was also mutated. On the basis of consent and mutual oral partition, the society came into possession of the property shown by letters Ka Kha Ga and Gha in the plaint map. Apart from this, the society had also got some property of gata no. 23/1 on the east side of the road which has also been sold by the society.

3. On 14.6.2005 through registered sale deed society sold an area of 1315.87 square yard to Sarnath Infrastructure Pvt. Limited, Bareilly, after getting adequate consideration and also delivered the possession of the sold land which is shown by the letters M, N, G and Gha.

4. Sarnath Infra. Pvt. Ltd. executed a registered agreement for sale on 12.9.2012 for an area of 815.44 square yard, shown by the letter A, N, Ga & Ba in favour of the plaintiff. As per term no. 2 of the agreement for sale, Sarnath Infra. Pvt. Ltd. had to raise boundrywall for the property in suit before executing the sale-deed in favour of the plaintiff. Since it could not be done so, therefore, Sarnath Pvt. Ltd. delivered the possession of the said land on 29.10.2012 by the letter of possession and on the request of the plaintiff, it was also notarized on 1.11.2012. Since then the plaintiff is in possession of the property in suit of area of 815.44 square yard and for the protection of the property it has also made some construction thereon.

5. Defendant is a land grabber and a mafia type of person who has no concern with the property in suit even then defendant with some unsocial elements on 5.1.2017 reached on the property in suit and tried to dismantle the constructions and occupy the land in suit forcefully. After getting the information from the security guard, the plaintiff reached on the spot and anyhow got stopped such illegal activities. The defendant left the place but threatened that he will come again and shall take possession of the property in suit. The matter was reported to the police who did not help the plaintiff saying it to be a civil matter. Hence, the cause of action arose and the suit was instituted.

6. The revisionist-defendant appeared in the case and moved an application 36 Ka under Order 7 Rule 11 CPC raising the question that the suit is barred by Section 229-B and 331 of the U.P.Z.A.& L.R. Act. The name of the plaintiff is neither recorded in the revenue record, nor in the agreement for sale, there is averment of delivery of possession. The notarized letter of delivery of possession 24C is a forged document. The plaintiff can file a suit only if the execution of sale-deed is in his name. The suit is barred by Section 31 and 38 of the Specific Relief Act. The plaintiff has not come with clean hands. Neither balance of convenience is in favour of the plaintiff nor any irreparable injury is caused to the plaintiff, therefore, the plaint be rejected.

7. Plaintiff filed objection 56C and opposed the application and contended that

the suit is not barred by the provisions of U.P.Z.A. & L.R. Act and since long time the property in suit is a residential land and the agricultural works are not being done. There are constructions over the property in suit. The suit has been filed on the basis of possession hence the application be rejected.

8. The learned trial Court referred the provisions of Order 7 Rule 11 CPC and concluded that on the basis of agreement for sale and letter of possession, the suit can be maintained and at this stage it can not be said that the letter of possession 24 C is a forged document and conclusion can be drawn only after taking evidence of the parties. The learned Court below has also noted that there is no dispute about the fact that Sarnath Infrastructure Pvt. Ltd. Bareilly has executed an agreement for sale in favour of the plaintiff. The suit has been filed on the basis of agreement for sale and on the basis of possession, therefore, it does not appear that the suit is barred by the provisions of U.P.Z.A & L.R. Act and Specific Relief Act.

9. The learned Court below relied on the judgment of ***Kamla and Others VS. K.T. Ishwara and others, (2008) 12 SCC 661***, wherein it has been held that the scope of Order 7 Rule 11 (d) CPC is very limited; at this stage merit of the case can not be looked into. Accordingly, the learned Court below rejected the application under Order 7 Rule 11 CPC.

10. This revision was entertained and notice was issued to opposite party-plaintiff who filed counter affidavit no. 60549 of 2017 reiterating the averments of the plaint and the objection and has denied the averments of the application moved by the defendant under Order 7 Rule 11 CPC and it has also been averred that the property in suit shall proceed under the Indian Stamp Act 1899 and by order dated 31.3.2006, the Deputy Commissioner (Stamp) has clearly held that the property in question was a residential property; it is well settled law that while deciding the application under Order 7 Rule 11 CPC the Court can only rely upon the averments made in the plaint. If for the sake of argument it is accepted that the property in suit is an agricultural land even then the suit filed by the plaintiff -opposite party was maintainable before the Civil Court on the ground of the principles of relief sought. Copy of the agreement for sale and delivery of possession alongwith order of Deputy Commissioner has been annexed with the counter affidavit.

11. From the perusal of record, it transpires that the defendant-revisionist has not claimed the property in suit on the basis of ownership or possession. At this stage only averment of the plaint has to be seen. Prima-facie it is not in dispute that the property in suit was purchased by Laxmi Sahkari Awas Samiti Limited in 1986 and its name was not mutated and the property in suit was not partitioned by way of consent and mutual oral partition. It is also prima-facie established that Laxmi Sahakari Awas Samiti sold the area of 1315.87 square yard on 14.6.2005 to Sarnath Infrastructure Private Limited, Bareilly, through registered sale-deed. It is also prima-facie established that Sarnath Infrastructure Private Limited executed an agreement for sale on 12.9.2012 in respect of the property in suit of an area of 815.44 square yard and also executed a notarized deed of delivery of possession on 29.10.2012 in favour of the plaintiff. It is also noteworthy that neither Sarnath Infrastructure Private Limited nor Laxmi Saharanpur Awas Samiti had any objections

regarding the possession, agreement for sale and letter of delivery of possession executed in favour of the plaintiff. Though the suit for permanent injunction can be filed on the basis of records of right but a suit for permanent injunction can also be maintained on the basis of possessory title atleast against a third person.

12. In ***Iqbal Basith and Others Vs. N.Subbalakshmi and Others, (2021) 2 SCC 718,*** it has been held that "suit for permanent injunction can be maintained on the basis of possession and possessory title."

In ***Rame Gowda (dead) by L.Rs Vs. M V Naidu (dead) by L.Rs and Other, (2204) 1 SCC 769***, it is held that a person in possession of land in assumed character of owner of exercising peaceably the ordinary right of ownership has a perfectly good title against all the world but the rightful owner. When the facts disclosed no title in either party, possession alone decides. The latine maxim "possessio contra omnes valet praeter eur cuei ius sit possessionis is important." In the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title. Law presumes the possession to go with the title unless rebutted. The Apex Court referred the following part of Salmond's book on jurisprudence and following judicial precedents which are as under:

5.Salmond states in Jurisprudence (Twelfth Edition), "few relationships are as vital to man as that of possession, and we may expect any system of law, however primitive, to provide rules for its protection. . . . . Law must provide for the safeguarding of possession. Human nature being what it is, men are tempted to prefer their own selfish and immediate interests to the wide and long-term interests of society in general. But since an attack on a man's possession is an attack on something which may be essential to him, it becomes almost tantamount to an assault on the man himself; and the possessor may well be stirred to defend himself with force. The result is violence, chaos and disorder." (at pp. 265, 266).

"In English Law possession is a good title of right against anyone who cannot show a better. A wrongful possessor has the rights of an owner with respect to all persons except earlier possessors and except the true owner himself. Many other legal systems, however, go much further than this, and treat possession as a provisional or temporary title even against the true owner himself. Even a wrongdoer, who is deprived of his possession, can recover it from any person whatever, simply on the ground of his possession. Even the true owner, who takes his own, may be forced in this way to restore it to the wrongdoer, and will not be permitted to set up his own superior title to it. He must first give up possession, and then proceed in due course of law for the recovery of the thing on the ground of his ownership. The intention of the law is that every possessor shall be entitled to retain and recover his possession, until deprived of it by a judgment according to law." (Salmond, ibid, pp. 294-295) "Legal remedies thus appointed for the protection of possession even against ownership are called possessory, while those available for the protection of ownership itself may be distinguished as proprietary. In the modern and medieval civil law the distinction is expressed by the contrasted terms petitorium (a proprietary suit) and possessorium (a possessory suit)." (Salmond, ibid, p.295)

6. The law in India, as it has developed, accords with the jurisprudential

thought as propounded by Salmond. In Midnapur Zamindary Co. Ltd. Vs. Kumar Naresh Narayan Roy and Ors. 1924 PC 144, Sir John Edge summed up the Indian law by stating that in India persons are not permitted to take forcible possession; they must obtain such possession as they are entitled to through a Court.

7. The thought has prevailed incessantly, till date, the last and latest one in the chain of decisions being Ramesh Chand Ardawatiya Vs. Anil Panjwani (2003) 7 SCC 350. In-between, to quote a few out of severals, in Lallu Yeshwant Singh (dead) by his legal representative Vs. Rao Jagdish Singh and others (1968) 2 SCR 203, this Court has held that a landlord did commit trespass when he forcibly entered his own land in the possession of a tenant whose tenancy has expired. The Court turned down the submission that under the general law applicable to a lessor and a lessee there was no rule or principle which made it obligatory for the lessor to resort to Court and obtain an order for possession before he could eject the lessee. The court quoted with approval the law as stated by a Full Bench of Allahabad High Court in Yar Mohammad Vs. Lakshmi Das (AIR 1959 All. 1,4), "Law respects possession even if there is no title to support it. It will not permit any person to take the law in his own hands and to dispossess a person in actual possession without having recourse to a court. No person can be allowed to become a judge in his own cause." In the oft- quoted case of Nair Service Society Ltd. Vs. K.C. Alexander and Ors. (1968) 3 SCR 163, this Court held that a person in possession of land in assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. When the facts disclose no title in either party, possession alone decides. The court quoted Loft's maxim 'Possessio contra omnes valet praeter eur cui ius sit possessionis (He that hath possession hath right against all but him that hath the very right)' and said, "A defendant in such a case must show in himself or his predecessor a valid legal title, or probably a possession prior to the plaintiff's and thus be able to raise a presumption prior in time.

In Krishna Ram Mahale (dead) by his Lrs. Vs. Mrs. Shobha Venkat Rao (1989) 4 SCC 131, it was held that where a person is in settled possession of property, even on the assumption that he had no right to remain on the property, he cannot be dispossessed by the owner of the property except by recourse to law. In Nagar Palika, Jind Vs. Jagat Singh, Advocate (1995) 3 SCC 426, this Court held that disputed questions of title are to be decided by due process of law, but the peaceful possession is to be protected from the trespasser without regard to the question of the origin of the possession. When the defendant fails in proving his title to the suit land the plaintiff can succeed in securing a decree for possession on the basis of his prior possession against the defendant who has dispossessed him. Such a suit will be founded on the averment of previous possession of the plaintiff and dispossession by the defendant.

In Nagar Palika, Jind Vs. Jagat Singh, Advocate (1995) 3 SCC 426, this Court held that disputed questions of title are to be decided by due process of law, but the peaceful possession is to be protected from the trespasser without regard to the question of the origin of the possession. When the defendant fails in proving his title to the suit land the plaintiff can succeed in securing a decree for possession on the basis of his prior possession against the

defendant who has dispossessed him. Such a suit will be founded on the averment of previous possession of the plaintiff and dispossession by the defendant.

In Fakirbhai Bhagwandas and Anr. Vs. Maganlal Haribhai and Anr. AIR 1951 Bombay 380 a Division Bench spoke through Bhagwati, J. (as his Lordship then was), and held that it is not necessary for the person claiming injunction to prove his title to the suit land. It would suffice if he proves that he was in lawful possession of the same and that his possession was invaded or threatened to be invaded by a person who has no title thereof. We respectfully agree with the view so taken. The High Court has kept the question of title open. Each of the two contending parties would be at liberty to plead all relevant facts directed towards establishing their titles, as respectively claimed, and proving the same in duly constituted legal proceedings. By way of abundant caution, we clarify that the impugned judgment shall not be taken to have decided the question of title to the suit property for or against any of the contending parties."

In **Anathula Sudhakar v. P. Buchi Reddy, (2008) 4 SCC 594**, *it has been held that-*

"the respondent having succeeded in proving possession over the suit property, and no evidence having been led by the petitioners to indicate to the conrary, or that the possession of the suit property by the respondent was wrongful, a simplicitor suit for injunction against forcible dispossession was maintainable without having to seek any titular rights over the suit property.

In **Nair Service Society Ltd. v. K.C. Alexander**, *AIR 1968 SC 1165, it has been held that:-*

"this Court ruled that when the facts disclose no title in either party, possesion alone decides. It was further held that if Section 9 of the Specific Relief Act, 1877 (corresponding to the present Section 6) is employed, the plaintiff need not prove title and the title of the defendant does not avail him. When, however, the period of six month has passed, questions of title can be raised by the defendant and if he does so the plaintiff must establish a better title or fail. In other words, such a right is only restricted to possession in a suit under Section 9 of the Specific Relief Act (corresponding to the present Section 6) but does not bar a suit on prior possession within 12 years form the date of dispossession, and title need not be proved unless the defendant can provide one."

13. The defendant-revisionist is a third party and has not been party to the sale-deeds and letter of the delivery. Till now he has not produced any deed of title about the property in suit, therefore, this Court is of the opinion that in such circumstances the suit of the plaintiff can be maintained against the defendant. Since the defendant is not claiming ownership over the property in the suit, it is not open for him to challenge the suit on the basis of Order 7 Rule 11 CPC. It is also pertinent to mention that sometimes when there is a mixed question of fact and law, it can only be decided after taking evidences of the parties. The power under Order 7 Rule 11 CPC can be exercised at any stage by the trial Court.

14. In ***Popat and Ketecha Property Vs. SBI Staff Assessment, (2005) 7 SCC 510,*** it has been held that "disputed question can not be contested in the application under 7 Rule 11 CPC."

15. Thus, on the basis of aforesaid discussions this Court is of the considered view that the the impugned order does not suffer from any illegality or infirmity. The revision is devoid of merit and is liable to be dismissed.

16. Accordingly, the revision is dismissed and the impugned order is affirmed. The stay order dated 10.2.20217 passed by this Court in this revision stands vacated.

17. Let a copy of this order be transmitted to the Court below for necessary compliance.

(2023) 3 ILRA 860
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Civil Revision No. 650 of 2014

Waqf Qabristan Shehkhan Biradri No. 616, Meerut ...Revisionist
Versus
U.P. Sunni Central Board of Waqfs & Ors. ...Respondents

Counsel for the Revisionist:
Sri Ayub Khan

Counsel for the Respondents:

Civil Law - Civil Procedure Code - Section – 151 - Order - 23, Rule 1 - Nagar Mahapalika Act, 1916 - Section - 213 - Waqf Act, 1995 - Sections – 54 & 55: - Civil Revision - against impugned order - by which application 3C2 U/s 151 of CPC moved by the applicant was allowed - maintainability - nature of property - suit was withdrawn - after about 11 years court below entertain the application under section 151 of CPC and restored the reference to its original number - certainly it is abuse and misuse of the power and illegal exercise of the inherent power of the Court - More so, such withdrawal order is revisable but no such procedure had been adopted by opposite party no. 2 and by adopting a short cut method and by adopting illegal measure, the impugned order has been obtained which is factually and legally incorrect – accordingly, the revision is allowed. (Para - 13, 14, 15)

Revision Allowed. (E-11)

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

1. This civil revision has been instituted against the judgment and order dated 29.9.2014 passed by Waqf Tribunal/Civil Judge (S.D.), Meerut, in Misc. Case No. 17 of 2004 (Mohammad Faruk Vs. Sunni Central Board and Others), by which application 3C2 under Section 151 C.P.C. Moved by the applicant-Mohammad Farooq, was allowed at the cost of Rs. 5,00/- and the order passed on the withdrawal application on 10.12.2003 in reference/original suit no. 1294 of 1993 was recalled.

2. In brief, facts of the case are that Md. Farooq-plaintiff filed a case in the Court of Waqf Tribunal/Civil Judge (S.D.) Meerut, as reference no. 1294 of 1993 against Sunni Central Waqf Lucknow, Managing Committee and Waqf Qabristan Biradari Shah Khan, with the averments that he is owner of the house no. 169 (170) situtated in Mohalla Gulzar Ibrahim, Lisari Road, Halka No. 13, Meerut City, and is living with his family. The house was constructed about 60 years back and father of the plaintiff was the resident of the house in suit as owner with his family and after his death, the plaintiff inherited his right as son and is residing in the house as owner,

the name of the petitioner is recorded as owner in the corporation Assessment Register. The house was not dedicated by his father or by him and it is his personal property.

3. On 2.11.1993 the plaintiff received a notice under Section 213 of the Nagar Mahapalika Act from which it is revealed that opposite party no.3 has applied for mutation of its name on the allegations that the property is a waqf property and the same has been registered by opposite party no.1 by order dated 12.9.1991. In the waqf register boundaries and house number are not given but since the opposite party no. 3 has applied for mutation hence the plaintiff is bound to get the order dated 12.9.1994 set-aside. The plaintiff was not given any notice by the opposite party before registering the house in dispute as waqf property and he was not knowing this fact before 2.11.1993. The order dated 12.9.1991 is illegal without jurisdiction and is liable to be set-aside. The plaintiff prayed for setting aside of the order dated 12.9.1991 regarding property in suit passed by U.P. Sunni Cetral Board of Waqf, Lucknow.

4. Defendant nos.2 & 3 appeared and filed written statement/objection and denied the facts of the plaintiff and in additional pleas, pleaded that the petition is miserably time barred and the plaintiff is stopped from challenging the nature of the property being part of Waqf Qabristan Biradary of Sheikhan known as Takia Shad Shah Langot, Meerut. The land beneath the malba of the house, which was erected with the permission of the then Mutwalli of the Waqf Qabristan, forms part of the big area spread over ten thousand square yards from time immemorial. The purpose of permitting the ancestors of the petitioner to reside within the boundaries of the Qabristan was to have a watch upon the waqf property, they did not enjoy and other privilege like ownership or lessee's rights. The petition has been filed on malafide grounds and vague allegations. The plaintiff has deliberately avoided to mention the names of his ancestor, who is alleged to have acquired the land and the mode of its acquisition, Khasra plot number and other details.

The real fact is that the land pertains to Khasra Plot No. 774 and other adjoining numbers, Mahal Lekhraj Mazbata, Qasba Meerut, and the then Mutwalli of Qabristan late Chaudhary Abdul Karim had allowed Mohd Hafiz father of the petitioner-plaintiff to occupy the land as a tenant for which a registered rent deed dated 6.5.1937 was executed between the parties as such the petitioner or his father can not claim ownership right of the property in question. The entire Qabristan was registered with the U.P.S.C. Board of Waqf Lucknow in the year 1970 and a committee of management was appointed for looking after the Waqf property. The petitioner or his late father had not challenged or asserted their title over the property, prior to their objections in the correction proceedings in the office of Meerut Corporation. The plaint is defective and is liable to be rejected on the ground that the Waqf has been impleaded through president of the management committee whereas only secretary of the committee, presently M.Haroon son of M. Shafi is entitled to file or defend the suit on behalf of the Managing Committee of the waqf.

On the aforesaid grounds, defendant prayed for dismissal of the suit and the reference.

5. During course of hearing in the Court of Civil Judge (S.D.)/Waqf Tribunal,

Meerut, the plaintiff Mohammad Farooq moved a withdrawal application that on 10.12.2002 at the time of reference, he was not fully aware of the facts and now after getting some old papers, this fact has been known to him that land Tahti of House No. 169 Mauh Gulzar Ibrahim Meerut, Waqf Shekhan/page 616 Meerut, is the waqf property which was taken by Sufi Hafiz Shah on rent from the Mutwalli of the Waqf and used to live as tenant. Late Sufi Hafiz Shah had orally gifted the house and the tenancy rights to the plaintiff and made the plaintiff owner in possession. On this basis, the petitioner had filed the aforesaid suit. Since the actual and true facts are known and it is proved that the disputed property is the waqf property, therefore, the plaintiff has no objection to the continuance of the entry in the name of opposite party no.1 as waqf property. The plaintiff has satisfied himself by understanding the legal position hence it was prayed to struck off the reference no. 1294/1993.

6. This application was allowed on 10.12.2003. The order dated 10.12.2003 reads as under:

"Case is taken up. Called out. The petitioner has prayed by submitting an application to struck off his reference. The opposite has no objection. When the petitioner himself wants dismissal of his reference and does not want to contest, then reference is quashed on the basis of application of the petitioner."

Order

On the basis of application of the applicant, the reference is quashed.

File be consigned. "

7. After a long gap the plaintiff Md. Farooq moved an application 3C2 under Section 151 CPC stating that the house no. 169 Gulzar Ibrahim Lisari Gate, Meerut, is the house of the applicant since the time of his father. The opposite party no.2-waqf has nothing to do with the house, no one has ever made Waqf of the debris of the house or tahti arazi. One Haroon who is the secretary of the waqf wrongly registered the property of the disputed house as waqf and on the basis of wrong entry, name of waqf has wrongly been entered into the records of the Municipal Corporation. After knowing, the applicant filed the reference number 1294/1993 in which evidence of the applicant was yet to be done. Haroon in collusion with the Chief Executive Officer, had wrongly got the order of eviction against the applicant against which the applicant had filed case no. 1095 of 2003. The applicant had obtained stay order in reference no. 1294 of 1993. The applicant is an old man and wanted to avoid hassle of the litigation, besides, Haroon is a very influential person, he tried to intimidate the applicant through other persons, started threatening that he would forcefully take over the house. Since the applicant wanted to avoid litigation, Hafiz Haroon told the applicant that if the applicant is handing over the land, he would consider him owner of the debris and the arazi, and he would not be evicted treating him to be tenant. After withdrawal of the suit, Hafiz Haroon tried to take possession of the house of the applicant under Section 55 of the Waqf Act, 1995 and refused to accept the applicant as tenant. The applicant came to know from these actions that his intention was different, he cheated the applicant and also cheated the Court. On account of cheating the case had been withdrawn due to which applicant is suffering therefore, order dated 10.12.2003 be canceled and the case be decided on merit.

8. Defendant-revisionist filed objection 23C2 with affidavit and submitted that the statement of the

applicant-plaintiff is false, the application is malicious and has been moved under pressure of some land mafias who want to take advantage of the opportunity in a wrong way creating influence on the brother and sister of the applicant, therefore, they want to get the order of the Waqf Tribunal quashed. The application is time barred and does not indicate as to how it is maintainable and how it could be decided on merit. The applicant had withdrawn the reference on 10.12.2003 and the original suit number 1095 of 2003 had also been withdrawn. Arif son of the applicant was also present in the Court and they had told the court that he was withdrawing the reference and the suit on their free will, it is wrong to allege that H.M. Haroon, Secretary, Managing Committee/Mutwalli of the Waqf avoided to receive rent or refused to treat the applicant as a tenant. It is specifically stated that the Waqf Qabristan assures the Court that if the applicant is avoiding to perform his undertaking and the fixed rent is paid by him, the proceeding under Section 54/55 Waqf Act would not be initiated against the applicant. It is wrong to allege that the property is not the Waqf property. The Court below after being satisfied had allowed the withdrawal of the reference. The applicant can not dictate the Court of law to act as per his choice and whims, if the application is allowed, the same shall result the endless litigation. The applicant has submitted the application on the greed of land mafias to grab the land. The applicant has concealed the condition of the site that one part was to be used as cemetery and agreed to pay rent on the other part. In fact he had removed all his house-hold articles from that part. Therefore, the application under Section 151 CPC be dismissed.

9. After hearing both the parties, Civil Judge (S.D.)/Waqf Tribunal allowed the application moved by the applicant-opposite party no.2, without giving any cogent reasons, therefore, the revisionist-opposite party had moved this civil revision on the aforesaid grounds.

10. None appeared from both the sides. Therefore, this revision is being decided after evaluating the evidence/material available on record.

11. It is noteworthy that in the reference, opposite party no. 2 has claimed himself and his father to be the owner of the property in question. It is also accepted by him that it is like debris and part of the waqf property. He did not deny that he had not moved the application dated 10.12.2003 before the Waqf Tribunal/Civil Judge (S.D.), Meerut, in which he had accepted that he is the son of Safi Hafiz Shah and had also accepted that the land of house no. 169 is under the ownership of Waqf Qabristan Shekhran Biradari No. 616, Meerut, which was taken by his father on rent and he was living there and during his lifetime, debris of the house and all the rights regarding tenancy was transferred to him by way of oral gift, therefore, he had filed the suit. Mohd. Farooq had also accepted that at the time of institution of the reference, he was not knowing the detail facts of the matter and after getting some old papers he knew that the property in suit is the waqf property which was taken by his father on rent. He had also admitted that he has no objection regarding recording of the property in question as waqf property. He had further admitted that he had satisfied himself by taking legal opinion and the application was moved with his free will and the same was

accepted and the reference and the suit of Md. Farooq was dismissed on 10.12.2003.

12. It is a matter of surprise that without moving any application for condonation of delay and without adopting any due course of law, the application under Section 151 CPC was moved and the same was allowed by Civil Judge (S.D.)/Waqf Tribunal, Meerut, without any cogent reason and without any basis. Under Order 23 Rule 1 CPC there is provision for withdrawal of suit which reads as such:

"As per Order 23, Rule 1(1) of the CPC, a plaintiff may abandon his suit or abandon a part of his claim at any time after the institution of a suit. As soon as an application is filed under this sub-rule, the withdrawal of the suit is complete and such withdrawal is not dependent on the court's order."

13. In this case no permission was taken to withdraw the reference with liberty to institute it again in respect of the subject matter, therefore, there was no occasion or right to move an application under Section 151 CPC. The Waqf Tribunal, Meerut, has hammered on the version of the application of the applicant that when the revisionist did not accept him to be tenant then necessity to restore the case arisen. From the perusal of the withdrawal application or from the perusal of the order dated 10.12.2003, it is crystal clear that no such condition was imposed by Mohd. Farooq or by the Court. The withdrawal application was moved without any coercion or undue influence. It has not been alleged by opposite party no.2 that he was withdrawing the reference case on the condition that he would be treated to be tenant of the property in question. The Court below has wrongly concluded that if the reference is restored, the multiplicity of the suit would decrease and the parties would be saved from any trouble. As the matter had already been settled and finalized by way of withdrawal, there was no occasion to entertain the application under Section 151 CPC after a gap of about 11 years and restore the reference to its original number.

14. Certainly it is abuse and misuse of the power and illegal exercise of the inherent power of the Court. More so such withdrawal order is revisable but no such procedure had been adopted by opposite party no.2 and by adopting a short cut method and by adopting illegal measure, the impugned order has been obtained which is factually and legally incorrect. Thus, the impugned order is liable to be set-aside and the revision is liable be allowed.

15. Accordingly, the revision is allowed and the order dated 29.9.2014 passed by Waqf Tribunal/Civil Judge (S.D.), Meerut, is hereby quashed.

16. Let a copy of this judgment be sent to the Court below for necessary compliance.

(2023) 3 ILRA 864
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.03.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Criminal Appeal No. 630 of 2014

Dhananjay @ Pappu ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Ram Suphal Shukla, Sri A.K. Pandey, Sri Chandan Sharma, Sri Sandeep Shukla, Sri Umesh Narain Shukla, Sri Vinod Singh (A.C.)

Counsel for the Respondent:
G.A.

Criminal Law- Indian Penal Code-1860-Sections 299,300,302 & 304(I)-Accused-Appellant inflicted serious injuries which resulted into death of the victims-Conviction U/s 302 IPC-No embellishment in the prosecution version-medical evidence adduced stood fully proved- Human blood was found on the *Khukari* and other incriminating articles-Any variation or omission in the examination, cross examination or examination in chief will not jettison the entire prosecution version and absolve the guilt- Death caused was not premeditated-Accused though had knowledge and intention that his act would cause bodily harm but did not want to do away with the deceased-Offence not punishable u/s 302 of I.P.C. but is culpable homicide not amounting to murder, punishable U/s 304 (Part I)-Criminal jurisprudence in our country is reformative and corrective and not retributive- Conviction of appellant is converted into conviction u/s 304 (I) I.P.C.

Appeal partly allowed. (E-15)

List of Cases cited:

1. Shreekantiah Vs St. of Bombay, 1955 SCJ 233

2. Yunis alias Kariya VS St. of M P, AIR 2003 SC 539

3. Anil Yadav VS St. of Bihar, 1992 (1) Crimes 282

4. Thaman Kumar VS St. of Union Territory of Chandigarh, AIR 2003 SC 3975

5. St. of Punjab VS Sucha Singh, AIR 2003 SC 1471

6. Nirmal Singh Vs St. of Bihar 2005 (41) ACC 302 (SC)

7. Hukum Singh Vs St. of Raj, 2000 (6) Supreme Court 245 (SC)

8. Jagdish Vs St. of Har AIR 1998 SC 923

9. St. of Rajasthan Vs Hanuman AIR 2001 SC 282

10. R. Prakash Vs St. of Karn. 2004 (49) ACC 777 (SC)

11. Sandeep Vs St. of Har. 2001 CRLJ 1456

12. Sewak Singh Vs St. of MP 2002 (44) ACC 1 (SC)

13. Ambika Vs St., 2000 SCC (Criminal) 522

14. Surendra Narayan Vs St., AIR 1998 SC 198.

15. Baldeo Singh & anr. Vs St. of Pun., 1996 AIR 372, 1995 SCC (6) 596

16. Amrik Singh vs St. of Pun. & ors., 2000 CriLJ 4305

17. St. of U.P. Vs Harvansh sahay 1996(6) SCC 50

18. St. Of U. P. Vs Hari Mohan & ors., 2000 SCC 516

19. Ram Bali vs St. Of U. P., 2004, SCC 2329-C Vol. - 02

20. Vijay Singh vs St. of Bihar, 2003 Scc 1093

21. Dhananjay Singh vs St. of Pun., 2004 SCC CRI 851

22. Ram Bihari Yadav VS St. of Bihar & or.s , 1998 (4) SCC 517)

23. Amar Singh VS Balwinder Singh & ors., (2003 (2) SCC 518)

24. Khema alias Khem Chandra vs St. of U.P. criminal appeal no. 1200-1202 of 2022 arising out of SLP (Criminal) No. 8624 Of 2019

25. Anil Phukan vs St. of Aasam 1993 Law Suit, (229)

26. Veeran & ors. Vs St. of M.P. (2011) 5 SCR 300

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

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

29. Mohd. Giasuddin Vs St. of A.P., [AIR 1977 SC 1926]

30. Deo Narain Mandal Vs St. of U.P. [(2004) 7 SCC 257]

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

32. Jameel Vs St. of U.P. [(2010) 12 SCC 532]

33. Guru Basavraj vs St. of Karn., [(2012) 8 SCC 734]

34. Sumer Singh Vs Surajbhan Singh, [(2014) 7 SCC 323]

35. St. of Punjab Vs Bawa Singh, [(2015) 3 SCC 441]

36. Raj Bala Vs St. of Har., [(2016) 1 SCC 463]

(Delivered by Hon'ble Mohd. Azhar Husain Idrisi, J.)

1. Heard Sri Ram Suphal Shukla, learned counsel for the appellants assisted by Sri A.K. Pandey Advocate and learned A.G.A. for the State. Perused the entire material and evidence on available on the record.

2. The accused are in jail since last more than 15 years i.e. since 01.01.2007 their case has not been considered for remission.

3. At the outset, it may be mentioned that accused Dhananjay alias Pappu and Deepak Kumar Thakur were charge-sheeted under Section 302 I.P.C. in Crime No.06 of 2007 and accused Dhananjay alias Pappu was separately charge-sheeted under Section 4/25 Arms Act and in Crime No. 07 of 2007. As described in the impugned judgement dated 22.03.2013. The co-accused in Crime No. 06 of 2007 Deepak Kumar Thakur in the course of trial absconded. Hence, vide order dated 21.11.2012, passed by the learned Trial Judge, his file was separated. Thus, only solitary accused Dhananjay alias Pappu was tried by the trial court.

4. The present appeal under Section 374(2) Cr.P.C. has been preferred on behalf of accused/ appellant Dhananjay alias Pappu challenging the judgment and order dated 22.3.2013, passed by the learned Additional Sessions Judge (Court No.1) Ghaziabad in (1)- Sessions Trial No. 445 of 2007 (State vs. Dhananjay & others), under Section 302 IPC whereby the accused Dhananjay was convicted and awarded a sentence of rigorous life imprisonment with fine of Rs.25,000/- and in default of fine he has to undergo two years' additional rigorous imprisonment and (2)- in S.T. No. 446 of 2007 (State vs. Dhananjay alias Pappu), wherein he was convicted and awarded sentenced to undergo two years rigorous imprisonment with fine of Rs. 1000/- and in default to undergo rigorous imprisonment of two years under Sections 4/25 Arms Act, In default of payment of fine, he has to undergo two years additional rigorous imprisonment. Both the sentences of imprisonment were to run concurrently.

5. In a nutshell, facts of the case, as culled out from the record, are that a first

information report was lodged on 01.01.2007 at about 19.45 P.M. under Sections 307 and 302 IPC, at Police Station Shahibabad, District Ghaziabad with respect to the incident occurred on the same day at about 5.30 P.M., by the complainant Salahuddin, against the accused Dhananjay alias Pappu and Deepak, unfolding that his sister's son Ummed Ali and his nephew Shan Mohammad and Waseem had gone at the Ram Manohar Lohiya Park for walking amusement. At evening about 5.30 p.m., two unknown boys came across them and demanded money from Ummed Ali but Ummed Ali refused to oblige their demand which caused great exasperation and excitement to these boys, prompting them to start exchanging abusing language and ensued quarrelling with the victims. The accused persons could not restrain their anger and ire resulting one of the accused taking out Khukri from his bag and attacked upon Ummed Ali and Shan Mohammad. They received serious injuries, as a result of which both the injured fell down in the park. The second boy caught hold of his other nephew. He intimidated threat to his life stating "salon ko jaan se maar do". He, with the help of his nephew Wasim, caught the miscreants and snatched Khukri. On being nailed, one of the accused divulged his name Dhananjay alias Pappu and the other unfolded his name Deepak Kumar Thakur. In the meantime, Satish and Arif Chaudhary, also arrived at the place of occurrence. Anyhow, he controlled both the injured and dialed- 100 number. Police personnel arrived at the spot. The injured Ummed and Shan Mohammad were taken to Ambey hospital through police Gypsy, where the injured Ummed was declared dead and the other injured Shan Mohammad was referred to G.T.B. Hospital, Delhi for treatment, where he also succumbed to injuries. Both the assailants were taken to police Station Shahiabad Ghaziabad alongwith Khurki which was saturated with blood. The informant Salahudin gave tehrir written by Munna Khan at the police station.

6. On the basis of the abovestated tehrir (written complaint) a first information report was registered at the Police Station Shahibabad, District Ghaziabad on 1.1.2007, as crime No. 06/2007 under Section 302, 307 I.P.C. against Dhananjay and others and crime No. 07/2007 under Section 4/25 Arms Act against accused Dhananyay alias Pappu. The particulars were entered into the Kayami G.D. and Chik F.I.R. The investigation was entrusted to S.S.I. Malkhan Singh.

7- On the investigation being put in motion I.O. reached at the spot alongwith other police personnel, recorded statement of witnesses, prepared the site plan of the place of occurrence, collected the bag and cover of Khukari from the place of occurrence and prepared the recovery memos. The accused appellant and the co-accused were taken into police custody on 1.1.2007 and recorded their statements. The blood-stained khukari was also taken into possession by the investigating officer. Against accused Dhananjay Kumar Singh alias Pappu, case crime no. 7/2007 under section 4/27 Arms Act was registered on the same day. He also collected blood stained and plain soil from the place of occurrence and memo of the same were prepared.

8. The inquest report of the deceased Ummed was prepared in the presence of witnesses and as per opinion of the witnesses to ascertain cause of death,

postmortem of the dead body was proposed. After completing the necessary formalities, The documents like request letter to C.M.O. challan lash, photo lash, sample of seal, with regard to the post mortem, were prepared and dead body of the deceased Ummed wrapped in sealed cloth cover and was taken to the mortuary for autopsy, accordingly. Dr. K.N. Tiwari conducted the the post mortem of the deceased Ummed.

9. The investigation officer (hereinafter referred as I.O.) after collecting the credible and clinching material and evidence showing the complicity of the accuse appellant and the co-accused submitted the charge sheet under sections 302 IPC and separate charge sheet against the accused Dhananjay alias Pappu under Section 4/25 Arms Act, before the learned Chief Judicial Magistrate, Ghaziabad, who took the cognizance of both the cases.

10. Being exclusively triable by the court of sessions, Chief Judicial Magistrate Ghaziabad, committed them to the Sessions Court on 9.4.2007. Later, the Sessions Judge transferred it to the court of Sessions Judge Ghaziabad (Court No. 1). for trial.

11. Learned Additional Sessions Judge, framed, charges against the accused appellant Dhananjay Kumar Singh alias Pappu and Deepak Kumar Thakur under section 302 IPC and, against accused Dhananjay alias Pappu and under Section 4/25 Arms Act against the accused Dhananjay alias Pappu separately. The charges were read over and explained to the accused/ appellant. They abjured the charges and pleaded "not guilty" and "claimed to be tried".

12. To bring charges home, prosecution examined, 8 witnesses as under:-

Sl.No.	Name of witnesses	Pw. No.
1	Wasim	Pw- 1
2	Salahuddin	Pw- 2
3	Dr. Arvind Kumar	Pw- 3
4	Dr. K.N. Tiwari	Pw-4
5	Constable Som Pal Singh	Pw- 5
6	Munna Khan	Pw- 6
7	Shamshad	Pw- 7
8	Malkhan Singh	Pw- 8

13. In Support of ocular version, following documents were also filed and proved by the prosecution-

S.L. No.	Particulars	Ext. No.	Proved By
1	Recovery Memo Khukari	Ex. Ka- 1	Pw- 1
2	Written Report (Tahrir)	Ext. Ka- 2	Pw- 2
3	P.M.R. Deceased Shanu	Ext. Ka- 3	Pw- 3
4	P.M.R. deceased Ummed Ali	Ext. Ka-4	Pw-4
5	Inquest Report deceased Ummed	Ext. Ka- 5	Pw- 7
6	Panchayatnama deceased Shanu	Ext. Ka- 5	Pw- 7
7	Site Plan	Ext. Ka- 6	Pw- 8
8	Recovery Memo blood stained and	Ext. Ka- 7	Pw- 8

	plain soil		
9	Recovery Memo bag and Khukari Cover	Ext.Ka-8	Pw-8
10	Charge Sheet u/s302	Ext.-Ka-9	Pw- 8
11	Supurdginama Lash	Ext. Ka-10	Pw- 8
12	Photo Lash	Ext. Ka-11	Pw-8
13	Letter of request for P.M.	Ext. Ka-12	Pw-8
14	Sample Seal	Ext. Ka-13	Pw-8
15	Carban Copy G.D.	Ext. Ka-14	Pw- 8
16	Chick FIR	Ext. Ka-15	Pw-8
17	Charge sheet u/s 4/25 Arms Act	Ext. Ka 14	Pw-8
18	Recovered Khukri	Ext.- 1	Pw-2
19	Wrapping cloth	Ext. Ka-& Ka2	Pw-2

14. After the conclusion of prosecution evidence, statements of the accused Dhananjay alias Pappu was recorded under Section 313 Cr.P.C. It was stated by the accused that he had neither demanded any money from Ummed (deceased), nor inflicted any blow of Khukari (knife) to the injured persons. A false recovery has been shown from his possession. The police in connivance and inkling of prosecution witnesses, have falsely implicated him in the present case. It was specifically averred by accused that the victims were roving in the park and were ravishing and teasing to the teenage girls, which was stiffly confronted by the melee of said park. The woes and throes of the public inflamed and the victims resulting into ugly scene of thrashing and beating to Ummed Ali and Shan Mohammad. On account of the injuries inflicted upon them, they succumbed to their injuries.

15. No defence evidence adduced by accused

16. The prosecution in substantiation of its case examined the P.W.1 Wasim, who stated on oath that the instant incident had occurred on 1st January 2007. He in the company of his uncle Salauddin, cousin brothers Shan Mohammad and Ummed Ali went in the Park for amusement and picnic at about 4.30 p.m. He and his uncle Salauddin were following at a distance of 15 to 20 paces, to Ummed Ali and Shan Mohammad, who were ahead to them. At about 5.30 p.m. Dhananjay (appellant) appeared and demanded money from Ummed Ali (deceased). Ummed Ali enquired reason for demanding the money which caused great heat of passion and excitement to the accused-appellant. As a consequence of which the accused appellant (Dhananjay) inflicted blow of knife on the holding of Ummed Ali by the Deepak (co-accused). The blow inflicted penetrated dissecting the heart of Ummed Ali. He and Shan Mohammad tried to save Ummed Ali, but the appellant (Dhananjay) attacked upon Shan Mohammad with knife, which caused fatal injuries in stomach, leg and thigh. He and Salauddin grasped to the accused (Dhananjay), and Deepak, they wrested the knife from him. On the shriek and alarm, a number of persons roving in the park and the guards gathered on the spot. The accused persons were nailed by the gathering, so they could not flee away

from the spot. He went outside and informed police by dialing 100 number from P.C.O. and the said information was also communicated to the family members. A number of persons including the relative Iliyas and Munna Khan came from residence. In the meantime police also reached at the spot. The police took Ummed and Shan Mohammad at the hospital, in association with him and others. The doctor attended the injured and declared Ummed Ali dead. Thereafter the report was lodged. Both the accused persons were taken at the police station Sahibabad alongwith Khukari (knife). Memo of recovery was reduced in writing at the police station and the signature of the witnesses were obtained. The witness proved his signature on the memo of recovery and proved it as Ext. Ka.-1. Looking to the acuteness and perilous situation injured Shan Mohammad was referred from Ambey Hospital to G.T.B. Hospital, Delhi, where he succumbed to injuries in the night.

17. In support of its stand, the prosecution has examined, Pw- 2 Salauddin. He deposed that the said incident has occurred on 01.01.2007, on the day of festival of Idu-zuha. At about 4.30 p.m. he in association with his sister's son (Bhanja) Ummed Ali and nephew Shan Mohammad and Mohd. Wasim (P.W.1), had gone to Ram Manohar Lohiya Park for recreation and amusement. On reaching there, they started to fro wander in the said park. He and Wasim were roving behind Ummed Ali and Shan Mohammad with a distance of 15-20 paces. At about 5.30 p.m. the accused appellant Dhananjay and Deepak came and demanded money from Ummed Ali. The victim Ummed Ali enquired from the accused appellant for what purpose he was demanding the money. At this accused/ appellant and co-accused Deepak were highly infuriated and started to hurl abusive and vituperative words denigrating his image. The co-accused Deepak had caught hold of Ummed Ali and accused/ appellant Dhananjay inflicted blows, from behind with Khukari (knife) which penetrated across his heart. Shan Mohammad made best efforts to save Ummed Ali, but accused appellant/ Dhananjay attacked upon the Shan Mohammad with his Khukari (knife) causing serious injuries to them. Looking to this incident, he and Wasim ran towards the assailants and caught hold of accused Dhanjay and co-accused Deepak and snatched Khukari from the hand of appellant/ Dhananjay. Looking to the episode and lamentation, a number of persons roving in the park and the Guards arrived at the place of occurrence. They encircled accused persons. His nephew Wasim informed the incident through P.C.O. to the police and victim's family members. In a short span of time, police and his relatives namely Munna Bhai, Taj Mohammad, Abbas and Iliyas came at the place of occurrence. He and police personnel took to the injured at the Ambe Hospital, Ghaziabad where Ummed Ali was declared dead. Subsequently thereto, on their narration, the tehrir scribed by Munna Khan was given in P.S. on while first information report was lodged on the basis of tehrir and the accused persons were taken into custody by the police. The blood saturated Khukari (knife) was also presented at the police station Sahibabad. The witness proved the tehrir, as Ext.Ka.2. Memo of the snatched Khukari (knife), presented at police station Shahibabad was prepared on which his signatures were obtained. The witness proved it as Ext. no.1. The said Khukari was brought in the court in a sealed cover

and was Ext. 8 to the witness, P.W.2 Salauddin, who identified the said Khukari, averred that the said Khukari was used by the accused appellant Dhananjay in causing injuries to Ummed Ali and Shan Mohammad. The said Khukari (knife) and the cloth covering it, were marked as physical Ext. 1 and 2. The injured Shan Mohammad was referred from Ambey Hospital to G.T.B. Hospital, where in the night at about 4.30 hour he succumbed to injuries, inflicted upon his person.

18. In corroboration to ocular evidence, the prosecution has examined P.W.3 Dr. Arvind Kumar, who deposed that on 2nd January, 2007 he was posted in G.T.B. Hospital, Delhi, as Senior Demonstrator. On the said date at about 11.30 A.M, the corpse of Shanu was brought, wrapped in a white cloth under the supervision of A.S.I. Hukam Chand at the mortuary for autopsy. They identified the body of the deceased Shan Mohammad. He conducted the post-mortem examination of the deceased on 2.1.2007 at about 11.35 A.M. and found the following facts:-

(i)- On general examination of the body of the deceased Shan Mohammad, it was found that there was reddish colour on the back side. Mouth and eyes were closed. In the right arm, a tato mark as "S" was punched. The deceased was aged about 20 years, he was a person of average built. Rigor mortis, was in developing phase, present all over limbs.

(ii)- **Ante-mortem Injuries**- During post-mortem examination, the Doctor following ante-mortem injuries on the person of Shan Mohammad:-

(1)- Stitched incised stabbed wound, penetrating 6cm x 0.3 in size in the lower left side of the abdomen. Upper lateral angle of wound cut is present over in size the stomach was stitched, the wound was cavity deep of the abdomen and going upward back medially left flie fossa, running parallel to left flic crest obliquely placed. Abdomen was full with blood. There was blood around intestine also. On exposing the track on the samall peritoneum cavity containing blood. Multiple incised wounds were present. Evidence of surgical repair present. Total depth of the wound is 18.5. cm.

(2)- "J' shaped stitched cut wound. On opening the stitches, incised wound of size 15 cm x 0.2 cm x 6cm present over posterior lateral aspect on left arm, muscle deep are cut wound, is 15 cm above the elbow joint.

(3)- Obliquely placed stitched wound on left chest. On opening the stitches, incised stitched wound of size 3 cm x 0.2 cm present. Upper lateral angle of wound is acute. Wound is present over posterior auxiliary line of left chest, 7 cm below posterior auxiliary fold. Direction of wound is backward, and downward. Medially wound is subcutaneous and muscle deep and by making exit wound is of size 1.5 cm x 0.2 cm, in size, 4 cm below entry wound.

(4)- Incised wound 2 cm x 0.1 cm x 0.5 cm obliquely placed, present over the right side of chin.

(5)- Incised wound of 2 cm x 0.1 cm x 0.8 cm present over dorsum of left hand, 3.5 cm over proximal to left knuckle of little finger of left hand.

(6)- Stitched cut wound. On opening the stitches, 6 cm x 0.2 cm x bone deep present, over left side of skull, just behind the parietal region (left) with undergoing the fracture of upper bulb of left parietal bone of size 3 cm x 0.1 cm.

(7)- Sapratomy made by the surgion 18 cm x 0.4 cm in the middle of abdomen Injury no.1 is surgically incised. Injury no. 7 is surgically disclosed.

(iii) Internal Examination--

(iv)- The doctor found skull in extravasutim blood present under surface below injury no.6.

(v)- Skull, as mentioned in injury no.6, rest normal. The brain was pale and edematous. empty containing blood. Stomach empty walls congested. Small intestine as mentioned in injury no.1. There is a span of 8 hours between death and post mortem.

(iv) Cause of death:-

(i)- In the opinion of doctor the cause of death of the deceased Shan Mohammads was due to cut of intestine blood vessels, excessive bleeding which is possible due to one edged weapon. Thus hemorrhage and shock due to ante-mortem injuries to abdominal vessel and other.

(ii)- Injury no.1 is sufficient to cause death in ordinary course of nature.

19. The doctor P.W. 3 deposed that the post mortem examination report was prepared by him in his own hand-writing and signature. He proved post-mortem examination report as Ext. Ka. 3.

20. The prosecution has also examined P.W. 4 Dr. K.N. Tiwari. He deposed that he was posted at M.M.G. Hospital, Ghaziabad on 2.1.2007. On the fateful day, he had conducted autopsy of deceased Ummed Ali, whose dead body was brought under the supervision of constable Manoj Kumar and Constable Sompal Singh, in a seal cover. The aforesaid constables had identified to the corpse.

21. Doctor found deceased, about 21 years old and his death occurred within half to one day before the autopsy. He was average built and rigor mortis was present in all over limbs.

(v) Ante mortem injuries. During post-mortem, Doctor found the following Ante mortem injuries on the person of the deceased, Ummed Ali:-

(1)- Stab wound with clean cut margins 44cm x2 cm, on Lt. side of the chest, 2 cm middle at level of, Lt. nipple (transversely present). The wound was chest cavity deep. (2)- In internal examination, the doctor also found that pericardium of the heart and left lung was cut chest cavity deep was. About ½ litre blood bleeded out.

(v) Cause of death:- In the opinion of the doctor the death of the deceased caused due to hemorrhage and shock, as a result of ante-mortem injuries sustained by him.

22. The doctor stated that the post-mortem examination report was prepared by him in his own hand-writing and signature. He proved the post mortem examination report as Ext. Ka. 4. The doctor endorsed that aforesaid injuries on the person of Ummed had come on 1.1.2007 at about 5.30 p.m. by the incising of some sharp edged weapon like knife.

23. In order to substantiate the prosecution version, Constable 1103 Sompal was examined as P.W.5. He stated on oath that on 1.1.2007 ,he was posted at Police Station Sahibabad. He divulged that on the fateful day, at about 11.00 p.m. the inquest of deceased Ummed was prepared before the witnesses. The corpse of Ummed was given under our supervision after completing necessary formalities and handing over the requisite papers by P.W. 8 S.I. Malkhan Singh, for carrying it to the mortuary. After making necessary entries at police line Ghaziabad and M.M.G.Hospital Ghaziabad , the autopsy of Ummed was conducted on 2.1.2007. The corpse of Ummed (deceased) was under his vigil and

watch, till it was taken inside the mortuary. In the meantime, the said constables did not allow to anybody to make access to the corpse.

24. P.W.- 6 Munna Khan stated on oath that on the date and at the time of incident, he was present at his house. He was informed that Ummed Ali and Shanu had sustained serious injuries. They were taken at Ambey Hosital. On receiving the information, he reached at the hospital. On reaching at the hospital, he came to known that Ummed had been declared dead and Shanu had been referred to G.T.B. Hospital, Delhi. He had scribed the tehrir, on the narration of Salauddin. He had scribed whatever was uttered by Salauddin and the same was read over to him. Salauddin had put his signature on the said document. He had proved the said report affirming that it was scribed by him and the same was already marked as Ext. Ka.2.

25. In order to authenticate the charge, the prosecution has examined Shamshad as P.W.-7, who stated on oath that on 1.1.2007, inquest with respect to the corpse of Ummed was conducted. After carrying out the necessary formalities, the corpse of Ummed was sent to mortuary. He had put his signature on the inquest which was duly identified by him. He proved the said inquest report as Ext.Ka.-5.

26. Further in substantiation of charge, the prosecution had examined S.I. Malkhan Singh as P.W.-8. He stated on oath that he was posted at police station Sahibabad on 1.1.2007. On the same the FIR was registered at the police station Sahibabad. The investigation was entrusted to him. During investigation, he visited the place of occurrence, prepared site plan, recorded statement of the witnesses. He had prepared the memo of recovery of Khukari (knife) and had also recorded the statement of Dhananjay (appellant) and co-accused Deepak and the other witnesses H.M. Devendra Singh Dhaman. Thereafter proceeded to Ambey Hospital and on 2.1.2007, he visited to G.T.B. Hospital at Delhi, where he had seen to injured Shan Mohammad. The injured Shan Mohammad was not in a position to utter any thing. He had recorded the statement of Salahuddin, Wasim, Salim, Arif Chaudhary, Munna Khan etc. He prepared the site plan in his own handwriting and signature. He proved the sight plan as Ext. Ka.6. He had taken blood stained and plain cement earth from the place of occurrence and the same was exhibited as Ext.- 7. He took a bag in possession from the place of occurrence in which the cover of the Khukari was kept and a fard (memo) was prepared him in his writing and signature by him. He proved it as Ext. Ka.-8. He had received the inquest report and post mortem report of Ummed (deceased) on 4.1.2007, he copied the chick and carban copy of G.D. and proved them as Ext. Ka- 14 and Ka- 15 statement of witnesses of inquest namely Abbsas, Taj Mohammad, Mohd. Ansar , Mohd. Farookh and Shamshad Ali, Firoz and Julfikar who had identified the corpse of Shan Mohammad. He had also recorded the statement of A.S.I. Hukum Singh on 12.3.2007, who had got the Panchnama prepared and was marked as Ext.Ka.9. The Panchnama of Ummed Ali was prepared by S.I. Malkhan Singh at the police station before him. He verified the writing and signature of S.I.Malkhan Singh. S.I. Malkhan Singh had put his signature on the inquest report Ka.6 and other requisite papers. Challan Lash, Photo Lash ,letter of Chief Medical Officer, specimen of seal, the writing of S.I. Malkhan Singh and signature were duly verified. The papers

were duly proved as Ext. Ka.10, Ka.11, Ka.12 and Ka.13. He had also conducted the investigation of Sessions Trial No. 446 of 2007 under sections 25/4 Arms. The fard of Khukari was prepared by Devendra Singh Head Moharrir (H.M.) at the time of initiation of proceedings and was exhibited Ka.1. Chik F.I.R of the case was written by Head Constable Devendra Singh which was entered in the G.D.No.42 . The said chik FIR was prepared on 1.1.2007 at 19.45 p.m. The chik FIR was duly proved and marked as Ext. ka 15. The witness stated that after due investigation he submitted charge-sheet against accused Dhananjay and Deepak, under Section 302 I.P.C. and against Dhananjay alias Pappu a separate charge-sheet was submitted under Section 4/25 Arms Act. He stated that both the charge-sheet were prepared by him and in his own writing and signature. He proved both charge-sheet Ext. Ka- 9 and Ext. Ka-14.

27. The prosecution witnesses, so examined, were also duly cross examined by the defence.

28. P.W.-1 Wasim during his cross examination, averred that at the time of incident, Salauddin, Ummed and Shan Mohammad were present with him in Lohiya Park. Dhananjay demanded money from the Ummed and Ummed loudly said "kaise paise." Ummed was accompanied by Shanu, he thought that they are talking something generally. He authenticated the demand of money by the accused Dhananjay from Ummed on the basis of loud voice of both. He had also seen Deepak. He could not properly understand the dispute, because of clamour in the park. He also proved that Dhananjay had taken out the knife (Khukri) and Deepak caught Ummed. He gave a blow of knife to Ummed from his back, which penetrated across his heart. The knife was visible from outside. Deepak had caught Ummed Ali from right side. Shan Mohammad was trying to pacify them. The accused persons caught hold of Shanu and inflicted him injuries. Shanu tried to flee away, but approximately about 15 to 20 paces fell down on the pakka kharanja. Waseem was not present when the blow of knife was inflicted on Ummed. He emphasized his presence when Shanu was injured with knife. Shanu had run away, after getting separated from the clutches of accused persons. He along with Salauddin (P.W.2) had caught the accused persons. On the shriek and scream, a number of persons gathered including the Guards of the park. On the direction of his uncle Salauddin he had given telephonic call to his family members and police personnel. The said call was received by his mother, on mobile no.9871212230. Ummed is the son of his father's sister. The accused persons were also caught by the Guard and other persons in the park. The time consumed in inflicting injuries to the victims, was hardly two minutes. The victims were taken to the Ambey Hospital. Saleem and Munna and other persons of the locality came at the Hospital. He and Salauddin had gone together therein Hospital in one vehicle and the remaining persons came in another vehicle. Ummed Ali was inflicted only one knife blow and Shan Mohammad was inflicted a number of knife blows. The victim Shan Mohammad was inflicted in hands, legs and stomach. When Ummed was inflicted he could not reach there at the exact spot. Shan Mohammad was alive and was referred to G.T.B. Hospital. He stayed there Ambey Hospital at about half an hour. Shan Mohammad was taken from Ambey Hospital to G.T.B. Hospital by Ambulance. The time consumed in

reaching to G.T.B. Hospital, was about half an hour. Shan Mohammad took his last breath in G.T.B. Hospital at about 1 to 2 "O' clock on the same night. Dhananjay had never given to Ummed any money. He showed his ignorance as to whether he had demanded money from anyone else also on the date of occurrence. A number of persons were moving in the park belonging to different casts. The women and girls were also moving in the park. He disowned that Ummed and Shan Mohammad had teased or molested to any girl or women which was opposed by the assailants. He gainsaid that no outsiders had attacked upon the victims from the gathering. He also denied that he had taken into custody to the assailants from gathering. He was not knowing to the assailants from earlier and did not have any animosity with them. He had heard the voice of Dhananjay who had spoken loudly. Thereafter Deepak had caught Ummed and Dhananjay had inflicted the knife blows. He could not ascertain as to whether the assailants had come with the motive of killing to victims as the incident had occurred at the spur of moment. He perceived that in case the victims would have given money to the assailants, they would not have lost their lives. The accused appellant (Dhananjay) had hung the bag on his shoulder at the time of demand of money. The accused appellant (Dhananjay) was caught on the spot after executing the occurrence. The bag containing the knife was also at the place of occurrence. He had not seen the bag putting in the shrubs to anyone. He could not ascertain as to whether the bag was present there or not at the moment of recovery. He was cross examined that earlier he had disclosed that assailants had thrown the bag in the bushes in his presence. Both the accused were trying to flee away. The accused appellant was having the bag of Khukari in his hand at the time of executing the crime. The accused appellant Dhanjay had thrown the bag in the shrub after executing the offence. The accused appellant Dhananjay was earlier caught by his uncle Salauddin and thereafter he caught him. The accused appellant Dhananjay also tried to attack upon Salauddin. He had caught him from behind and snatched the Khukari.

29- The prosecution witness no. 2 Salauddin was cross examined during trial. He averred that he, in association with Wasim (P.W.1), Ummed (deceased) and Shan Mohammad deceased) had proceeded from his house at about 4.30 p.m. on 1.1.2007. Salauddin and Wasim were riding in one motor cycle. Mohammad Ummed & Shan Mohammad were riding on Hero Splendor motor cycle. The motor cycle driving by Wasim (P.W.1) was belonging to Irfan. The time consumed from his house to the park was about 15 to 20 minutes. The heated exchange of words between assailants and the victims ensued after half an hour. The P.W.2 Salauddin and the victims were following at minor distance to each other. He disclosed that the distance of the victims from him was about 20 to 25 paces. The accused appellant demanded money from Ummed but he could not confirm the exact amount of money, which was demanded. On refusal to Ummed to pay the money to the accused appellant caused infuriation and exasperation to the accused persons hurling abusive words. Ultimately fisticuffs were started and the accused appellant stabbed Khukari upon Ummed. There was not huge gathering in the park. He had heard the voice of demand of money as well as refusal to pay the money. When the accused appellant Dhananjay had pierced Khukari, he was at a distance of 15 paces.

The Khukari was put inside a bag covered by chain. Black cover was put on the Khukari. He had never seen to the assailants in the company of victims. He had for the first time seen the assailants. To his best knowledge, there was no transaction between the assailants and the victims. The incident had taken place on account of refusal to pay the money to the assailants. When he had caught to the accused appellant Dhananjay, the accused appellant had already inflicted 7 to 8 injuries to him. Ummed was injured with Khukari from behind the left side Dhananjay was stabbing the Khukari all around, which caused great nervousness to him therefore, he could not muster courage to hold him. The time of incident was confirmed about 5 to 5.15 p.m. There was little fog but the sight was visible. The information of the incident was given by Wasim (P.W.1) from P.C.O. at about 5.30 p.m at the police station and also to the members of the family. The distance of the police station was about two kilometers. The family members and the police personnel reached at the same moment.

30. The investigating officer had recorded the statement of P.W.2 Salauddin on the next day. The investigating officer had not apprised him about his statement. The victims were taken by the police personnel at the Ambey Hospital in association with the family members of the injured.

31. The Khukari was handed over by the P.W.2 Salauddin to the police officer, at the police station. The bag in which Khukari was kept was also taken by the police personnel in their possession.

32. The police team has visited the spot inspection in the presence of P.W.2 Salauddin. The bag was of cream colour having its height about one feet. At the time of spot inspection, none was present there except Salauddin (P.W.2). The guard deputed at the park had also come equipped with guns. The guard had come after execution of the occurrence. He proved his presence at the crucial juncture of incident. He also disowned that there was any scene of teasing and tormenting of girls in the park by the victims Ummed and Shanu. There is not any iota of evidence delineating misbehavior of victims with the girls roving in the park. He proved that accused Dhananjay and Deepak had done to death to Ummed and Shanu. The appellant Dhananjay and the co-accused Deepak are the real perpetrator of crime as a result of which Ummed and Shahu sustained fatal injuries culminating to their death.

33. During his cross examination, Pw- 3 Dr. Arvind Kumar, who had conducted post mortem of Shanu, stated that Shanu was admitted in the hospital on 1.1.2007 at about 8.35 p.m. and succumbed to injuries on 2.1.2007 at 4.00 p.m. The cause of death of Shanu was hemorrhage shock due to ante mortem injuries to abdominal vessel and organ produced by single sharp edge weapon. All injuries are ante mortem in nature .Injury no.1 is sufficient to cause death in ordinary course of nature.

34. In his cross examination, Pw-4 Dr. K.N.Tiwari who had conducted post mortem of Ummed (deceased) stated that corps of the deceased Ummed was brought by Constable Manoj Kumar and Constable Somepal Singh The cause of death of Ummed was hemorrhage and shock as a result of ante mortem injuries sustained. He

had proved that the deceased Ummed was caused injury by single sharp edge weapon on the vital organs, inclusive of chest.

35. The learned counsel for the defence also cross examined, P.W.5 Constable Sompal Singh. He stated that the dead body of Ummed Ali was firstly brought at Ghaziabad Police Line at about 1.00 p.m. in the night on 2.1.2007, Next day, the corpse of Ummed was taken to M.M.G. Hospital at Ghaziabad, the corpse of Ummed was taken to mortuary Hindan Ghaziabad after getting the entry done in the M.M.G. Hospital. Both the constables were present at the juncture of post mortem. After autopsy, the corpse of Ummed was handed over to his family members.

36. The P.W.-7 Shamshad was also subjected to the cross examination during trial. He disclosed that Shanu and Ummed is the son of his Sadhu. It was the holistic day of Idu-zuha. He had sacrified goats and had brought the meat at the residence of the victims.e wHe He He was called at the police station for completing the inquest. He confirmed that Ummed had died on the spot and Shanu had succumbed to injuries at the hospital. He had stated that the dead body of Ummed was sealed before him.

37. P.W.-8, investigating officer Malkhan Singh, was also cross examined. He stated that he had conducted the investigation of the said crime. Entire C.D. was prepared by him. He had also recorded the statements of the witnesses. He had recorded the statements of the witnesses. The name of Arvind, Dharmveer were not put in the list of witnesses, because they were not the witnesses of fact. The statements of Arvind, Dharmveer were recorded at the Lohiya Park. He had interrogated to the persons gathered at the place of occurrence and recorded their statement.

38. Arvind, Dharmveer had given their statement in support of the prosecution. Arvind, Dharmveer, deputed at the Lohiya Park in the capacity of Guard. He unfolded that those persons disclosed that the quarrel had ensued between the victims and the assailants, on account of tormentation and teasing of girls. Further it was stated by P.W.8 Malkhan that it was wrong to say that inident had occurred on the issue of tease and taunt to the girls. It was also divulged by P.W.8 that he did not make recovery of Khukari The Khukari was recovered by the complainant and the witnesses and had brought at the police station. Head Moharrir Devendra had prepared the fard of Khukari on 1.1.2007 at the police station. He had sent Khukari and other incriminating articles for forensic report.

39. We have heard learned counsel for the appellant and learned A.G.A. for the State, at length. Perused and analysed the entire evidence and other material, on record.

40. Learned trial court on the basis of the above evidence convicted and sentenced the accused appellant Dhananjay alias Pappu under Section 302 I.P.C. and under Section 25 Arms Act by the impugned judgement dated 22.03.2013. Learned counsel for appellant has assailed the impugned judgement on various grounds.

41. Learned counsel for appellant argued that there is no material from the side of prosecution to evince that the accused persons had hardboured vengeance

on the issue of paltry demand of money. The witnesses of facts are the close relations of the deceased and have falsely embroiled the accused persons on suspicion leaving the actual assailant. The presence of prosecution witnesses at the place of occurrence is highly doubt full and not really commend acceptance for their testimony. There are material contradictions in the statement of prosecution witnesses. Medical evidence also do not support the ocular evidence. Tangible materials were elicited from the evidence of the prosecution witnesses in cross examination by which their testimony was not found to be satisfactory. The chain of evidence and circumstances is not complete to conclusively establish that the accused person are the perpetrator of dreadful crime of murder of Ummed Ali and Shanu. The learned trial judge nisred and missappriciated the entire evidence in convicting and sentencing the appellant u/s 302 IPC. The circumstance from which the conclusion of guilt is to be drawn is not fully established. The prosecution has failed to show that in all human probability, the act have must been done by the appellant. It is also argued that appellant never demanded mony from the victim Ummed Ali. The incident to place in the park were girls and women were also roving there the victim were tesing and tainting them, public opposed and beaten them as a result of which fatal injuries were received by the victims. Appellant has no role in the incident. The conviction and sentence awarded to the appellant u/s 302 IPC is not sustainable and the impugned order dated 23.03.2013 may be quashed and the accessed appellant may be set at liberty.

42. Per contra, learned AGA opposed the arguments submitted by learned counsel for appellant. He argued that there is no embellishment in the prosecution version. There is no material contradiction in the state mant of prosecution witnesess. Medical evidence also supports the ocular evidence. The evidence adduced by prosecution has established guilt of appellant beyond reasonable doubts. The victims died of inflicting the injuries on their person by the appellant and the co accused there is a chain of evidence to demons treat that the diseased victims were inflicted serious injuries with khukri as result of which the victim Ummed Ali took last breath and Shan Mohd was seriously and fatally injured. Accused were caught on the spot with khukri and other incriminating materials. No explanation by appellant as to how and in what manner victims were inflicted grave and grim the story of teasing and tormenting of girls could also not establish on no body had come forward to prove this version of defiance. The learned Sessions Judge has passed order of conviction and sentenced the appellant after appreciating the entire evidence of record. Hence the judgment of learned Sessions Judge may be sustained

43. Learned counsel for the appellant has further elaborated his arguments. He argued that the appellant has been falsely roped in the present case. The incident had occurred inside the Lohiya Park on 1.1.2007 at about 5.30 p.m. on the issue of demand of money from Ummed Ali (nephew) of the complainant. The mere refusal to pay the money to the appellant will not instill such strong motive that the accused appellant will attack upon the victims to take away his life. Learned counsel for the appellant placed reliance upon Virender V. State of Haryana [2020 (1) UP Cr R 356] wherein the Apex Court has held that prosecution has failed to

prove any common intention on appellant's part. There is no hint of motive. The conclusion of the lower court is based on assumption and conjectures and not on reliable evidence. In spite of the prosecution having filed to discharge its burden to prove the case against the appellant beyond reasonable doubt- evidence against appellant is shaky and insufficient. Benefit of doubts must go to him.

44. Learned A.G.A. refuted the argument putforth by the learned counsel for the appellant. In this behalf it may be relevant to mention that there is a plethora of cases wherein the Apex Court has observed that motive is relevant facter in all criminal cases, whether based on testimony of eye witnesses or circumstantial evidence. In **Shreekantiah Vs. State of Bombay, 1955 SCJ 233** the Apex Court observed-

"It has to be kept in mind that a person does not commit a grave illegal act which might expose him to prosecution and possible disgrace, unless he is prompted by some strong motive."

Whether a criminal act may be presumed without motive? Generally, no criminal act be presumed, unless motive is proved. But there may be cases when even if motive is not proved the commission of criminal act may be presumed. It is not mandatory that motive must exist to prove a criminal act nor is it mandatory that motive must be proved before a criminal act is presumed. In this context it would be apposite to mention here that in Yunis alias Kariya V. State of Madhya Pradesh, AIR 2003 SC 539, it was held by by the Supreme Court that when ocular evidence (eye witness) is very clear and continuing. role of the accused person in time stands established. Failure to prove motive for crime has no consequence. Similarly, in Anil Yadav V. State of Bihar, 1992 (1) Crimes 282, it was held that motive is not a sine qua non for the success of prosecution case if the evidence is convincing and not open to reasonable doubt. In Thaman Kumar V. State of Union Territory of Chandigarh, AIR 2003 SC 3975, it was held by the Apex Court that where the ocular evidence is found to be trustworthy and is reliable and finds corroboration from medical evidence, the accused can be safely convicted even if the motive for the commission of crime has not been proved. In State of Punjab V. Sucha Singh, AIR 2003 SC 1471 has observed unambiguously that motive howsoever strong it might be, cannot take place of proof- Thus, we can safely infer from the above discussion that where there is clear proof of guilty act, which stands established beyond a straw of doubt, proof of motive hardly matters and is just superfluous. On the contrary, where there is just no proof of guilty act, the proof of motive is of no significance. In other words, motive alone is meaningless unless accompanied by proof of guilty act.

45. In the present case all the witnesses of facts Pw- 1 Wasim and Pw- 2 Salauddin who are eye witnesses of the incident, has averred that while the victims and they were roving in the park, suddenly the accused appeared on the spot and demanded money from the deceased Ummed Ali. On refusal to oblige their demand stating what kind of money, the appellant caused exasperation and excitement to the appellant, prompting them to fight the victims. They started abusive and vituperative words. They could not restrain their anger and caused injuries to the victims. Thus, snatching of money was of the motive of the accused to commit

the incident. The testimony of Pw- 1 Wasim and Pw- 2 Salauddin witnesses are trustworthy of credit and their testimony cannot be discarded. They have proved the prosecution story. Medical evidence has very well supported their testimony. In the above legal scenario, even if there is no strong proof of motive the prosecution case cannot be discarded.

46. It is next submitted by the learned counsel for the appellant that there is no independent public witness to support the prosecution version. The learned counsel for appellant argued that the witnesses of facts are related to deceased and thus interested witnesses. It is next argued that there were other witnesses also available but prosecution did not examined them. Therefore, the testimony of the prosecution witnesses is unworthy of credit, learened A.G.A. refuted the argument. In this behalf it may be mentioned that there is catena of decision of the apex Court. **Nirmal Singh Vs. State of Bihar 2005 (41) ACC 302 (SC), Hukum Singh Vs. State of Rajasthan, 2000 (6) Supreme Court 245 (SC) Jagdish Vs. STate of Haryana AIR 1998 SC 923 State of Rajasthan Vs. Hanuman AIR 2001 SC 282 R. Prakash Vs. State of Karnataka 2004 (49) ACC 777 (SC) Sandeep Vs. STate of Haryana 2001 CRLJ 1456, Sewak Singh Vs. State of MP 2002 (44) ACC 1 (SC) Ambika Vs. State, 2000 SCC (Criminal) 522, Surendra Narayan Vs. State, AIR 1998 SC 198.** The Apex Court has held time and again that if ocular evidence is supported by the medical evidence, the examination of relation or interested witnesses, will not affect prosecution case adversely. It is true that P.W. 1 Wasim, is nephew of P.W. 2 Salauddin and Pw- 2 and the victims are their sister's and brother's son uncle of Pw- 2 and deceased are the nephew wife, daghter and son of the deceased Sikander, but, it may be mentioned that although they are related to the deceased. However, nothing could be shown by the accused/ appellant that they were nurturing animus and grudge against the accused, as such their testimony cannot be discorded merely because of their relationship with the deceased. The two guards namely Arvind and Dharamveer deputed at the said park were not examined. Which creates serious doubt about the prosecution version. Besides, there is no justification if injured witnesses or his relatives will implicate an innocent excepting real culprit. However, an inimical or relative witnesses should be carefully examined.

47. The accused/ appellant has been assigned specific role of causing injury to Ummed Ali with Khukari . There is no material inconsistency or discrepancy in the prosecution version.

48. Learned counsel for the appellant also argued that the alleged incident took place amongst the gathering of the people and the accused persons were held only by the complainant and Wasim (P.W.1) and none had appeared, from the public to hold them. In this regard, it may be mentioned that prosecution has examined Pw- 1 Wasim and Pw- 2 Salauddin as eye witnesses whose evidence is trustworthy. They clearly assigned the role of inflicting Khukri to both the deceased. There is no material contradiction in their statement. It is an established law that quality of the witnesses matters and not be quantity and even if there is solitary believable witness, there need not to examine multiple number of witnesses. Pw- 8 in his S.I. Malkhan Singh has explained that there were number of people present but they were not eye witnesses so he need not taken them as

witnesses. Prosecution has also examined Pw- 6 Munna Khan who is the scriber of the first information report (tehrir) Ext. Ka-2 and also Pw- 7 Shamshad who is the witness of inquest report and they are not the witnesses of facts and neither eye witnesses. Therefor the evidence of the witnesses of the fact are worthy of credit. It is common knowledge that often independent witnesses did not comeforward to support prosecution case, due to their own security reasons.

49. Learned counsel for the appellant has submitted that the quarrel ensued between the accused persons and the victims on the issue of tease and taunt upon the girls roving in the park but no girl has come forward to narrate about the said incident. There is not an iota of evidence that the victim has taunt or tease any women. The P.W.1 Wasim and P.W.-2 Salauddin were the eye witnesses who had seen the entire incident and snatched the Khukari from the accused persons, have also not supported this defence version. Appellant was accorded an opportunity to adduce evidence for his defence but they did not availed the opportunity. This leads us adverse inference to the defence version. It may also be mentioned that Pw- 1 Wasim and Pw-2 Salauddin themselves heard that at the time of incident appellant was demanding money and victim Ummed did not oblige his demand the appellant committed the incident by inflicting the blows of Khukri on the person of the victim. Thus, it is well established that the incident occurred on the issue of demanding of money by the appellant.

50. The P.W.1 Wasim and P.W.-2 Salauddin were the eye witnesses who had seen the entire incident and snatched the Khukari from the accused persons but they had not sustained even minor injuries which also indicates that they had not seen the incident. The accused persons had inflicted as many as six injuries to Shan Mohammad who tried to save the injured Ummed Ali and the P.W.1 Wasim and P.W.2 Salauddin held to the accused appellant (Dhananjay) and snatched Khukri (knife) from his hand but no minor injuries were inflicted upon them in the course of scuffing. It may be a fight on behalf of I.O. who could have gather the blood stained cloths. The fault of I.O. cannot adversely affect the prosecution case. Therefore, the argument of the learned counsel for the appellant is not sustainable.

51. The prosecution witnesses had made improvements in their deposition and had narrated the manner of incident in such a way which cannot be perceived by ordinary course of diligence and prudence. There is no material inconsistency in the post mortem report which proves that the manner in which the occurrence took place would be incorrect.

52. The learned counsel for the appellant has argued that the recovery of Khukri and other incriminating articles from the accused persons is highly untrustworthy and dubious. The same was not sent for chemical examination to FSL. Learned A.G.A. refuted the argument. In this regard it is emphasised that Pw- 1 Wasim and Pw- 2 Salauddin are the eye witnesses of the incident has deposed that Pw-2 Salauddin caught hold of the appellant and snatched the Khukri/ knife. Pw- 1 Wasim further stated that when they snatched the knife they were not injured. They also stated that afterward Khukri was given to the police. Pw- 2 Salauddin has stated that a recovery memo of the same, Ext. Ka- 2, was prepared and it was

produced before the court during trial as physical Ext. 8. Both these prosecution witnesses identified the Khukri which was used in the incident. Doctor Pw- 3 Arvind Kumar and Pw- 4 Dr. K.N. Tiwari has categorically stated that the injuries inflicted upon the deceased victim were caused by one sided sharp edged weapon, which may be called knife. Thus, the fact of recovery of the Khukri, the weapon of assault has been identified, at all relevant places in the court or outside. Pw-8 I.O. S.I. Malkhan Singh has stated that to ascertain blood stains Khukri was sent to FSL. His statement is fortified by a letter sent to FSL, Agra, the carban copy of which is on record. However, no FSL report is on record regarding the items sent to FSL Agra but is the fault of I.O. who do not collect the report. Nevertheless, it do not affect the prosecution case adverserly.

53. In **Baldeo Singh & Anr vs State Of Punjab, 1996 AIR 372, 1995 SCC (6) 596, Amrik Singh vs State Of Punjab And Others, 2000 CriLJ 4305, State of U.P. vs Harvansh sahay 1996(6) SCC 50, State Of Uttar Pradesh vs Hari Mohan & Ors, 2000 SCC 516, Ram Bali vs State Of Uttar Pradesh, 2004, SCC 2329-C Vol. - 02, Vijay singh vs State of Bihar, 2003 Scc 1093, and Dhananjay singh vs State of Punjab, 2004 SCC cri 851 . The Apex Court in Ram Bali (Supra) referring Paras Yadav and Others Vs. State of Bihar (1999 (2) SCC 126) and Ram Bihari Yadav Vs. State of Bihar 1998 (4) SCC 517 and Amar Singh Vs. Balvindar Singh and Others (2003 (2) SCC 518)** held that the lapse or omission is committed by the investigating agency or because negligence there had been defective investigation prosecution evidence is required to be examined de hors such omissions carefully to find out whether the said evidence is reliable or not and to what extent, such lapse affected the object of finding out the truth. The contaminated conduct of officials alone should not stand on the way of evaluating the evidence by the courts in finding out the truth, if the materials on record are otherwise credible and truthful; otherwise the designed mischief at the instance of biased or interested investigator would be perpetuated and justice would be denied to the complainant party, and in the process to the community at large.

54. In **Ram Bihari Yadav V. State of Bihar and Ors , 1998 (4) SCC 517)** the apex court held that if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the Law enforcing agency but also in the administration of justice.

55. In **Amar Singh V. Balwinder Singh and Ors, (2003 (2) SCC 518)**, it would have been certainly better if the firearms were sent to the forensic test laboratory for comparison. But the report of the ballistic expert would merely be in the nature of an expert opinion without any conclusiveness attached to it. When the direct testimony of the eye-witnesses corroborated by the medical evidence fully establishes the prosecution version, failure or omission or negligence on the part of the IO cannot affect credibility of the prosecution version.

56. Having regard to the overall facts and circumstances of the case and also from the aforesaid discussions of the evidence on record, there is no manner of doubt about the complicity of the accused appellant (Dhananjay) in inflicting fatal and

grave injuries on Ummed and Shan Mohammad which resulted into death of Ummed on the spot and death of Shan Mohammad after some hours. Though the witnesses were cross examined by the defence but no contradiction could be brought so as to discard the version regarding the involvement of the accused appellant in committing ghastly murder of Ummed and Shan Mohammad. The medical evidence adduced by prosecution witness nos. 3l & 4 relating to injuries caused by Khukari stood fully proved. The Khukari was sent to the forensic laboratory. The report was received demonstrating incriminating articles i.e. cover of the Khukari ,blood stained cement and plain cement. Human blood was found on the Khukari and other incriminating articles. In case the investigating officer did not send the Khukri in the forensic science library for analysis and confirmation. The confessional statement made by the accused appellant in the presence of police personnel to the extent of disclosure of facts consistent with the prosecution version is admissible. The prosecution story will not stand demolished for the fault of the investigating officer. The trial court had assessed and analysed the entire prosecution version and defence of the accused appellant on the yardstick of its reliability and trustworthiness and has rightly reached at the conclusion that it is the appellant who in association with co-accused is the real perpetrator of the offence of inflicting fatal and heart rending injuries to Ummed and Shanu who succumbed to injuries. There is clear and categorical evidence to prove the accusations of causing serious injuries with Khukari to Ummed and Shanu. Thus, they cannot escape from the punishment for the offence committed by them. The learned counsel for the appellant has placed reliance on a gamut of dictum of Hon'ble Supreme Court in re **Khema alias Khem Chandra vs State Of U.P. criminal appeal no. 1200-1202 of 2022 arising out of SLP (Criminal) NO. 8624 Of 2019 , Anil Phukan vs State of Aasam 1993 Law Suit, (229), Virendra (Supra) State represented by Inspector of Police (Supra)** do not have any applicability with the present set of facts and circumstances of the case.

57. Thus, there is no embellishment in the prosecution version. The victims died on account of inflicting of injuries on their person by the accused appellant and the co-accused. The entire incident has been narrated in a very intrinsic and natural way. It is a case of homicidal death. The murder has taken place in day light at the public place in the presence of the witnesses who supported the prosecution version in cross examination and examination in chief. The murder has taken place in Ram Manohar Lohiya park on the trivial issue of demand of money from the side of the accused persons and the refusal by the victims. There is a chain of evidence to demonstrate that Shan Mohammad and Ummed were inflicted serious injuries with Khukari as a result of which Ummed took last breath and Shan Mohammad was seriously and fatally injured. The accused persons were caught on the spot and the Khukri and incriminating materials were recovered from the appellant. In case there is any variation or omission in the examination, cross examination or examination in chief that will not jettison the entire prosecution version and will absolve the guilt. The non-examination of Salim and Arif Chaudhary who were illustrated in the list of charge sheet will not falsify the prosecution version in entirety. From the facts and the circumstances of the case it emanates that

the crime has been committed shaking the conscience and heart of public at large in a very brutal and diabolical manner., Multiple injuries were inflicted in the vital part of the victim with an intent to eliminate him. The testimony of the witnesses is trust worthy and reliable. No explanation has been given by the accused appellant as to how and in what manner the victims were inflicted grave and grim injuries in the said park. The story of the teasing and tormenting of girls could also not be established and no body had come forward to prove this version. The evidence by the prosecution witnesses is consistent with the hypothesis of the guild of the accused persons. There is no other hypothesis except the guilt of the accused persons. The mere conviction and sentence as well as incarceration of the accused appellant will not placate the severity and barbarity of offence wherein innocent persons were killed in a barbarous and ruthless manner. The nature of injuries on the person of the victims were heart rending and unbearable shaking the soul and conscience of the persons present in the said park. The learned Sessions Judge has passed the order of conviction and sentence after appreciating the entire evidence on record and has rightly arrived at the conclusion that it was the accused persons alone who committed the serious offence of causing fatal and ghastly injuries to the victims hence the judgment and order passed by the learned Sessions Judge may be sustained.

58. In the light of prolix and verbose discussions made herein above and also regard being had to the entire facts and circumstances of the case, we are of the opinion that the prosecution has proved its allegations beyond reasonable doubts, pointing unerringly guilt of the accused appellant. The trial court has rightly accepted the prosecution evidence holding the appellant guilty. However, looking to the nature of allegations, the materials on record and also manner of executing the crime, it appears that the accused appellant did not have any pre-mediation or pre concerted mind to eliminate Ummed and Shanu (deceased). The incident had occurred abruptly on the heat of passion, hence the accused appellant deserves to be convicted. Therefore, we concur with the findings of trial court.

59. This takes us to the next question whether it was a perpetrated murder or would it fall within any of the exceptions to Section 300 of IPC?

60. It would be relevant to refer to Section 299 of the Indian Penal Code, which reads as under:

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

61. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts loose sight of the true scope and meaning of the terms used by the legislature in these sections, and allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be is to keep in focus the keywords used in the various clauses of Section 299 and 300 of

I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences:-

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the 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.

62. From the upshot of the aforesaid discussion, it appears that the death caused by the accused was not premeditated, accused though had knowledge and intention that his act would cause bodily harm to the deceased but did not want to do away with the deceased. Hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. (2011) 5 SCR 300** which have to be also kept in mind.

63. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra**, reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka,** reported in **1994 SUPP (1) SCC 304**, we come to the definite conclusion that the death was not premeditated. The precedents discussed by us would permit us to uphold our finding which we conclusively hold that the offence is not punishable under Section 302 of I.P.C. but is culpable homicide not amounting to murder, punishable U/s 304 (Part I) of I.P.C.

64. Now, it is to be seen whether the quantum of sentence is too harsh and requires to be modified. In this regard, we have to analyse the theory of punishment prevailing in India.

65. 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."

66. The term '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.

67. 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.

68. Keeping in view the facts and circumstances of the case and also 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.

69. 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.

70. In view of the above, the accused-appellant is sentenced to 10 years rigorous imprisonment. Fine is reduced to Rs.5000/-. However, the default sentence is maintained. If 10 year's sentence is already over, the accused-appellant be set free forthwith, if not wanted in any other case. He will deposit the fine within four weeks from the date of his release and in case fine is not deposited he will be re-incarcerated to undergo the sentence of default.

71. Resultantly, the appeal is partly allowed to the extent that the appellant be convicted under section 304 Part-I IPC awarding sentence of ten years rigorous imprisonment with fine of Rs, 15,000/ in Session Trial No. 445 of 2007 is maintainable with default sentence which would run after 10th year of incarceration. As appellant is in jail for 15 years, he be set free immediately if not wanted in other offence. The conviction and sentence awarded vide judgement and order dated 22.03.2013 passed by learned Additional Sessions Judge Court No. 1 Ghaziabad in Sessions Trial No. 446 of 2007, under Section 4/25 Arms Act, shall remain intact which is already served.

72. Trail court record be transmitted to the court concerned immediately for necessary action

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(2023) 3 ILRA 887
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.02.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 755 of 2022

Samharu Gupta ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Karunesh Pratap Singh

Counsel for the Respondent:
G.A.

Criminal Law-Indian Penal Code-1860-Sections 299,300,302 & 304(I))-Accused-Appellant in anger killed his wife by single blow of shovel (fawda)-Conviction U/s 302 IPC- Postmortem report st.d injuries on the body would be the cause of death and it was homicidal death- The death was not premeditated-Accused had

knowledge that his act would cause bodily harm to the deceased he but did not want to do away with the deceased- Offence is not punishable u/s 302 but is culpable homicide not amounting to murder, punishable U/s 304 (Part I) of I.P.C-Criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective-Accused undergone more than seven years of incarceration and he has one daughter to look after-Fine is substituted by four months' imprisonment of incarceration-Impugned judgment and order modified.

Appeal partly allowed. (E-15)

List of Cases cited:

1. Veeran & ors.Vs St. of M.P. (2011) 5 SCR 300.

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

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

4. Mohd. Giasuddin Vs St. of A.P., [AIR 1977 SC 1926]

5. Deo Narain Mandal Vs St. of U..P [(2004) 7 SCC 257]

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

7. Jameel vs St. of U.P. [(2010) 12 SCC 532]

8. Guru Basavraj vs St. of Karn., [(2012) 8 SCC 734]

9. Sumer Singh Vs Surajbhan Singh, [(2014) 7 SCC 323]

10. St. of Pun.Vs Bawa Singh, [(2015) 3 SCC 441]

11. Raj Bala Vs St. of Har., [(2016) 1 SCC 463]

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. & Hon'ble Ajit Singh, J.)

1. Heard Sri Karunesh Pratap Singh, learned counsel for the appellant and learned A.G.A. for the State.

2. Though learned counsel for the appellant has made submissions as far as bail is concerned, we have gone through the record, the judgment impugned and the factual data and by consent of learned A.G.A. we proceed to decide this appeal finally where the accused-appellant is in jail for more than seven years and he has one daugher to look after.

3. This appeal challenges the judgment and order dated 3.12.2021 passed by Additional Sessions Judge/Special Judge, P.A. Act/U.P.S.I.B., Gorakhpur in Sessions Trial No.129 of 2016 (State vs. Samharu Gupta) whereby the learned Sessions Judge has convicted accused-appellant under Section 302 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced him to undergo imprisonment for life with fine of Rs.50,000/- and, in case of default in payment of fine further to undergo two years' imprisonment.

4. Brief facts as culled out from the record are that the brother of the deceased made a complaint before the Police Station Pipraich, Gorakhpur stating therein that her sister who was married with accused-appellant 21 years ago was killed by her husband by Shovel (Fawda). It was also stated that there were quarrel between both of them due to suspicion of illicit relation of deceased. The deceased died while on the way to hospital. On the basis of his complaint, First Information Report was registered as Case Crime No. 328 of 2015.

5. On investigation being put into motion, the investigating officer recorded

the statements of all the witnesses and submitted the charge-sheet to the learned Magistrate. The learned Magistrate summoned the accused and committed him to Court of Sessions as prima facie charge was under Section 302 of IPC.

6. On being summoned, the accused-appellant pleaded not guilty and wanted to be tried. The Trial started and the prosecution examined 11 witnesses who are as follows:

1	Chandrabhan	PW1
2	Smt. Vimla Devi	PW2
3	Ritu Gupta	PW3
4	Arun Gupta	PW4
5	Madhuri Devi	PW5
6	Ganga Prasad	PW6
7	Guddu Gaud	PW7
8	Akhilesh Kumar Upadhyaya	PW8
9	Prabhatesh Kumar	PW9
10	Nirmal Kumar Yadav	PW10
11	Dr. Dhananjay Kushwaha	PW11

7. In support of ocular version following documents were filed and proved:

1	F.I.R.	Ex.Ka.13
2	Written Report	Ex.Ka.1
3	Postmortem Report	Ex.Ka.3/1 & 3/2
4	Panchayatnama	Ex.Ka.11
5	Charge-sheet	Ex. Ka.7
6	Site Plan	Ex.Ka.5
7	F.S.L. Report	Ex.Ka.6

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

9. It is submitted by learned counsel for the appellant that the incident occurred at the spur of moment which arose due to sudden quarrel between husband and wife. It is submitted that the accused had not premeditated to do away with the deceased.

10. In alternative, it is submitted that at the most, the death can be homicidal death not amounting to murder and punishable under Section 304 II or Section 304 I of I.P.C. If the Court decides that the accused is guilty under Section 302 of IPC, then the accused may be granted fixed term punishment of incarceration as the death is not a gruesome act on part of accused.

11. Per contra, learned A.G.A. for the State submits that there was no grave and sudden provocation from the side of the deceased and that looking to the gruesomeness of the offence and the evidence of prosecution witnesses, this Court should not show any leniency in the matter. It is further submitted by learned A.G.A. that ingredients of Section 300 of IPC are rightly held to be made out by the learned Sessions Judge who has applied the law to the facts in case.

12. We have considered the evidence of witnesses and the Postmortem report which states that the injuries on the body of

the deceased would be the cause of death and that it was homicidal death, we concur with the finding of the Court below.

13. This takes us to the next question whether it was a perpetrated murder or would it fall within any of the exceptions to Section 300 of IPC?

14. It would be relevant to refer to Section 299 of the Indian Penal Code, which reads as under:

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

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

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the 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. Out of anger he had given a single blow to his wife. The evidence of P.W.3 also goes to show that incident occurred without premeditation. The deceased resented to the idea of selling field given by the father and there was hot discussion about the same and in anger the accused gave single blow to his wife.

17. From the upshot of the aforesaid discussion, it appears that the death caused by the accused was not premeditated.

Accused though had knowledge that his act would cause bodily harm to the deceased he but did not want to do away with the deceased. Hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

18. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra, reported in (2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka,** reported in **1994 SUPP (1) SCC 304**, we come to the definite conclusion that the death was not premeditated. The precedents discussed by us would permit us to uphold our finding which we conclusively hold that the offence is not punishable under Section 302 of I.P.C. but is culpable homicide not amounting to murder, punishable U/s 304 (Part I) of I.P.C.

19. This takes this Court to the quantum of sentence. In this regard, we have to analyse the theory of punishment prevailing in India.

20. 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."

21 . '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.

22. 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.

23. 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.

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. In view of the above, the accused-appellant is sentenced to the seven years of imprisonment as he has undergone more than seven years of incarceration and he has one daughter to look after. Fine is substituted by four months' imprisonment of incarceration which would start after seven years. The accused-appellant be set free forthwith, if he has served the sentence imposed by this Court and if he is not wanted in any other case.

26. In view of the above, the appeal is partly allowed. Judgment and order passed

by the learned Sessions Judge shall stand modified to the aforesaid extent. Record be sent back to the Court below forthwith.

(2023) 3 ILRA 893
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.02.2023

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE VINOD DIWAKAR, J.

Criminal Appeal No. 1170 of 2017

Deshraj @ Baba ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Sanjay Kumar Srivastava, Sri Gaurav Kakkar

Counsel for the Respondent:
G.A.

(A) Criminal Law - Criminal Procedure Code, 1973 - Sections- 313 & 437 - Indian Penal Code, 1860 - Sections 201, 302 & 364 - Appeal – against conviction & sentence - Offence of murder - FIR -, during investigation, it is was found that, accused along with co-accused with an intent to grab amount of two deceased, killed them - Examination of evidences - Court finds that, Accused appellant is with regard to recovery of spade and bullock cart which has already been disbelieved by the court - There is neither any appeal filed against such finding by St. nor we find any error in the conclusion arrived at by court below particularly as recovery of spade is after three and a half months and there are no independent witness to such recovery - Court also finds that, there is no specific question put to the accused appellant with regard to recovery under Section 313 Cr.P.C - admittedly, case is based on circumstantial evidence and in such circumstantial prosecution must connect the chain of events without any alternate hypothesis - held, prosecution has miserably failed to connect chain of events pointing exclusively to the hypothesis of guilt attributed to the accused appellant - motive to commit the offence has not been established - Except for weak evidence in the nature of recovery and circumstance of last seen, - trial court, completely omitted to consider evidence in correct perspective - Inconsistency in testimony has also been overlooked - Gap of 20 hours in time of last seen and expected time of death remains wholly unexplained and an alternative hypothesis consistent with the innocence of accused during such period otherwise cannot be ruled out – in such circumstances accused appellant is entitled of benefit of doubt - Appeal is allowed, directions accordingly. (Para - 26, 27, 38, 40, 41, 43)

Appeal allowed. (E-11)

List of Cases cited:

1. Jabir & ors. Vs The St. of Uttarakhand, 2023 AIR SC 488,

2. Ram Pratap Vs The St. of Har., 2023 (2) SCC 345,

3. Jai Prakash Tiwari Vs St. of M. P., 2022 AIR SC 3601,

(Delivered by Hon'ble Ashwani Kumar Mishra, J. & Hon'ble Vinod Diwakar, J.)

1. This appeal is by the accused appellant Deshraj @ Baba challenging the judgment and order dated 18.02.2017, passed by Additional District and Sessions Judge, Court No. 3, Aligarh in Sessions Trial No. 779 of 2004 (State vs. Deshraj @ Baba and others) arising out of Case Crime No. 133 of 2003, whereby the accused appellant has been convicted under section 302 IPC and sentenced to life imprisonment with fine Rs. 20,000/- and in default of fine further undergo three months additional imprisonment; under section 201 IPC for three years imprisonment with fine of Rs. 10,000/- and in default of fine further undergo one

month additional imprisonment; and under section 364 IPC for ten years imprisonment with fine Rs. 10,000/- and in default of fine further undergo one month additional imprisonment. All the sentences are to run concurrently.

2. It transpires that the village Chowkidar (PW-1) gave a written report, scribed by Pratap Singh (PW-2), to the police on 16.12.2003 at 10.00 AM stating that while he was going to ease himself at 08.00 AM outside the village he saw two unknown headless dead bodies in dry canal between Jaufari and Salempur Mafi and their heads were lying at a little distance and it appears that the dead bodies were brought from outside and thrown at this place. On the basis of written report First Information Report got registered as Case Crime No.133 of 2003 on 16.12.2003.

3. After lodging the FIR the investigation proceeded. The inquest started at 10.30 AM on 16.12.2003 and it concluded by 12.00 in the afternoon. It is found that the death is homicidal and for ascertaining the cause of death the dead bodies were sent for postmortem. The autopsy on the two unknown dead bodies was conducted next day on 17.12.2003. Injuries found on the dead bodies are as under:-

Injuries on first deceased

1. A L.W on right arm 20 X 14 cm (skin loss)

2. A L.W on the right infraclavicular region 19 X 20 cm.

3. Thoracic Inlet completely cut through & through from front to back (skin to skin) all the openings of major parts visible-trachea esophagus, big vessels. Level is C 5 (size of Inlet 17 cm X 16 cm).

Cause of death: shock and haemorrhage as a result of injuries.

Duration of death: About one and a half day.

Injuries on second deceased

1. Thoracic inlet 15 cm X 13 cm front of neck to back (skin to skin) all openings of major parts visible, Trachea esophagus big vessels level is C-4.

Cause of death: shock and haemorrhage as a result of injuries.

Duration of death: About one and a half day.

4. During investigation it is found that the brother of Parshottam (PW-3), namely Raju and his partner Om Prakash were done to death by accused Deshraj @ Babu in connivance with co-accused Brahm Dev.

5. It is at this stage that a written report was given by Purushotam (PW-3) and on its basis the investigation proceeded further. As per this written report (Ex. Ka. 4) the dead bodies were of the brother of PW-3, namely Raju and one Om Prakash and both the deceased were engaged in the business of selling milk and cottage cheese from the shop of one Brahm Dev. It is alleged that business of selling milk and cottage cheese was being undertaken from two different places and that sum of Rs. 80,000/- was outstanding from Brahm Dev and despite persistent demands made, the amount was not returned on one pretext or the other. On 14.12.2003 at about 2.00 in the afternoon, the accused Deshraj @ Baba resident of village Jaufri came to their house and informed the two deceased that he would ensure return of outstanding amount from Brahm Dev tomorrow, who is with him at Jaufri. The accused further

stated that he would return tomorrow and that two deceased may come with him for receiving the payment. It is then alleged that on 15.12.2003 accused Deshraj @ Baba came to the house of PW-3 at about 9.00 in the morning and asked the two deceased to come with him so as to get the amount from Brahm Dev. The deceased Raju and Om Prakash alongwith accused Deshraj went on their Raajdoot motorcycle bearing Registration No. 81 E 2682 to Jaufri. On the way Sanjeev S/o Om Prakash (PW-4) met him and one of the deceased Om Prakash told him that they are going to Brahm Dev for getting the amount from him and would return by the evening. He further instructed PW-4 to go to Ahmadpur and supervise the work. By the evening when two deceased did not return despite attempts made to locate them. Ultimately, PW-3 came to know that two dead bodies have been found near Jaufri canal which have been sent to mortuary. Thereafter, PW-3 as well as family member of other deceased came to the mortuary and identified the two deceased as Raju and Om Prakash. It is therefore alleged that accused appellant alongwith Brahm Dev with an intent to grab amount of two deceased, killed them.

6. The investigation proceeded with recording of statement of various witnesses. During the course of investigation, the Investigating Officer also recovered a buggi (bullock cart) and a favada (spade) allegedly on the pointing out of the accused appellant from heap of straw in the house of appellant. On the basis of such evidence collected during the course of investigation, the Investigating Officer proceeded to submit charge sheet against the appellant, Brahm Dev and five others. Since the case was triable exclusive by the court of Sessions, therefore, the Magistrate committed the case to the court of Sessions which framed charges against the accused appellant along with others under Section 302 and 201 IPC on 12.10.2005. The accused appellant denied the charges and demanded trial.

7. The prosecution in order to prove its case produced documentary evidence in the form of F.I.R. (Ex. Ka. 1), Written Report (Ex. Ka. 3), Written Report (Ex. Ka. 4), Recovery memo of "Buggi' & Spade (Ex. Ka. 7), Recovery memo of Blood-stained & Plain Soil (Ex. Ka. 8), Recovery memo of Blood-stained & Plain Soil (Ex. Ka. 9), P.M. Report (Ex. Ka. 5), P.M. Report (Ex. Ka. 6), P.M. Report (Ex. Ka. 6A), "Panchayatnama' (Ex. Ka. 12), "Panchayatnama' (Ex. Ka. 16), "Panchayatnama' (Ex. Ka. 19), Charge-Sheet (Ex. Ka. 22), Site Plan with Index (Ex. Ka. 10), Site Plan with Index (Ex. Ka. 21) etc.

8. In addition to the documentary evidence the prosecution has also produced oral testimony of Head Constable Chetna Prakash Gond as PW-1, who has proved the chick FIR. The village Chaukidar who has given a written report had died during the course of trial. PW-2 is the scribe of written report. The prosecution case primarily hinge upon the testimony of two witnesses namely PW-3 Purushotam, brother of one of the deceased Raju, and PW-4 Sanjeev S/o Om Prakash (deceased).

9. PW-3 in his testimony has supported the prosecution case and in his examination-in-chief has alleged that sum of Rs. 15,000/- was outstanding from Brahm Dev on account of milk and cottage cheese provided to him by the deceased Raju and Om Prakash. The accused appellant was working in the shop of

Brahm Dev. This witness has further stated that around 09.00 am on 15.12.2003 the accused appellant came to his house and asked the two deceased to come with him for collecting the amount due and payable from Brahm Dev. He has also stated that the deceased Raju and Om Prakash along with the accused appellant had met P.W. 4 and the deceased has assured that they would return by the evening. This witness has been cross examined. In the cross examination he has stated that though the deceased Raju and Om Prakash had gone with the accused appellant and had not return by the evening yet this fact was neither told to anyone nor any report was lodged soon. He stated that he made attempts to locate the deceased and for such purposes visited the house of the appellant where he met the sister in law of accused appellant and she informed PW-3 that two deceased have not come to her house. PW-3 thereafter, returned and did not lodge any report with the police. This witness saw in the newspaper about the discovery of two dead bodies where after he came to the mortuary and could identify the deceased. The witness further stated that his previous disclosure about the outstanding amount being Rs. 15,000/- was incorrect and that a sum of Rs. 80,000/- was due and payable by Brahm Dev and no documents in the form of register or account book was available nor any such material was produced. He has stated that on the basis of grave suspicion he has lodged the report against the accused persons.

10. PW- 4 is the witness of last seen inasmuch as PW-3 in his statement has clearly alleged that two deceased alongwith appellant were seen by PW-4. This witness stated that the accused appellant and deceased Raju were going towards Jaufri on motor cycle. PW-4 admitted it. It is stated that his father (deceased Om Prakash) told him that he is going to Deshraj @ Baba at Jaufri where he was called and where Brahm Dev is also present. This statement of PW-4 is relevant and is reproduced:-

"मेरे पापा ने मुझसे कहा की में देशराज उर्फ़ बाबा के पास कोसेपुर जॉफरी जा रहा हूँ वह पर मुझे बुलाया गया था वह पर ब्रह्मदेव भी है । "

11. This witness has also supported the prosecution case about dead body of two persons having been found on 16.12.2003. Though this witness has supported the prosecution case that amount of Rs. 80,000/- was due to the two deceased on account of supply of milk and cottage cheese but no accounts or registers in that regard have been produced. He has also alleged that his father used to carry a diary which contained all the accounting entries but this diary has not been produced and the diary has not shown to the Investigating Officer. In the cross examination, he has further stated that he saw his father and other deceased Raju on the motorcycle. Statement in that regard is reproduced hereinafter:-

"मेरे पापा जेब में डायरी रखते थे। वह डायरी मेरे पास नहीं है वह डायरी हमने पुलिस को नहीं दिखायी। जो दो पर्चो ब्रह्मदेव के हिसाब के थे वो मैंने पुलिस दरोगा जी को नहीं दिखये। वह दोनों पर्चा अदालत में जमा नहीं किये। जिस मोटरसाइकिल पर मैंने अपने पिता जी व राजू को देखा था ।"

12. This witness has also stated that the motor cycle of his father has not been traced and was kept in police station. He has further admitted that though his father has not returned for two days but no missing report was lodged by him in respect of his disappearance. He has denied

the suggestion that he has not seen the accused appellant going with two deceased.

13. PW-5 (Dr. S. K. Upadhyaya) is the doctor who has conducted the autopsy of the two dead bodies. He clearly stated that approximate time of death was about one and a half days from the time when postmortem was conducted. PW- 5 has moreover proved the postmortem report.

14. PW-6 (V.S. Bajpayee) is retired Inspector, who is a witness of the recovery of spade and bullock cart. The spade has also been produced during trial before the court below.

15. PW-7 (Chauthi Prasad) is Sub Inspector, who has conducted the inquest of two dead bodies.

16. PW-8 (Virendra Singh Tomar) is the Investigating Officer of the case. He has admitted that the spade recovered from the house of the accused appellant after three and a half months has not been sent for forensic examination.

17. On the basis of the evidence led by the prosecution during the course of trial, the incriminating materials were confronted to the accused for recording his statement under Section 313 Cr.P.C. The accused has denied the allegations made against him. The incriminating material have been put to the accused appellant in the form of separate questions. We have been taken through the questions by the counsel for the appellant in order to emphasise that there is no specific question put to the accused appellant with regard to recovery of spade and bullock cart.

18. On behalf of the defence testimony of one Chandra Bhan Singh has been produced as DW-1 and not much turns on his testimony.

19. The trial court on the basis of evidence led in the matter has come to the conclusion that two deceased have been done to death by the accused appellant where after their bodies were found in an open place. The motive for commission of the offence is the defaulted outstanding amount payable by Brahm Dev to the two deceased, repayment of which he wanted to avoid. The trial court has relied upon the evidence of PW-3 and PW-4 to hold that the two deceased were lastly seen in the company of accused appellant and it is this evidence which is against the appellant. So far as recovery of spade and bullock cart is concerned, the trial court has disbelieved it on the ground that there are no independent witnesses and even otherwise the recovered items have not been sent for forensic examination. The trial court ultimately held the appellant guilty of the charges and convicted and sentenced him vide the judgment impugned. Being aggrieved, the appellant is before this Court in the present appeal.

20. Sri Gaurav Kakkar, learned counsel for the appellant submits that this is a case of virtually no evidence against the accused appellant inasmuch as the testimony of last seen is not reliable and there is neither any credible recovery from the accused appellant nor the motive is established. It is urged that the appellant was not named in the FIR and his implication has surfaced on the basis of an application of PW-3 after four days which is nothing but an after thought. Learned counsel further submits that in the absence of any motive attributed to the accused appellant the prosecution case based on circumstantial evidence cannot succeed.

Learned counsel further submits that testimony of PW-4 with regard to last seen theory is not reliable and even otherwise there was substantial gap between the time of alleged last seen and the recovery of dead body.

21. Learned AGA, on the other hand, has supported the judgment of court below on the ground that there is definite motive for commissioning of offence as the accused appellant was working for Brahm Dev who owed about Rs. 80,000/- to the two deceased. It is further submitted that two deceased were seen lastly going with the accused appellant and since only their dead body have been recovered later, as such the implication of accused appellant is well founded. Learned AGA also points out that it was only after the witnesses recognized the dead bodies at the mortuary that a report was got lodged with the police in the matter.

22. We have heard learned counsel for the parties and perused the materials on record including the original records.

23. The record reveals that dead body of two unidentified persons were spotted by the village Chaukidar of village Nada Wazidpur in P.S Lodha, District Aligarh at about 8.00 in the morning. The bodies were lying near the canal. The skull was lying at a distance from the two dead bodies. Thereafter, the inquest was conducted and the two dead bodies were sent to mortuary for postmortem. The prosecution witnesses apparently have identified the two dead bodies as that of Raju and Om Prakash at the mortuary.

24. The implication of accused appellant in the present case is on account of the prosecution story that one Brahm Dev was running a shop in Aligarh, selling milk and cottage cheese, which was being supplied by the two deceased Raju and Om Prakash and sum of Rs. 80,000/- was due and payable to the two deceased for long. The accused appellant came to the house of deceased and asked him to come with him for taking the money from Brahm Dev who was at Jaufri with the accused appellant. The prosecution case is that two deceased alongwith accused appellant left on a motor cycle for village Jaufri and were lastly seen together by PW-4 in the morning hours on 15.12.2003. The deceased were seen there. Their dead bodies were found in the next morning on 16.12.2003.

25. As per prosecution case, there was a definite motive for the accused appellant to commit the murder of two deceased as he was employed in the shop of Brahm Dev who owed Rs. 80,000/- to the two deceased. It is further alleged that accused appellant had come to the house of deceased and took them on the pretext of ensuring return of the amount and since the dead bodies were found later the prosecution alleges that it was the accused appellant who had done them to death.

26. Admittedly, it is a case of circumstantial evidence and for a case based on circumstantial to succeed the prosecution must connect the chain of events in such a manner that it points exclusively to the hypothesis of guilt attributed to the accused appellant and that any alternate hypothesis is ruled out.

27. We are, therefore, required to analyse the evidence on record so as to determine whether the chain of events has been successfully connected by the prosecution in this case to implicate the present appellant. The first aspect which

requires examination is with regard to the motive which assumes significance in the case of circumstantial evidence. As per the prosecution the motive was that a sum of Rs. 80,000/- which was owed to the two deceased by Brahm Dev had not been returned. The accused appellant is stated to be working in the shop of Brahm Dev. It is, however, admitted that the amount was not payable or due from the accused appellant and no evidence is led by the prosecution to show that accused appellant would have gained anything or was to derive any advantage on account of death of two deceased. The motive as per prosecution could at best implicate Brahm Dev and not the accused appellant. Even otherwise, we find the evidence relating to motive to be weak and except the bald allegation that a sum of Rs. 80,000/- was due and payable to the two deceased in the testimony of PW-3 and PW- 4, there is no other material which may indicate that such amount was actually payable to the two deceased. Neither any accounts have been produced nor any other material in the form of register or diary etc. has been produced during trial, which may show that such amount was payable by Brahm Dev to the two deceased. We are, therefore, of the opinion that prosecution has not been able to establish any motive for the accused appellant to commit the murder of the two deceased. The only material to implicate the accused appellant is the statement of the PW-3 and PW-4 that the accused appellant visited them and asked the two deceased to come with him for collecting outstanding money from Brahm Dev. PW-3 in his statement has further stated that two deceased went along with accused appellant in the morning hours on 15.12.2003. It is also alleged that the incident of three (two deceased along with accused appellant) going together has been witnessed by PW- 4.

28. PW-3 has moreover admitted that his brother had not returned by the evening. The conduct of PW- 3 in not lodging any missing report despite the fact that he knew that his brother had gone with the accused appellant creates some suspicion upon the version of PW-3. In the event PW-3 was aware that his brother had left with the accused appellant and had not returned in the entire night it was expected that he would report the disappearance of his brother to the police and also narrate the fact about the missing person having gone with the accused appellant. There is no evidence to show that such a report was made by PW-3.

29. Similarly, PW-4 although has alleged that he saw the three going together but in his testimony this witness has clearly stated that his father told him that he is going to the accused appellant at village Jaufri where he was called and Brahm Dev is also there. This statement does indicate that accused appellant was actually not present with the two deceased or else the statement would have been different.

30. In the event accused appellant was present with the two deceased there was no occasion for the father of the PW- 4 to state that he is going to the place of accused appellant. In the subsequent part of his testimony also the witness has stated that he saw the two deceased going on motorcycle and there is no reference of presence of accused appellant with the two deceased. This statement therefore, creates suspicion with regard to presence of the accused appellant with the two deceased or the testimony of PW-4 about his having lastly seen the deceased with the accused appellant.

31. We further find substance in the argument of counsel for the appellant that even if the prosecution case on the basis of

testimony of PW-3 and PW-4 is accepted, yet it would not establish the guilt of the accused appellant on the settled touchstone of a case of circumstantial evidence.

32. As per prosecution, the postmortem of the two deceased has been conducted on 17.12.2003 at about 3.30 - 4.00 pm. The approximate time of death has been indicated as one and a half day. In the event one and a half day is calculated from the time of conduct of postmortem the expected time of death of the two deceased would be around 3.30- 4.00 am on 16.12.2003. The time gap between the incident of last seen and time of death is thus about 19 - 20 hours.

33. The time gap in that regard is a matter of significance. The law is well settled that an alternate hypothesis consistent with the innocence of accused must be proved to be not in existence and the time gap would be a relevant factor in that regard which would dent the prosecution case.

34. In a recent decision of the Supreme Court in the case of **Jabir and ors. vs. The State of Uttarakhand, 2023 AIR SC 488** the Court has specifically examined this aspect of the matter while observing as under:-

"25. In the present case, save the "last seen" theory, there is no other circumstance or evidence. Importantly, the time gap between when the deceased was seen in the company of the accused on 09-10-1999 and the probable time of his death, based on the post mortem report, which was conducted two days later, but was silent about the probable time of death, though it stated that death occurred approximately two days before the post mortem, is not narrow. Given this fact, and the serious inconsistencies in the depositions of the witnesses, as well as the fact that the FIR was lodged almost 6 weeks after the incident, the sole reliance on the "last seen" circumstance (even if it were to be assumed to have been proved) to convict the accused-appellants is not justified. 8 2016 (1) SCC 550."

35. The law is otherwise well settled that the prosecution in a case of circumstantial evidence is obliged to prove each circumstances beyond reasonable doubt and to link all circumstances against the accused appellant.

36. The principle has been summed up in para 21 of the judgment in **Jabir (supra)** where their Lordships have followed the previous decision of the court in Sarad Birdichand Sarda which has acquired the status of locus classicus on the issue, which is reproduced hereinafter:-

"21. A basic principle of criminal jurisprudence is that in circumstantial evidence cases, the prosecution is obliged to prove each circumstance, beyond reasonable doubt, as well the as the links between all circumstances; such circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else; further, the facts so proved should unerringly point towards the guilt of the accused. The circumstantial evidence, in order to sustain conviction, must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused, and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his

innocence.5 These were so stated in Sarad Birdichand Sarda (supra) where the court, after quoting from Hanumant, observed that:

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an Accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra (1973) 2 SCC 793 where the following observations were made: [SCC para 19, p. 807: SCC (Cri.) p. 1047] Certainly, it is a primary principle that the Accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the Accused, that is to say, they should not be explainable on any other hypothesis except that the Accused is guilty, (3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of 5 Ibid 3 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." These panchsheel precepts, so to say, are now fundamental rules, iterated time and again, and require adherence not only for their precedential weight, but as the only safe bases upon which conviction in circumstantial evidence cases can soundly rest."

37. We further find support from the judgement of the Supreme Court in the case of **Ram Pratap vs. The State of Harayan, 2023 (2) SCC 345** wherein following principles have been laid down:-

"9. It has been held by this Court in a catena of cases including Sharad Birdhichand Sarda v. State of Maharashtra reported at (1984) 4 SCC 116, that suspicion, howsoever strong, cannot substitute proof beyond reasonable doubt. This Court has held that there is not only a grammatical but also a legal distinction between 'may' and 'must'. For proving a case based on circumstantial evidence, it is necessary for the prosecution to establish each and every circumstance beyond reasonable doubt, and further, that the circumstances so proved must form a complete chain of evidence so as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show, in all human probability, that the act has been done by the accused. Further, it has been held that the facts so established must exclude every hypothesis except the guilt of the accused.

38. The other circumstance against the accused appellant is with regard to recovery of spade and bullock cart which has already been disbelieved by the court below. There is neither any appeal filed against such finding by the State nor we find any error in the conclusion arrived at

by the court below particularly as the recovery of spade is after three and a half months and there are no independent witness to such recovery. The spade otherwise has not been sent to forensic examination. We also find force in the contention of learned counsel for the appellant that specific circumstance with regard to recovery since has not been put to the accused under Section 313 Cr.P.C. therefore, this aspect also cannot be read in evidence against the accused appellant.

39. The principle in that regard has been reiterated by the Supreme Court in the case of **Jai Prakash Tiwari vs. State of Madhya Pradesh, 2022 AIR SC 3601** wherein the Court has observed as under:-

"20. This Court in the case of Satbir Singh v. State of Haryana, (2021) 6 SCC 1, while emphasising upon the significance of Section 313 CrPC, has delineated the duty of the trial Court and held thus:

"22. It is a matter of grave concern that, often, trial courts record the statement of an accused under Section 313 CrPC in a very casual and cursory manner, without specifically questioning the accused as to his defence. It ought to be noted that the examination of an accused under Section 313 CrPC cannot be treated as a mere procedural formality, as it is based on the fundamental principle of fairness. This provision incorporates the valuable principle of natural justice -- "audi alteram partem", as it enables the accused to offer an explanation for the incriminatory material appearing against him. Therefore, it imposes an obligation on the part of the court to question the accused fairly, with care and caution. The court must put incriminating circumstances before the accused and seek his response. A duty is also cast on the counsel of the accused to prepare his defence, since the inception of the trial, with due caution..." (emphasis supplied)

40. Once the facts of the present case are analysed on the basis of the law settled by the Supreme Court in respect of case based on circumstantial evidence, we have no hesitation in coming to the conclusion that the prosecution has miserably failed to connect the chain of events pointing exclusively to the hypothesis of guilt attributed to the accused appellant. Except for the weak evidence in the nature of recovery and the circumstance of last seen, which we have discarded for the reasons enumerated above, there is no other circumstance to implicate the accused appellant. The chain of circumstances is, therefore, left incomplete.

41. The trial court while recording the finding of guilt against accused appellant, however, has completely omitted to consider the evidence in correct perspective in light of our discussions held above. The inconsistency in the testimony of PW-3 and PW-4 has been overlooked. The gap of 20 hours in the time of last seen and the expected time of death remains wholly unexplained and an alternative hypothesis consistent with the innocence of accused during such period otherwise cannot be ruled out.

42. In such circumstances, we cannot endorse the findings returned by the court below with regard to the establishment of guilt of accused appellant and the same stands reversed.

43. The appeal consequently succeeds and is allowed. The judgment and order passed by the court below dated 18.02.2017, convicting and sentencing the

accused appellant, is set aside. The accused appellant is entitled to benefit of doubt and as he has already undergone incarceration of more than 8 years without remission, he is entitled to be released forthwith, unless he is wanted in any other case subject to compliance of Section 437 Cr.P.C.

(2023) 3 ILRA 903
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.02.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 1522 of 2000

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

Counsel for the Appellant:
Sri Apul Misra, Sri P.N. Mishra, Sri Chetan Chatterjee(A.C.), Sri Pawan Kumar Tripathi

Counsel for the Respondent:
A.G.A.

Criminal Law- Indian Penal Code-1860-Sections 201, 302, 376 -Evidence Act, 1872-Section 3-Deceased was found in naked condition and her clothes were besides her dead body-Conviction U/s 302,376 & 201 IPC-Trial court convicted the appellant only on the basis of circumstantial evidence-Where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances-Circumstantial evidence does not conclusively establish the guilt-Last seen theory, arrest of the accused, recovery the dead body, do not conclusively complete the chain of evidence-Conviction of accused is set aside.

Appeal allowed. (E-15)

List of Cases cited:

1. Hukam Singh Vs St. of Raj. AIR (1977 SC 1063)

2. Eradu and Ors. Vs St. of Hyderabad (AIR 1956 SC 316)

3. Earabhadrappa @ Krishnappa Vs St. of Karn. (AIR 1983 SC 446)

4. St. of U.P. Vs Sukhbasi & ors. (AIR 1985 SC 1224)

5. Balwinder Singh @ Dalbir Singh Vs St. of Pun. (AIR 1987 SC 350)

6. Ashok Kumar Chatterjee Vs St. of M.P. (AIR 1989 SC 1890)

7. Bhagat Ram Vs St. of Pun. (AIR 1954 SC 621)

8. C. Chenga Reddy & ors. Vs St. of A.P. (1996) 10 SCC 193

9. Ravinder Singh @ Kaku Vs St. of Pun., 2022 (7) SCC 581

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. & Hon'ble Ajit Singh, J.)

1. This appeal has been filed challenging the judgment and order dated 26.05.2000 passed by Vth Additional Sessions Judge, Muzaffarnagar, convicting the appellant in Session Trial No.703 of 1998 (State Vs. Raju), under Sections 302, 376 and 201 I.P.C. and sentencing him to imprisonment for life, imprisonment of life and 3 years R.I., respectively. All the

sentences having been directed to run concurrently.

2. The prosecution story in brief is that in the morning of 05.03.1998 the niece of the complainant, aged about seven years had gone to school but did not return home till late evening. On 06.03.1998 at about 03:00 p.m. residents of the village, namely, Janeshwar, Ram Avtar and Dhir Singh told the complainant that they had seen his niece yesterday afternoon going towards the forest along with accused/Raju. Thereafter, the informant along with co-villagers, namely, Krishna Pal son of Kalu, Krishn Pal son of Pratap Singh, Sirpal son of Ram Pal, Brijpal son of Javar Singh, Gopal son of Baljeet and Kiran Pal son of Surja enquired accused about her niece then he told that he had murdered her yesterday afternoon in the field of Kiran Singh. The accused had taken them to the field of Kiran Singh where she found her niece dead. She was in naked condition and her clothes were besides her dead body.

3. The investigation of the case was entrusted to the Sub-Inspector, Om Prakash Singh, who inspected the place of occurrence and prepared the site plan and recorded the statement of witnesses. After completion of investigation, the Investigating Officer has submitted charge-sheet against the accused/appellant under Sections 376, 302 and 201 I.P.C. on 16.03.1998 and the cognizance was taken by the Magistrate and considering that the case was triable by the Session Judge and it was committed to the court of session and the Session Court charged the accused under Sections 376, 302 and 201 I.P.C. on 23.10.1998.

4. In order to prove its case the prosecution has examined five witnesses, who are as follows :

1	Mange Ram	PW-1
2	Dheer Singh	PW-2
3	K.K.Agrawal	PW-3
4	Dr. C.K.Parekh	PW-4
5	Om Prakash	PW-5

5. In support of ocular version following documents were filed:

1	F.I.R.	Ex.Ka.-4
2	Written Report	Ex.Ka.1
3	Pathology report	Ex.Ka. 2
4	P.M. Report	Ex. Ka. 3
5	Panchayatnama	Ex. Ka.7
6	Charge Sheet	Ex.Ka.13
7	Site Plan with Index	Ex. Ka.6

6. The prosecution laid the evidence against the accused and the court after prosecution evidence examined the accused under Section 313 Cr.P.C. and the accused submitted that he has been falsely implicated in the present case with ulterior intention of harassing him. He pleaded not guilty and claimed to be tried. The learned Sessions Judge framed charges under Sections 376, 302 and 201 I.P.C.

7. After considering the evidence available on record the trial court convicted the accused as aforesaid. Being aggrieved by the conviction judgment and order this appeal has been filed.

8. Heard Sri Chetan Chatterjee, amicus curaie appointed for the appellant and Sri Patanjali Mishra, learned A.G.A. for the State.

9. Learned counsel for the accused/appellant submits that the appellant has been falsely implicated by the informant as there was no evidence on record which could show that the accused has murder the deceased after committing rape. No one had seen the accused either committing rape or murder. There are contradictions in the statement of witnesses and the last seen evidence given by Janeshwar, Ram Avtar and Dheer Singh against the accused does not appear to be very credible. He also submits that as per postmortem report no spermatozoa was found. The dead body of the deceased was not recovered a the instance of the accused-appellant. He lastly submits that the accused is in jail and he has served more than twenty four years in prison. It was the first offence of the accused and after conviction the accused had not indulged in any other criminal activity. Although the trial court has convicted the present accused on the basis of mere conjuncture while the appellant is absolutely innocent and has been falsely implicated in this case with the ulterior intention of harassing him.

10. Learned A.G.A. has submitted that the accused has committed murder after raping a seven years old child and there was last seen evidence against the accused.

11. The conviction of appellant is based only upon circumstantial evidence. Hence, in order to sustain a conviction, it is imperative that the chain of circumstances is complete, cogent and coherent. This court has consistently held in a long line of cases Hukam Singh v. State of Rajasthan AIR (1977 SC 1063); Eradu and Ors. v. State of Hyderabad (AIR 1956 SC 316); Earabhadrappa @ Krishnappa v. State of Karnataka (AIR 1983 SC 446); State of U.P. v. Sukhbasi and Ors. (AIR 1985 SC 1224); Balwinder Singh @ Dalbir Singh v. State of Punjab (AIR 1987 SC 350); Ashok Kumar Chatterjee v. State of M.P. (AIR 1989 SC 1890)] that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In **Bhagat Ram vs. State of Punjab (AIR 1954 SC 621),** it was laid down that where the case depends upon the conclusion drawn from circumstances, the cumulative effect of the circumstances must be such as to negate the innocence of the accused and bring the offence home beyond any reasonable doubt. We may also make a reference to a decision of this Court in **C. Chenga Reddy and Ors. vs. State of A.P. (1996) 10 SCC 193**, wherein it has been observed that:

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence.

Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence....".

[Emphasis supplied]

12. Upon thorough application of the above settled law on the facts of the present case, we hold that the circumstantial

evidence against the present appellant does not conclusively establish the guilt in committing the murder of the deceased. The last seen theory, the arrest of the accused, the recovery the dead body, do not conclusively complete the chain of evidence and do not establish the fact.

13. In a case where the conviction is solely based on circumstantial evidence, such inconsistencies in the testimonies of the important witnesses cannot be ignored to uphold the conviction of accused-appellant.

14. It would be seen by this Court that the facts in this case are similar to a recently decided case by the Apex Court titled **Ravinder Singh @ Kaku Vs. State of Punjab, decided on 04.05.2022 reported in 2022 (7) SCC 581** wherein the Apex Court while dealing with similar facts has held as follows:

"17. In a case where the conviction is solely based on circumstantial evidence, such inconsistencies in the testimonies of the important witnesses cannot be ignored to uphold the conviction of A2, especially in light of the fact that the High Court has already erred in extrapolating the facts to infer a dubious conclusion regarding the existence of a motive that is rooted in conjectures and probabilities.

18. With respect to the extra judicial confessions, suffice it to say that the attempt of the respondent herein to rely on that is untenable since the High court has taken note of the inconsistencies in the evidence of PW13 Goverdhan Lal and has rightly rejected his Evidence in "in toto". We uphold the judgment of the High Court to the extent that it rejects the testimony of PW13 and finds the theory of extra judicial confession of A2 and A3 to be unnatural."

14. Accordingly, the appeal is allowed and the impugned order dated 26.5.2000 is set aside to the extent that it convicts accused under section 302 and 376 I.P.C. Hence, the conviction of accused is set aside.

15. We direct that a copy of this order be communicated to the relevant jail authorities and the appellant Raju be immediately set at liberty, unless his detention is required in any other case.

(2023) 3 ILRA 906
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.03.2023

BEFORE

THE HON'BLE PRITINKER DIWAKER, A.C.J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 1568 of 2020
with
Criminal Appeal No. 1971 of 2020

Mahendra Singh & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Dinesh Kumar, Shri Krishan Yadav

Counsel for the Respondent:
G.A., Sri Ankit Agarwal

Criminal Law- Code of Criminal Procedure,1973 - Section 313 - Indian Evidence Act-1872-Sections 3 & 27-Dead body of the deceased was found two days after her alleged last seen with the appellants-Conviction U/s 302, 201, 120-B, 34, 404 IPC & 4/25 Arms Act-Cash and knives (murder weapon) recovered on pointing out of accused person- Evidence rendered by the prosecution in respect of the last seen is not reliable and trustworthy-Alleged extra-judicial confession said to be made to P.W.4 by

the accused is not trustworthy and requires solid corroboration which is missing-Omission on the part of the learned trial court regarding the question of recovery of Rs.10,000/- caused serious prejudice to the appellant-Recovery of currency notes does not fall within the ambit of Section 27 of Evidence Act-Contradiction on the point of the site of recovery of alleged murder weapon- No FSL Report in respect of the murder weapon-Chain of the circumstances never completed, which was essential to record a conviction of an accused in a case based on circumstantial evidence-Material circumstances, like last seen, motive, recovery of murder weapon, extra judicial confession have not been proved for want of cogent and reliable evidence. Order of conviction set-aside.

Appeal allowed. (E-15)

List of Cases cited:

1. Sharad Birdhichand Sarda Vs St. of Mah., (1984) 4 SCC 116

2. G. Parshwanath Vs St. of Karn., (2010) 8 SCC 593

3. Raju Vs St. of Raj., 2022 (121) ACC 954

4. Dharam Deo Yadav Vs St. of U.P., (2014) 5 SCC 509

5. St. of Goa Vs Pandurang Mohite, AIR 2009 SC 1066

6. St. of U.P. Vs Satish, 2005 (3) SCC 114

7. Mohibur Rahman & anr. Vs St. of Assam, 2002 (2) JIC 972 (Supreme Court)

8. Rohtash Kumar Vs St. of Har., 2013 (82) ACC 401 (SC) (Paragraph 25)

9. Ashok Vs St. of Mah., (2015) 4 SCC 393

10. Niranjan Panja Vs St. of W. B., 2010 (6) SCC 525

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

12. Narayan Singh Vs St. of M.P., (1985) 4 SCC 26

13. Jagta Vs St. of Har., (1974) SCC (4) 747

14. U.O.I. Vs R. Metri, (2022) 6 SCC 525

15. Nar Singh Vs St. of Har., (2015) 1 SCC 496

16. Satbir Singh Vs St. of Har., (2021) 6 SCC 1

17. Bharat Vs St. of M.P. (2003) 3 SCC 106

18. Javed Masood & anr. Vs St. of Rajasthan, (2010) 3 Supreme Court Cases 538

19. Anter Singh Vs St. of Ra., A.I.R. 2004 SC 2865

20. Mahendran Vs St. of T. N., (2019) 5 SCC 67

21. Anter Singh Vs St. of Ra., (2004) 10 SCC 657

22. Sheesh Pal Vs N.C.T. of Delhi, (2022) 9 SCC 782

23. Chandrapal Vs St. of Chhattisgarh (Earlier M.P.), AIR 2022 Supreme Court 2542

24. Nandu Singh Vs St. of M. P. (now Chhatisgarh), 2022 SCC Online Supreme Court 1454

25. Pannayar Vs St. of T. N., (2009) 9 SCC 152

26. St. of U.P. Vs Kishanpal & ors., (2008) 16 SCC 73

27. Suresh Chandra Bahri Vs St. of Bihar, 1995 Supp (1) SCC 80

28. Babu Vs St. of Kerala, (2010) 9 SCC 189

29. Anwar Ali Vs St. of H. P., (2020) 10 SCC 166

30. Anvar P.VS Vs P.K. Basheer, (2014) 10 SCC 473

31. Ravi Sharma Vs St. (NCT of Delhi), (2022) 8 SCC 536

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

1. Heard Sri Shri Krishan Yadav and Sri Kripa Kant Pandey, learned counsel for the appellants and Sri Amit Sinha, learned A.G.A. for the State.

2. The validity and sustainability of the judgment and order dated 26.02.2020 passed by Additional Sessions Judge, Court No.4 / Special Judge, Mathura in Sessions Trial No.663 of 2011 (State Vs. Mahendra Singh and others) arising out of Crime No.238 of 2011 under Section 302, 201, 120-B, 34, 404 IPC, Police Station Chatta, District Mathura and Sessions Trial No.304 of 2012 (State Vs. Mahendra Singh) arising out of Crime No.241 of 2011 under Section 4/25 Arms Act, Police Station Chatta, District Mathura and Sessions Trial No.305 of 2012 (State Vs. Ganga Dhar) arising out of Crime No.242 of 2011 under Section 25 Arms Act, Police Station Chatta, District Mathura has been challenged by way of instant criminal appeals, whereby the appellants Mahendra Singh, Ganga Dhar and Baniya @ Balveer were convicted and sentenced to undergo imprisonment for life under Section 302/34 IPC with a fine of Rs.10,000/- each, in default thereof, to further undergo three months additional simple imprisonment, to undergo imprisonment for life under Section 120-B IPC with a fine of Rs.5000/- each, in default thereof, to further undergo three months additional simple imprisonment, to undergo three years rigorous imprisonment under Section 201 IPC with a fine of Rs.500/-each, in default thereof, to further undergo fifteen days additional simple imprisonment, to undergo two years imprisonment under Section 404 IPC with a fine of Rs.500/- each, in default thereof, to further undergo fifteen days additional simple imprisonment. Further, appellants Mahendra Singh and Ganga Dhar were convicted and sentenced to undergo two years imprisonment under Section 4/25 Arms Act with a fine of Rs.500/-each, in default thereof, to further undergo fifteen days additional simple imprisonment. All sentences were directed to run concurrently.

3. The prosecution story, in brief, finds place in the F.I.R., which was lodged on the basis of the written report Ex.Ka.-1 given by informant Bacchu Singh, wherein it was narrated that the informant is an employee in Railway Department and has cordial relations with his neighbour accused Mahendra Singh, who uses to come to his house. The informant and his brothers have executed an agreement to sale on 08.07.2011 and the informant got Rs.2 lakh as his share, which were kept in his house. On 12.07.2011, the informant's daughter Bhagwan Dei received a phone call by Mahendra who wanted to have a chat with her mother Laxmi, wife of the informant. After receiving the call, Laxmi took some articles in a bag and went away from house stating that she was going to her parental home at village Nahra and to come back after two hours. Laxmi was seen by many people going towards Chatta alongwith accused Mahendra on Akbarpur Roadways. The informant made a phone call to Laxmi in the evening when she did not reach Nahra, but she was in haste and was unable to talk and subsequently her phone was switched off. The informant found that Rs.2 lakh, gold & silver jewels and clothings were missing from the house. After search, he found and identified the dead body of Laxmi at the Postmortem House, Mathura on 15.07.2011.

4. F.I.R. Ex.Ka.-10 was lodged against the named accused Mahendra Singh on 16.07.2011 at 13:00 P.M. by Constable Clerk Krishan Pal Singh, who also prepared the registration G.D. Ex.Ka.-11.

5. The investigation ensued and was taken over by C.O. Devendra Singh, who performed the proceedings of the investigation and during the course of investigation, the statements of relevant witnesses were recorded by him. The call details record of the mobile phones of the accused and deceased was also obtained. The dead body of the deceased was recovered and cash money and murder weapon knives were also retrived on the pointing out of the accused persons. The investigating officer also prepared the site plans of the place of occurrence and recovery Ex.Ka.-13, Ex.Ka.-15 and Ex.Ka.-17.

6. The inquest of the deceased was performed and inquest report Ex.Ka.-5 was also prepared.

7. The autopsy of the dead body of the deceased was performed by Dr. R.S. Maurya, who after performing the postmortem of the deceased prepared autopsy report Ex.Ka.-2. The following injuries were found over the body of the deceased :

(i) Multiple lacerated wounds on inner aspect of left upper limbs average size 3 cm. x 1.5 cm. x muscular deep.

(ii) Lacerated wound 4 cm. x 1.5 cm. chest cavity deep on left side front of chest 2 cm. below from left breast.

(iii) Lacerated wound 5 cm. x 2 cm. x abdomen cavity deep on lower part of abdominal mid line.

As per opinion of Doctor, the cause of death was due to shock and haemorrhage, as a result of ante-mortem injuries.

8. After completion of the investigation, charge-sheet Ex.Ka.-18 was filed in the Court against accused Mahendra Singh, Ganga Dhar and Baniya @ Balveer under Sections 302, 201, 120-B, 34, 404 IPC.

9. The investigation of the case under Section 25 Arms Act was taken by S.I. Saleem Khan, who after performing the investigation of the case, prepared site plan Ex.Ka.-19 and Ex. Ka.-21, and submitted charge-sheets Ex.Ka.-20 and Ex.Ka.-22 against accused Mahendra and Ganga Dhar respectively, to the court.

10. The matter, being exclusively triable by the Sessions Court, was committed to the Court of Sessions for trial.

11. Charges under Sections 302/34, 201, 120-B, 404 of IPC were framed on 23.01.2012 against accused Mahendra Singh, Ganga Dhar and Baniya @ Balveer. Charge under Section 4/25 Arms Act was also framed against accused Mahendra Singh and Ganga Dhar on 28.06.2012. The accused persons pleaded not guilty and claimed to be tried.

12. To bring home the charges against the accused, the prosecution produced in all nine witnesses in oral evidence. They are (P.W.1) Bacchu Singh, informant, (P.W.2) Pooran Singh, (P.W.3) Bhagwan Dei, (P.W.4) Shri Chandra, (P.W.5) Dr. R.S. Maurya, (P.W.6) Constable Krishan Pal Singh, (P.W.7) S.I. Devendra Kumar Tyagi, (P.W.8) Devendra Singh and (P.W.9) S.O. Saleem Khan, who were examined.

13. In documentary evidence, written report Ex.Ka.-1, Postmortem Report Ex.Ka.-2, police papers related to postmortem report, pratisar nirikshak report, form 33, inquest, photo lash, letter to C.M.O., nakal report P.S. Chhata, Report of Bharat Singh Ex.Ka.-3 to 9, Chik F.I.R. Ex.Ka.10, G.D. Ex.Ka.-11, Seizure Memo of currency notes Ex.Ka.-12, Site Plan Ex.Ka.-13, Seizure Memo of Cash Ex.Ka.-14, Site Plan Ex.Ka.-15, Seizure Memo of Weapon Ex.Ka.-16, Site Plan Ex.Ka.-17, Charge-sheet Ex.Ka.-18, Site Plan Ex.Ka.-19, Charge-sheet Ex.Ka.-20, Site Plan Ex.Ka.-21, Charge-sheet Ex.Ka.-22, F.I.R. and Registration G.D. relating to the case under Arms Act as Ex.Ka.-23, Ex.Ka.-24, Ex.Ka.-25 and Ex.Ka.-26 respectively have been proved.

14. (P.W.1) Bacchu Singh is the original informant and the husband of the deceased. He has supported the F.I.R. version in his examination-in-chief and has affirmed the fact that his wife Laxmi had left his house on 12.7.2011 after receiving a telephone call of the accused Mahendra alongwith two lac rupees, jewelleries and clothes, as was informed to him by his daughter. On 15.07.2011, he had seen the dead body of Laxmi at Postmortem House, Mathura. He has proved the written report given by him to the police station as Ex.Ka.-1. However, he has admitted in his cross-examination that he had not seen his wife going alongwith the accused. He has stated that the accused used to come to his house from about one year prior to the incident. He has also proved the fact that Rs.90,000/- were recovered by the police from accused Ganga Dhar and the memo thereof was prepared by the police at the police station.

15. (P.W.2) Pooran Singh is the real brother of the informant and he has affirmed the fact in his deposition that he and his two brothers had executed an agreement to sale for a consideration of six lakh rupees and rupees two lakh each were received by all the three brothers, as per their respective shares. However, his testimony, as to the other facts of the case comes within the category of hearsay evidence. The noteworthy part of the deposition of this witness is that when two lakh rupees were distributed amongst all the three brothers including himself, he had made his signature over each and every currency note. Rupees four lakhs were in the form of rupees five hundred notes, whereas rupees two lakh were in the form of rupees one hundred notes and he had signed over all the currency notes.

16. P.W.1 and P.W.2 both state that they found the dead body of the deceased at Postmortem house, Mathura on 15.07.2011.

17. (P.W.3) Bhagwan Dei, is the daughter of the deceased, who in her examination-in-chief has stated that on 12.07.2011, she had received a phone call from the accused Mahendra, who wanted to talk to her mother and after receiving that call, her mother left the house alongwith money, clothes and jewels telling her to come back within two hours, as she was going to her parents' home at Nahra. She herself went to leave her to the Tempo Stand. Thereafter, when she tried to contact her mother on phone, the phone was switched off and subsequently her dead body was found. She has further stated that when she was returning from the Tempo Stand after leaving her mother there, she had seen accused Mahendra Singh, Ganga Dhar and Baniya @ Balveer at the Tempo Stand.

18. It is noteworthy that all the aforesaid prosecution witnesses admit that

the murder of the deceased was not committed before them.

19. (P.W.4) Shri Chandra is the witness of last seen and also of extra-judicial confession made by accused Ganga Dhar to him. In his deposition, he has stated that on 12.07.2011 at about 1:00 P.M., he had seen Laxmi wife of Bacchu, going alongwith accused Baniya @ Balveer and Ganga Dhar Nai at the Tempo Stand of the Village. Laxmi had taken a bag and on his query, she told that she was going to her parents' house. On 15.07.2011, he came to know that Laxmi has been murdered. He has further stated that on 16.07.2011, Ganga Dhar Nai, the native of his village came to him and confessed the crime of murder of Laxmi, alongwith Mahendra and Baniya @ Balveer, being seduced by them. Accused Ganga Dhar further told him that in a planned manner, all the three accused had murdered Laxmi by using knife and the dead body was concealed under the grass near the tree besides the railway boundary. He has further stated that the fact of last seen and extra-judicial confession was disclosed by him to the Investigating Officer. He has further stated that he had no friendship with accused Ganga Dhar.

20. (P.W.5) Dr. R.S. Maurya has performed the autopsy of the deceased. Explaining the injuries found over the body of the deceased, he has stated that the death might have been caused on 12.07.2011 at about 1:00 P.M. He has further stated in his cross-examination that the injuries found over the body of the deceased have not been caused by use of sharp-edged weapon or knife rather the injuries might be inflicted by use of any blunt object.

21. (P.W.6) Constable Clerk Krishna Pal Singh is the scribe of the F.I.R., who has proved Chik F.I.R. Ex.Ka.-10 and Registration G.D. Ex.Ka.-11 and has also stated that on the basis of the written report of informant Bacchu Singh, F.I.R. was lodged by him.

22. (P.W.7) S.I. Devendra Kumar Tyagi, is the witness of inquest and has proved the inquest report as Ex.Ka.5. He has stated that on the information given by the informer, he had arrested accused Mahendra Singh and Ganga Dhar and rupees fourty thousand cash each in the form of hundred rupee currency notes were recovered from their possession and recovery memo was prepared. He has further stated that both the accused confessed their guilt before the police and on their pointing out, two knives were retrieved by the police and one mobile phone was also handed over by accused Mahendra to the police and the recovery memo was prepared. Subsequently, on 27.08.2011, accused Baniya @ Balveer was also arrested by the police and on his pointing out, rupees ten thousand were recovered by the police from a box kept in the house of the accused, which were in the form of hundred rupee currency notes. Recovery memo Ex.Ka.-12 has been proved by this witness and the photo copies of the currency notes and their bundles were also proved as Material Ex.-1 to Material Ex.-9.

23. (P.W.8) S.H.O. Devendra Singh is the Investigating Officer of the case, who has proved the proceedings of the investigation in his deposition. The factum of arrest of accused Mahendra Singh, Ganga Dhar and subsequently of Baniya @ Balveer and recovery of knives on the pointing out of accused Mahendra Singh and Ganga Dhar and also of currency notes to the tune of total ninety thousand rupees

from all the accused persons has been proved by this witness. He also proves recovery memos Ex.Ka.-14, Ka.-15, Ka.-16, Ka.-17, Site Plan Ex.Ka.13 and charge-sheet Ex.Ka.-18 as well and states that the case properties were sent to F.S.L. The alleged murder weapon, two knives have been proved by him as Material Ex.-10 and Material Ex.-11.

In the cross-examination, he has stated that nothing came to his knowledge regarding the love affair between the accused Mahendra and deceased.

24. (P.W.9) S.H.O. Saleem Khan, is the Investigating Officer of the case under Section 4/25 Arms Act. In his deposition, he has proved the proceedings of the investigation relating to both the cases under Section 4/25 Arms Act and the site plan as well as charge-sheet as Ex.Ka.-20, Ka.-21. As a secondary witness, he has proved the F.I.R. and Registration G.D. relating to both the accused, Mahendra and Ganga Dhar as Ex.Ka.-23, Ex.Ka.-24, Ex.Ka.-25 and Ex.Ka.-26 respectively, for the cases under Arms Act.

25. The learned trial court upon scrutiny of the evidence on record concluded that the case of prosecution was proved beyond reasonable doubt against all the accused persons and recorded conviction and sentence against the accused persons as hereinabove mentioned.

26. Assailing the impugned judgment on various grounds, learned counsel for the appellants have submitted that the prosecution case is based upon circumstantial evidence, but the chain of circumstances is not complete, so as to prove the guilt of the accused. Even the evidence of last seen has not been proved in proper manner. There was no motive for the appellants to do away with the deceased. The Investigating Officer also did not find even a whisper of evidence to the effect that appellant Mahendra Singh was having any affair with the deceased. The so called extra-judicial confession by appellant Ganga Dhar to (P.W.4) Shri Chandra is not a reliable piece of evidence and there was no occasion for appellant Ganga Dhar to make any extra-judicial confession to P.W.4. The prosecution case does not find support from the medical evidence as well which also falsifies the alleged recovery of knives as murder weapons on the pointing out of appellants Mahendra Singh and Ganga Dhar. The statements of P.W.1 and P.W.2 are also not trustworthy. The F.I.R. has also been recorded belatedly and no plausible explanation has been offered by the prosecution in respect thereof. The investigation of the case is also faulty, which affects the prosecution case in material aspects. The conclusion arrived at by the prosecution is per se perverse and based on no credible evidence.

27. On the aforesaid grounds, a prayer to set-aside the impugned judgment and order and acquittal of the appellants has been made by the learned counsel for the appellants.

28. Per contra, learned A.G.A. has vehemently opposed the present appeals mainly on the ground that the last seen evidence is trustworthy and reliable piece of evidence. (P.W.3) Bhagwan Dei, the daughter of the deceased, had no reason to depose falsely before the court intending false implication of the appellants. The motive of the incident has also been proved by cogent evidence. The appellants wanted to grab the money from the poor deceased

lady and in the accomplishment of this object, under the criminal conspiracy, they caused murder of the deceased and grabbed the money from her and a part thereof was recovered from their possession, which further substantiates the prosecution allegations. All the links make a complete chain of circumstances and are sufficient to prove the guilt of the appellants. There is no material fault or discrepancy in the investigation. The prosecution case is also corroborated by the medical evidence. The informant, being worried and busy in search of his wife, could manage to lodge the F.I.R. only after getting the dead body of his wife and that was the cause for delay in lodging of the first information report. Extra judicial confession made by Ganga Dhar, one of the accused persons, is another piece of strong evidence against all the accused persons. On the aforesaid grounds, it has been stated by the learned A.G.A. that the prosecution story is proved by cogent and reliable oral and documentary evidence. There is nothing on record to suggest that the appellants have been falsely implicated by the informant or police. Hence, the appeals are liable to be dismissed.

Principles governing the cases based on Circumstantial Evidence -

29. Indubitably, present is a case based on circumstantial evidence and no direct evidence lies, on record, to indicate the involvement of the accused persons in the alleged crime. What the prosecution is under obligation to prove in a case based on circumstantial evidence, has been settled in umpteen of cases by the Hon'ble Apex Court and this Court as well.

30. In **Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116,** the Apex Court laid down the following five golden principles, i.e. the panchsheel of the proof of a case based on circumstantial evidence:

(i) The circumstances from which the conclusion of guilt is to be drawn should be fully established. There is not only a grammatical but a legal distinction between "may be proved' and "must be or should be proved". 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.

(ii) 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.

(iii) the circumstances should be of a conclusive nature and tendency,

(iv) they should exclude every possible hypothesis except the one to be proved, and

(v) 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.

31. In **G. Parshwanath Vs. State of Karnataka, (2010) 8 SCC 593**, it was held that 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, where various links in the chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court.

32. Recently in **Raju Vs. State of Rajasthan, 2022 (121) ACC 954,** the aforesaid legal position has been reiterated.

33. Applying the aforesaid proposition of law in the present case, we are under obligation to search out whether having taken cumulatively, the circumstances are forming the chain which is so complete that there is no escape from the conclusion that within all normal and human probabilities, the crime was committed by the accused only and none else and the aforesaid conclusion must be free from any other hypothesis than that of the guilt of the accused.

Last seen Theory -

34. The first circumstance, which is relied upon by the prosecution, is the last seen theory. It has been submitted that the deceased was seen last time in the company of the appellants and thereafter her dead body was recovered. P.W.3, the daughter of the deceased, develops the story of last seen in her cross-examination where she states that while returning from the tempo stand, she had seen Bania, Mahendra and Ganga Dhar standing over the Tempo stand. She had made a specific statement that she had not seen anyone carrying her mother or killing her. Hence, the theory of last seen is not sufficiently proved by the evidence of P.W.3.

35. P.W.4, is another witness of last seen and states that on 12.07.2011 at about 1:00 P.M., he had seen Laxmi going with Bania @ Balveer and Ganga Dhar Nai at the tempo stand of the village who told him that she was going to her parental house. On 15.07.2011, he came to know that she has been murdered. He has further stated that on 12.07.2011 itself, when the informant met him, he had disclosed this fact to him. It is noteworthy that (P.W.1) Bacchu Singh does not state even a single word in respect of meeting of deceased with P.W.4 or any conversation between them. Surprisingly, this fact was not mentioned in the F.I.R. Ex.Ka.-10, lodged four days thereafter by the informant, which was a material fact. It is significant to note that on the point of last seen, the deposition of P.W.4 does not find place in his statement recorded by the investigating officer P.W.8, as admitted by P.W.4 himself.

36. P.W.4 further states in his cross-examination that it is true that many persons were standing at the tempo stand and hence he is unable to tell as to with whom Laxmi had come and whether she was accompanied by anyone or was all alone. He is also unable to tell the time when Laxmi Devi went by tempo nor he has shown the place to the Investigating Officer where she was standing.

37. P.W.4 has also stated, in his cross-examination, that he did not meet any family member of Bacchu Singh at the tempo stand and except Laxmi, Ganga Dhar and Baniya @ Balveer, no other person met him at the tempo stand. This statement shakes the credibility of this witness in the light of the evidence of P.W.3, the daughter of the deceased, who has stated that she had gone to the tempo stand alongwith her mother and came back from there after her mother took her place in the tempo. This contradiction shows that P.W.4, in fact, was not present at the tempo stand and he is not a witness of last seen.

38. We find hearsay evidence of P.W.2 on the point of last seen, which is of no value. Notably, Badan Singh and Saudan Singh, who allegedly told P.W.2 in respect

of last seen of the deceased in the company of accused persons, as P.W.2 states, are not examined as prosecution witnesses, nor they are named in the charge-sheet as witnesses.

39. On the basis of the aforesaid analysis, it is explicit that the evidence rendered by the prosecution in respect of the last seen is not reliable and trustworthy rather it is shaky and in fact, the prosecution evidence reflects that there was no witness of last seen. We also find that P.W.2 (Pooran Singh) and P.W.4 (Shri Chandra) nowhere state that appellant Mahendra was also seen by them at the tempo stand alongwith the deceased. It is true that the statement of P.W.3 (Bhagwan Dei) shows that the deceased had left her house on receiving a phone call by appellant Mahendra, but there is no cogent evidence to this fact that she actually went to the appellant Mahendra after leaving her house.

40. In **Dharam Deo Yadav vs. State of U.P., (2014) 5 SCC 509**, it has been held that "normally the last seen theory comes into play when the time gap between the point of time when the accused and 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 perpetrator of the crime becomes impossible. It will be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. However, if the prosecution, on the basis of reliable evidence, establishes that the missing person was seen in the company of the accused and was never seen thereafter, as in the present case, it is obligatory on the part of the accused to explain the circumstances in which the missing person and the accused parted company. In such a situation, the proximity of time between the event of last seen together and the recovery of the dead body or the skeleton, as the case may be, may not be of much consequence".

41. Referring the statement of (P.W.5) Dr. R.S. Maurya, it has been vehemently submitted by the learned State counsel that at the time of autopsy of the dead body of the deceased on 15.07.2011, it has been found by the doctor (P.W.5) that the death of the deceased might have been caused on 12.07.2011 at about 1:00 P.M. He has also opined that the death might have been occurred three days before the postmortem. On the basis of said medical evidence, it has been submitted that soon after the last seen of the deceased in the company of the appellants, her homicidal death was caused.

42. The legal position in respect of the last seen theory has also been explained in a catena of decisions of the Apex Court and this Court also such as **State of Goa vs. Pandurang Mohite, AIR 2009 SC 1066, State of U.P. vs. Satish, 2005 (3) SCC 114, Mohibur Rahman & Another vs. State of Assam, 2002 (2) JIC 972 (Supreme Court), Rohtash Kumar vs. State of Haryana, 2013 (82) ACC 401 (SC) (Paragraph 25), Ashok vs. State of Maharashtra, (2015) 4 SCC 393, Niranjan Panja vs. State of West Bengal, 2010 (6) SCC 525.**

43. If we summarize the legal theory regarding last seen as emerges out from the observations made in the aforesaid judgments, we reach at a definite conclusion that in fact, it would be difficult in some cases to positively establish that the deceased was last seen with the accused

when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases where prosecution depends upon the theory of last seen together. Further, it is always necessary that the prosecution should establish time of death. Even if it is assumed that the death of the deceased in the present case happened on 12.07.2011, as may be inferred from medical evidence, the question stands as to on the basis of which evidence the prosecution succeeds to establish the theory of last seen and the answer is that there is no evidence.

44. It is true that the doctrine of established "last seen together' shifts the burden of proof on accused requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard would give rise to a very strong presumption against him.

45. In an established last seen case, the prosecution exempted to prove exact happening of incident, as accused himself would have special knowledge of incident and thus would have burden of proof as per Section 106 Evidence Act, although the initial burden of proof is on prosecution to adduce sufficient evidence pointing towards the guilt of the accused.

46. Hence in the present case, the careful scrutiny of the evidence leads us to the definite conclusion that the last seen theory has gone and, at this juncture, we also find that the learned trial court relying upon the last seen theory has committed a grave error.

Extra Judicial Confession -

47. As another circumstance, to prove the guilt of the appellants, the prosecution has relied upon the extra-judicial confession made by appellant Ganga Dhar to (P.W.4) Shri Chandra. P.W.4, in his examination-in-chief, states that on 16.07.2011, appellant Ganga Dhar Nai had come to him in the village and requested to save him. He, while admitting his guilt, told that in the bad company of Mahendra and Balveer, he has committed a grave mistake and alongwith both of them he has committed murder of Laxmi. Further, he also disclosed the place of concealment of the dead body and the murder weapon (knife) and the bag of the deceased and the time of murder as well. However, in his cross-examination, he states that Ganga Dhar had come to him on 15.07.2011 and this contradiction had been put to him by the defence side in his cross-examination.

48. So far as the confessions are concerned, the law never says that the confessions, in any circumstance, cannot be relied upon at all. If one directly acknowledges his guilt in a criminal charge, he is said to admit his guilt, which in law is called as confession. However, if the confession has been caused by way of any inducement, threat or promise, it, in all circumstances, is irrelevant in a criminal proceeding.

49. As regarding extra-judicial confession, it was so held in **State of U.P. Vs. M.K. Anthony, (1985) 1 SCC 505** that extra-judicial confession appears to have been considered as a weak piece of evidence, but there is no rule of law, nor rule of prudence that it cannot be acted upon unless corroborated. It was also pronounced in **Narayan Singh Vs. State of**

M.P., (1985) 4 SCC 26 that it is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend upon the nature of the circumstances, the time when the confession was made and the credibility of the witnesses, who speak about such a confession. Another authority on the subject is **Jagta Vs. State of Haryana, (1974) SCC (4) 747** wherein it was clarified that the evidence about an extra-judicial confession is, in the nature of things, a weak piece of evidence. If the same is lacking in probability, there would be no difficulty in rejecting the same.

50. If we translate the aforesaid theory into the facts and circumstances of this case, we find that (P.W.4) Shri Chandra, in his examination-in-chief, states not only about the confession made by appellant Ganga Dhar Nai to him on 16.07.2011, but the disclosure of this fact also that all the three appellants, after committing the murder of Laxmi by use of knife concealed her dead body near the trees under grass besides the railway boundary and her bag was also hidden there. He also states, in his examination-in-chief, that the extra-judicial confession was made to him by appellant Ganga Dhar on 16.07.2011. This statement takes us to the statement of P.W.8, the Investigating Officer, who has stated that on 16.07.2011, he had visited the place of occurrence and while coming back, he had recorded the statement of Shri Chandra son of Chibbo on the way and on the basis of his statement, the names of accused Mahendra, Ganga Dhar and Baniya @ Balveer came into light. We also find that for extra judicial confession, different dates have been stated by P.W.4 as to when appellant Ganga Dhar came to him and he tells both the dates as correct which makes his testimony doubtful so far as the factum of extra-judicial confession is concerned.

51. We are obliged to examine this aspect also as to why appellant Ganga Dhar chose (P.W.4) Shri Chandra to make his extra-judicial confession before him. P.W.4 is a farmer and resides in the same village where appellants Balveer and Ganga Dhar reside. As he states in his evidence, he is a common man having no influential credit nor holding any high official post or any intimate relations with the informant so that appellant Ganga Dhar would be under impression that he might have saved him. In his cross-examination, P.W.4 states that he belongs to Thakur caste and Ganga Dhar is Nai (Barber) by caste. They are not relatives to each other and he never happened to be in any friendship with Ganga Dhar. He also contradicts P.W.8, the Investigating Officer when he makes statement to disclose the fact of extra judicial confession to the police 3 - 4 days after its making, whereas P.W.8 states this date to be as 16.07.2011. This situation may also be taken into account that whether the factum of accused making confession, all of a sudden, in absence of any cogent reason on his part, especially when the Investigating agency had no clues regarding crime, may be accepted as genuine and reliable. This fact also cannot be over-sighted that appellant Ganga Dhar is not said to be the main culprit, it was appellant Mahendra, whose name was disclosed as the person on whose call the deceased left her house.

52. Learned counsel for the appellants, referring to these statements, vehemently states that in the light of the aforesaid statement, there was no reason for appellant Ganga Dhar to go to the witness Shri Chandra and to make such a serious

confession of the offence of murder, who was a common man and was never in a position to protect him.

53. After making a close scrutiny of the testimony of P.W.4 and the circumstances surrounding the extra-judicial confession, we find that the alleged extra-judicial confession in this case is not a reliable piece of evidence. Recently in **Union of India Vs. R. Metri, (2022) 6 SCC 525**, the Apex Court has held that extra-judicial confession is weak piece of evidence and unless such confession is found to be voluntary, trustworthy and reliable, conviction solely on the basis of the same without corroboration, is not justified.

54. We have no hesitation to hold that the principles enumerated in the aforesaid case law squarely apply to the facts and circumstances of this case. The alleged extra-judicial confession said to be made to P.W.4 by appellant Ganga Dhar is not trustworthy and requires solid corroboration which, no doubt, is missing in this case and hence, we ignore and reject the alleged extra-judicial confession, as relied upon by the prosecution.

Motive and Recovery of Currency Notes and knives -

55. In a catena of decisions, it has been settled that motive keeps a significant place and is countenanced in a case based upon circumstantial evidence.

56. Learned A.G.A. in his argument, as advanced before this Court, has impressed upon the fact that appellant Mahendra was having some affair with the deceased and this fact was also known to him that rupees two lac were kept in the house of the deceased, which were received by her husband P.W.1, as his share in the sale consideration of his land. It has been brought into the evidence that the deceased had left her house alongwith two lac rupees, clothes and jewelleries. It has been submitted by the learned State counsel that to grab the money and jewellery aforesaid, the deceased was taken by the appellants and after taking the money and articles, they caused murder of the deceased and subsequently, Rs.90,000/- out of the aforesaid amount, were recovered in different parts from the respective possession of the appellants. It has been further submitted that the currency notes, which were recovered from the possession of the appellants, were bearing the signature of P.W.2 (Pooran Singh). P.W.2, in his deposition, has stated that he had made his signature over each and every currency note. It has been further argued that no doubt is left to presume that the currency notes retrieved from the appellants were the same, which were taken by the deceased with her while leaving her house.

57. Learned counsel for the appellants have submitted that the evidence of P.W.2 is not natural and he is an unreliable witness when he states that he had made his signature over each and every currency note. P.W.2 has deposed that two lac rupees were in the form of 100/- rupee currency notes and four lac rupees were in the form of 500/- rupee currency notes and he had signed over all the currency notes. The bundles of 100/- rupees currency note were taken by the deceased while leaving her house.

58. Learned counsel for the appellants submit that in the light of the aforesaid statement of P.W.2, it may be assumed that

two thousand currency notes in the form of Rs.100/- per currency note were taken by the deceased and P.W.2 had already made his signature over each and every note. It has been vehemently argued that it is neither natural nor believable that P.W.2 signed over two thousand currency notes without any reason and his statement does not appeal to the common sense. We find force in the contention of the learned counsel for the appellants. There was no need or justification to sign over two thousand currency notes and over other currency notes also, which were in the form of Rs.500/- currency notes.

59. Learned State counsel has submitted that P.W.7 proves that Rs.40,000/- each in the form of Rs.100/- currency notes were retrieved by appellants Mahendra and Ganga Dhar respectively and the signatures of Pooran Singh, P.W.2 were found over the first and last currency note of the bundle. Accordingly, Rs.10,000/- in the form of a bundle of Rs.100/- currency notes were retrieved by appellant Balveer from his house and in this bundle also, the signatures of Pooran Singh, P.W.2 were found over the first and last currency note.

60. However, the aforesaid recovery has been denied by the appellants in their statement under Section 313 Cr.P.C. It is noteworthy that no question regarding the recovery of Rs.10,000/- has been put to appellant Balveer in his statement under Section 313 Cr.P.C. Learned counsel for the appellant - Balveer vehemently argued that this omission on the part of the learned trial court creates a prejudice to the defence of the appellant, as he was not aware of the incriminating evidence of recovery of currency notes adduced against him.

61. Reliance has been placed upon **Nar Singh Vs. State of Haryana, (2015) 1 SCC 496** wherein it has been held that -

"(10). There are two kinds of examination under Section 313 Cr.P.C. The first under Section 313 Cr.P.C. (1) (a) Cr.P.C. relates to any stage of the inquiry or trial; while the second under Section 313 Cr.P.C. (1) (b) Cr.P.C. takes place after the prosecution witnesses are examined and before the accused is called upon to enter upon his defence. The former is particular and optional; but the latter is general and mandatory."

"(11). Section 313 Cr.P.C. prescribes a procedural safeguard for an accused, giving him an opportunity to explain the facts and circumstances appearing against him in the evidence and this opportunity is valuable from the standpoint of the accused.....The object of Section 313 (1) (b) Cr.P.C. is to bring the substance of accusation to the accused to enable the accused to explain each and every circumstance appearing in the evidence against him. The provisions of this section are mandatory and cast a duty on the court to afford an opportunity to the accused to explain each and every circumstance and incriminating evidence against him. The examination of accused under Section 313 (1) (b) Cr.P.C. is not a mere formality."

62. In **Satbir Singh Vs. State of Haryana, (2021) 6 SCC 1**, it was reiterated like this -

"It is a matter of grave concern that, often, Trial Courts record the statement of an accused under Section 313 Cr.P.C. in a very casual and cursory manner, without specifically questioning the accused as to his defence. It ought to be noted that the examination of an accused under Section

313 Cr.P.C. cannot be treated as a mere procedural formality, as it is based on the fundamental principle of fairness. This provision incorporates the valuable principle of natural justice - "audi alteram partem", as it enables the accused to offer an explanation for the incriminatory material appearing against him. Therefore, it imposes an obligation on the part of the Court to question the accused fairly, with care and caution. The Court must put incriminating circumstances before the accused and seek his response."

63. In the facts and circumstances of the case and keeping in view the observations made in the aforesaid case laws by the Apex Court, we are of the view that serious prejudice has been caused to appellant Balveer by the aforesaid omission which goes against the prosecution.

64. Learned counsel for the appellants have vehemently submitted that, if any circumstance is not explained by the accused in his statement under section 313 Cr.P.C., this alone is not liable to be held them guilty. Reliance has been placed upon **Bharat Vs. State of M.P. (2003) 3 SCC 106**, wherein it has been observed that if the accused failed to offer any explanation in his statement under Section 313 Cr.P.C., it cannot be held proof of his guilt. No doubt, the aforesaid law leans in favour of the appellants as the burden of proof lying upon the prosecution cannot be replaced.

65. The aforesaid submissions made by both the sides take us to meticulously scrutinize the evidence on record in reference to the motive to commit the crime and the alleged recovery of currency notes on the pointing out of the appellants. 66. To ascertain the fact whether appellant Mahendra had some affair with the deceased, we are obliged to peruse the oral evidence of P.W.1 (Bacchu Singh) and P.W.2 (Pooran Singh). P.W.1 deposes that appellant Mahendra is his neighbourer, who was well known to him and used to come to his house. We do not find even a whisper in the entire testimony of P.W.1 that his wife, the deceased and appellant Mahendra had any affair. His real brother P.W.2 has deposed that he has stated before the police that he had some doubt over the character of Mahendra. Mahendra used to visit the house of his brother Bacchu Singh much prior to the present incident.

67. P.W.3, the daughter of the deceased states that everyone in the house disliked the visit of Mahendra except her mother and she disliked him because he used to come in a drunken position.

68. Further, the attention of the Court is drawn towards the statement of P.W.8 (Devendra Singh), the first Investigating Officer, who has stated in clear terms that " विवेचना में महेंद्र और मृतका श्रीमती लक्ष्मी देवी का प्रेम प्रसंग मेरी जानकारी में नहीं आया था, बल्कि मृतका के पास दो लाख रुपये तफ्तीश में आई थी जिसकी वजह से उसका क़तल हुआ था"

69. In the light of the statement of P.W.1, the husband of the deceased and P.W.8, the first Investigating Officer, we arrive at the conclusion that there is no evidence on record to show that the deceased and appellant Mahendra had been indulged in some affair.

70. So far as the factum of recovery of currency notes on the pointing out of the appellants is concerned, the statements of P.W.7 (S.I. Devendra Kumar Tyagi) and P.W.8 (Devendra Singh) make a sketch of the story of recovery in the manner that Rs.40,000/- each were retrieved from the

possession of appellants Mahendra and Ganga Dhar when they were arrested by the police and recovery memo Ex.Ka.-14 was proved by P.W.8, whereas Rs.10,000/- were retrieved on the pointing out of appellant Balveer, which remind us that the recovery of currency notes on the pointing out of appellant Balveer comes within the scope and purview of Section 27 of the Evidence Act.

71. As P.W.7 (S.I. Devendra Kumar Tyagi) deposes, accused Balveer had stated in the police custody that he alongwith other co-accused Mahendra and Ganga Dhar had murdered Laxmi and the dead body was concealed near the railway boundary and Rs.90,000/- got from her bag, were distributed amongst them and he got Rs.10,000/- as his share, which was concealed by him in a box in his house. Pursuant to that statement, when the police went to his house, he opened a box inside his house and one bundle of Rs.100/- currency notes kept in a polythene was handed over by him to the police and the bundle bore the name of Pooran Singh over the first and last currency notes. The bundle of notes was seized and recovery memo Ex.Ka.-12 was prepared on the spot. P.W.8 (Devendra Singh) also proved the recovery memo. The aforesaid articles were proved as Material Exts. 1 to 9 by P.W.7. It is submitted by learned A.G.A. that the aforesaid recovery is admissible under Section 27 of the Evidence Act, which is a strong circumstance against the appellants and P.W.7 & P.W.8 are material witnesses to prove such recovery.

72. The aforesaid recovery has been assailed by learned counsel for the appellants. It has been argued that there is no public witness of the alleged recovery and the recovery is false and fabricated. In this connection, cross-examination of P.W.1, the informant / husband of the deceased has been referred who, in his cross-examination, has deposed that Rs.90,000/- were recovered from the possession of appellant Ganga Dhar only at 10:00 A.M. and the date was 16th. He also states that at the time of recovery, he was present on spot alongwith several persons of the village and appellant Ganga Dhar was also present in custody of the police. However, his signature was not obtained by the police over the memo and the recovery memo was prepared at the police station.

73. Since P.W.1 is the informant and the husband of the deceased, his testimony has a distinguished weight. It is very significant to note that on this point, the prosecution did not request the court to permit it to cross-examine P.W.1 and in this situation, his aforesaid statement finds force and is binding upon the prosecution and it takes us to the relevant law promulgated in **Javed Masood and Another Vs. State of Rajasthan, (2010) 3 Supreme Court Cases 538** wherein it has been held that -

"19.....The testimony of Mohammad Ayub (PW 6) cannot easily be surmounted by the prosecution. He has testified in clear terms that PWs 5, 13 and 14 were not present at the scene of occurrence. It is not known as to why the public prosecutor in the trial court failed to seek permission of the court to declare him "hostile". His evidence is binding on the prosecution as it is. No reason, much less valid reason has been stated by the Division Bench as to how evidence of PW-6 can be ignored.

In the present case the prosecution never declared PWs 6,18, 29 and 30 "hostile". Their evidence did not support

the prosecution. Instead, it supported the defence. There is nothing in law that precludes the defence to rely on their evidence."

74. In the light of the aforesaid legal position, if we scrutinize the aforesaid statement of P.W.1, we find that according to P.W.1, Rs.90,000/- were recovered from appellant Ganga Dhar alone and if this statement is taken as it is, the story of recovery of Rs.10,000/- on the pointing out of appellant Balveer becomes totally false and baseless. This statement also clarifies that appellant Mahendra was even not present on the spot when Rs.90,000/- is said to be retrieved and no money was recovered from him. It is also significant to mention that Ex.Ka.-14, the recovery memo bears the date as 17.07.2011, whereas the informant P.W.1 states that the recovery was made on 16th.

75. 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."

76. Learned counsel for the appellants has contended that the incident is said to be happened on 12.07.2011 and appellants Mahendra and Balveer were arrested by the police on 17.07.2011 and as per statement of P.W.8, they were having currency notes of the value of Rs.40,000/-, each in the form of Rs.100/- currency notes in the pocket of their pants. It is submitted that it is quite improbable that even after five days of the occurrence, they were wandering with the alleged currency notes, which were obtained by them from the deceased. It was also argued that there is no public or independent witness of the said recovery and the statement of P.W.1, who states that the recovery memo was prepared at the police station, itself falsifies the whole story of alleged recovery of currency notes. In the facts and circumstances of the case, we find ourselves in agreement with the submissions of the learned counsel for the appellants.

77. It is also notable that the aforesaid recovery does not fall within the ambit of Section 27 of Evidence Act, as it was not made in consequence of any information received from both the appellants while in police custody.

78. We may recall the statement of (P.W.2) Pooran Singh, who stated in clear terms that on each and every currency note, he had made his signatures. Admittedly, the signature of (P.W.2) Pooran Singh, is not found on each and every currency note allegedly retrieved from the accused persons. This fact also cannot be ignored that the said currency notes were not put before P.W.2 at the time of recording of his testimony before the court and he had no opportunity to identify his signature over the currency notes and to prove that they are the same currency notes which were signed by him.

79. Another link to complete the chain of circumstances is the recovery of knives

on the pointing out of accused-appellants Mahendra and Ganga Dhar, which are claimed to be murder weapons by the prosecution. The aforesaid knives have been proved as Material Exs.-10 and 11 by P.W.7. It is deposed by him that on 17.7.2011, both the aforesaid appellants were arrested by the police. Murder weapons, two knives, were retrieved on their pointing out, which was made subsequent to their statement made to the police confessing their guilt.

80. Learned State Counsel has vehemently submitted that the recovery of knives is a fact discovered pursuant to the disclosure statement made by both the appellants which is admissible under Section 27 of the Evidence Act. Recovery memo (Ex.Ka.-16) and the site plan of place of recovery Ex.Ka.-15 have been properly proved by the Investigating Officer P.W.8. Relying upon **Mahendran Vs. State of Tamil Nadu, (2019) 5 SCC 67,** he has submitted that relevant fact discovered on the basis of common memorandum of recovery prepared on the basis of disclosures made by the accused persons separately is admissible and this argument has been advanced in the light of the recovery memo Ex.Ka.-16, which is a joint recovery memo.

81. Learned counsel for the appellants has assailed the alleged recovery by arguing that the alleged recovery has been made on 17.7.2011, i.e. five days after the occurrence. There is no public or independent witness of the said recovery, as has been admitted by the Investigating Officer (P.W.8) Devendra Singh himself and the evidence of police officials only is not reliable.

82. The aforesaid rival submissions of both the sides take us to the evidence regarding the recovery of alleged murder weapons. Site plans (Ex.Ka.-15) and (Ka.-21) show that the recovery has been made from the field of Giriraj son of Babu. It is a huge field adjacent to the railway boundary and road. Railway crossing is also existing there at some distance and the recovery place situates in one side of the field which is adjacent to railway boundary and road. Thus, the scene of recovery seems to be a place, visible and accessible to all.

83. In the similar situation, when the recovery of pistol was made from a place which was accessible and visible to anyone and moreover, it was also doubtful whether the said pistol was used in the alleged crime or not, it was held that information leading to discovery of fact is one link in the chain of proof and the other links must be proved in legally permissible manner and it was held, on facts, that the discrepancies and shortcomings in evidence considerably corrode credibility of prosecution version and the inevitable conclusion is that the prosecution has not established the accusations against the accused beyond reasonable doubt and consequently, he is entitled to be acquitted and that is held so in the case of **Anter Singh Vs. State of Rajasthan, (2004) 10 SCC 657.**

84. (P.W.7) S.I. Devendra Kumar Tyagi, while being contradicted on the point of the site of recovery, had made statement contrary to that of Ex.Ka.15 and Ka.-21. According to him, in all the directions of the place of recovery of murder weapon on the pointing out of appellant Mahendra Singh, there are empty fields, whereas in the relevant map in the west of the scene of recovery, railway boundary and road have been shown and it brings the veracity of the site of alleged recovery under cloud of suspicion. He

further states that the two accused persons were arrested at a crowded place and public road, whereas the house of accused Balveer exists in a residential area. Despite that, the absence of public or independent witness of the said recovery also falsifies the story of recovery.

85. In continuation of the scrutiny of evidence regarding recovery of murder weapons, our attention is also drawn to the fact that no FSL Report in respect of the murder weapon, knives, is available on record to connect them with the alleged offence despite the fact that they were sent for chemical examination, as stated by P.W.8, the Investigating Officer.

86. The prosecution has a specific case that the deceased was murdered by use of knives, which are said to be retrieved from the possession of accused Mahendra Singh and Ganga Dhar. We are under obligation to peruse the medical evidence in regard to the recovery of aforesaid knives. As has been mentioned above, P.W.5 (Dr. R.S. Maurya), who has performed the autopsy of the deceased, has found several lacerated wounds on various parts of the body of the deceased. It would be apposite to note here that, in his examination-in-chief, P.W.5 nowhere suggests that the injuries found on the body of the deceased might be inflicted by use of knives. In his cross-examination, he has made a relevant statement that the injuries have not been inflicted by any sharp-edged weapon and significantly, he further states that the injuries have not been caused by knives or any sharp-edged weapon. At the cost of repetition, it is to be reminded that the present is not a case of eyewitness account, rather it is a case of circumstantial evidence where no one has seen the occurrence. Had it been the case based on ocular evidence, the significance of medical evidence might be put into question, but since there is no eyewitness of the occurrence, the medical evidence has its own significance and evidentiary value. Learned counsel for the appellants vehemently submitted that the medical evidence does not support the prosecution version and the alleged recovery of knives is of no use for the prosecution because the knives were not used in the commission of the crime.

87. So far as the absence of public or independent witness is concerned, we notice that the law does not require such a procedure to be adopted at all times, but the strong suspicion is due to the fact that as per medical evidence, the death of the deceased was not caused by use of any sharp-edged weapon or by knives, as the prosecution claims (the medical evidence on this point shall be discussed later in this judgment) and we can successfully take note of the principle enumerated in **Sheesh Pal Vs. N.C.T. of Delhi, (2022) 9 SCC 782**, in this respect.

88. Thus, we find that not only the last seen evidence adduced by the prosecution is shaky and unreliable, as discussed above, which might be the first link to start with the chain of the circumstances, but another incriminating circumstance of extra-judicial confession has also not been found reliable and trustworthy on the basis of such evidence which, while subjecting to a rigorous test on the touchstone of credibility, is proved to be unacceptable.

89. Recently, in **Chandrapal Vs. State of Chhattisgarh (Earlier M.P.), AIR 2022 Supreme Court 2542**, a case depending upon circumstantial evidence,

the Apex Court taking into account the evidence available on record, held that -

"According to prosecution, co-accused had made self-inculpatory confession before witnesses, disclosing involvement of other accused as well. Extra-judicial confession is a weak kind of evidence and unless it inspires confidence or is fully corroborated by some other evidence of clinching nature, ordinarily conviction for the offence of murder should not be made only on the evidence of extra-judicial confession. In absence of any substantive evidence against the accused, the extra-judicial confession allegedly made by the co-accused loses its significance and there cannot be any conviction based on such extra-judicial confession of the co-accused."

It was further held that -

"The time gap between the two incidents i.e., the day when accused was last seen with the deceased and finding of dead body was quite big. It was difficult to connect accused with the alleged crime, more particularly when there is no other clinching and cogent evidence produced by the prosecution. In absence of any other links in the chain of circumstantial evidence, the accused cannot be convicted solely on the basis of "Last seen together", even if version of the prosecution witness in this regard is believable."

90. The aforesaid observation squarely applies in the circumstances of the present case where the dead body of the deceased was found two days after her alleged last seen with the appellants.

91. The story of recovery of currency notes and knives from the possession of the appellants has also serious loopholes. During the investigation, nothing has come into light to show any illicit relation or extra-marital affair of the deceased with appellant Mahendra. All these circumstances, if put together, thrash out another element of "motive' to commit the crime.

92. Since the recovery of currency notes from the possession of and on pointing out of the appellants has not been proved in the manner provided by law, the strong link of motive which could possibly be helpful for the prosecution to prove its case, is also not available to it. In fact, there was no motive of the appellants to do away with the deceased.

In this regard, the legal position is well settled in umpteen of decisions of the Apex Court, such as **Nandu Singh Vs. State of Madhya Pradesh (now Chhatisgarh), 2022 SCC Online Supreme Court 1454, Pannayar Vs. State of Tamil Nadu, (2009) 9 SCC 152, State of U.P. Vs. Kishanpal & Ors., (2008) 16 SCC 73, Suresh Chandra Bahri Vs. State of Bihar, 1995 Supp (1) SCC 80, Babu Vs. State of Kerala, (2010) 9 SCC 189 and Anwar Ali Vs. State of Himachal Pradesh, (2020) 10 SCC 166** and the crux we find is that the absence of motive in case depending upon the circumstantial evidence is a factor that weighs in favour of the accused. Motive plays an important link to complete the chain of circumstances and in the present case the chain of events do not provide a clear motive to substantiate the argument of the respondent.

Call Details Record -

93. Another aspect to link the accused-appellants with the alleged crime as alleged by the prosecution, is Call

Details Record (CDR), which allegedly took place between the deceased and accused-appellant Mahendra Singh. P.W.7 (Devendra Kumar Tyagi), the Investigating Officer deposes that accused-appellant Mahendra handed over a mobile phone Spice M 4250 having no SIM to the police. P.W.8 (Devendra Singh) also states that call details record of the deceased and accused-appellants were collected and mentioned in the case diary, which is available on record. However, nothing further has been stated by both the witnesses and the prosecution completely missed to prove the aforesaid CDR in the manner provided by law, which is an electronic evidence and is admissible as electronic record under Section 3 of Evidence Act as amended by Act 21 of 2000. However, the procedure and authenticity for the admissibility of electronic record depends upon factual situation and it is always required to see that the person producing electronic evidence, has whether furnished certificate as required under Section 65-B (4) of the Evidence Act. Though such certificate is not always mandatory and the Court, in the interest of justice, may relax its requirements, but at the same time, as held in **Anvar P.V. Vs. P.K. Basheer, (2014) 10 SCC 473**, safeguards provided under Section 65-B of the Evidence Act are to ensure the source and authenticity of electronic record, as electronic records are more susceptible to tampering, alteration, transposition, excision, etc. without any safeguard, the whole trial based on proof of electronic records can lead to travesty of justice.

94. Expostulating the evidence regarding the CDR, learned counsel for the appellants has impressed upon the provisions of Section 65-B (4) of the Evidence Act, which requires certain certificates to be produced by the party relying upon the electronic evidence. No such certificate is available on record which was necessary in the facts and circumstances of the case and the availability of which, could not be relaxed as the aforesaid evidence of CDR, if proved properly in the manner prescribed by the Evidence Act, could throw some light upon the relations between the deceased and appellant Mahendra and thus, to enable the Court to draw any inference regarding the motive of the case.

95. On the basis of the aforesaid discussion, we are of the considered view that the prosecution has miserably failed to prove its case beyond reasonable doubt. Learned trial court though has analysed several factors relating to the case, but has not scrutinized the evidence on record in proper and legal manner and thereby, has accorded a perverse finding of conviction. The chain of the circumstances is never complete, which was essential to record a conviction of an accused in a case based on circumstantial evidence. All the material circumstances, like last seen, motive, recovery of murder weapon, extra judicial confession have not been proved for want of cogent and reliable evidence. The evidence rendered by the prosecution is shaky and not trustworthy. The medical evidence stands against the prosecution version. All these shortcomings denude the prosecution case and in the aforesaid legal and factual scenario, we have no option but to set-aside the impugned judgment and order and to record acquittal of all the appellants.

96. Recently, in **Ravi Sharma Vs. State (NCT of Delhi), (2022) 8 SCC 536,** where in the circumstances of the case, the Supreme Court found the last seen theory

not to be true, motive was not proved, recovery of firearm was doubtful, material contradictions found in the evidence rendered and no sufficient link to come to the irresistible conclusion pointing guilt only to appellant, it was reiterated that mere suspicion, howsoever strong it may be, cannot be a substitute for acceptable evidence. In the peculiar circumstances of the present case, the aforesaid theory also applies to this case.

97. Hence, the impugned judgment and order of conviction and sentence, which has been sought to be assailed, calls for and deserves interference. The criminal appeals are liable to be allowed and the same are, accordingly, allowed.

98. The impugned judgement and order dated 26.02.2020 is, accordingly, set aside. The convicts-appellants are accordingly found not guilty for the offence punishable under Sections 302/34, 120-B, 201, 404 IPC and 4/25 Arms Act. They are acquitted from all the charges. Convicts-appellants are in jail. They shall be released forthwith, if not wanted in any other case.

99. Let a copy of this judgment along with trial court record be sent to the Court concerned for necessary compliance. A copy of this judgement be also placed in the connected appeal.

(2023) 3 ILRA 927
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.03.2021

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Appeal No. 2675 of 2021

Achche Lal & Anr. ...Appellants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellants:
Sri Vijay Prakash Yadav, Sri Mohd. Raghib Ali, Sri Mohd. Raghib Ali, Sri Saghir Ahmad(Sr. Adv.)

Counsel for the Respondent:
G.A.

Criminal Law- Indian Penal Code-1860-Sections 304B, 498-A- Dowry Prohibition Act-1961-Sections 3 & 4 - The Indian Evidence Act, 1872-Sections 106, 113B-Accused appellants burnt the victim after pouring kerosene oil on her upon non-fulfillment of the dowry demand-Conviction of accused appellants (Husband & Mother-in-law) U/s 498-A, 304B IPC & Section 4 of D.P Act and acquittal of other co-accused persons-Dowry demand initiated by the husband-Victim subjected to torture and cruelty-Death occurred within seven years of marriage by physical burns and in unnatural circumstances at matrimonial place- Accused failed to divulge any plausible explanation of the death which occurred due to extensive burn injuries received by the deceased at her matrimonial home-Accused failed to discharge reverse burden imposed under law by virtue of Section 106 as well as Section 113-B of the Evidence Act-No specific allegation levelled against Prema Devi (Mother-in-law)-Co-accused who were assigned similar role to that of appellant Prema Devi, have already been acquitted by learned Trial Court, accused Prema Devi deserves to be extended benefit of doubt-Conviction and sentence imposed on appellant Prema Devi is set aside. Appeal in respect of appellant Achchhey Lal (husband) is dismissed.

Appeal partly allowed. (E-15)

List of Cases cited:

1. Sandeep Vs St. of U.P., (2012) 6 SCC 107

2. Prithipal Singh Vs St. of Pun. 2012(76) ACC 680 (SC)

3. Trimukh Maroti Kiran Vs St. of Mah., (2006) 10 SCC 681

4. Laxman Vs St. of Mah., (2002) 6 SCC 710

5. Koli Chunilal Savji Vs St. of Gu.t, 1999 (9) SCC 562

6. VSK. Mishra & anr. Vs St. of Uttarakhand, (2015) 9 SCC 588

7. Surinder Singh Vs St. of Har., (2014) 4 SCC 129

(Delivered by Hon'ble Ram Manohar Narayan Mishra, J)

1. Heard learned counsel for the appellants and learned A.G.A. for the State and perused the lower court record.

2. Instant Crl. Appeal has been preferred by convict appellants Achchhe Lal and Prema Devi against judgment and order dated 19.2.2021 passed by learned Additional Sessions Judge/ FTC (offence against women), Jaunpur passed in S.T. No. 263 of 2017 arising out of Case Crime 292 of 2017, under Section 498-A, 304-B IPC and Section 3/4 D.P. Act, P.S. Sujanganj, District Jaunpur. By the impugned judgment and order, learned Trial Court has convicted the appellants for charge under Sections 498-A, 304B IPC and Section 4 of D.P. Act. One year imprisonment and Rs. 2,000/- fine for charge under Section 498-A IPC, 10 years imprisonment for charge under Section 304B IPC and six months imprisonment and Rs. 1,000/- fine for charge under Section 4 D.P. Act and all the sentences were directed to run concurrently.

3. Factual matrix of the case relevant for present appeal is that informant Udayraj Bind, who is r/o Umrikhurd, P.S. Maharajganj, District Jaunpur, lodged an F.I.R. on the basis of written report Ext. Ka-1 at P.S. concerned with averment that his niece Roshni Bind was married with Achchhey Lal Bind S/o Prahland Bindh, R/o village Sujahniya, P.S. Sujanganj, District Jaunpur, on 24.4.2014. Husband and in-laws of his niece were not satisfied with the gifts and dowry given which were given to them in marriage and they started demanding additional dowry to the tune of Rs. 5,00,000/- from Roshni and on non-fulfillment of their demand of dowry, they used to beat and torture her. On 24.5.2017 she was badly tortured by accused persons Achchhey Lal (husband), Rati Lal (husband's brother), Aneeta (sister-in-law) and Prema Devi (mother-in-law). He got apprised of this fact on 24.5.2017 in the evening telephonically. He visited the matrimonial home of his niece by taking a hired vehicle but the accused persons refused to send her off to her parental place. They snatched the child of 18 months from her lap and for that reason she could not accompany the informant to visit her parental home. The informant and his companions returned home thereafter. However, on 26.5.2017 at 12:00 noon he was informed that his daughter (niece) has been burnt. When the informant and his family members reached on the spot, they were apprised of the fact that she was burnt and she has been admitted to P.H.C. Sujanganj and thereafter she was referred to District Hospital for Jaunpur. Informant side visited the victim at P.H.C. Sujangaj where she stated that her husband Achchhey Lal Bind, father-in-law Prahlad, brother-in-law Rati Lal, sister-in-law Aneeta and mother-in-law Prema had burnt her after pouring kerosene oil on her body. Victim died on way to District Hospital. The informant lodged an F.I.R. at P.S. concerned on 26.5.2017 at 16:45 hours.

4. The inquest on dead body of the deceased was conducted on 27.5.2017 between 10:00 am to 12:00 hours. Post mortem of the deceased was conducted by Dr. R.P. Vishwakarma (PW-5) on 27.5.2017 at 3:35 PM. Doctor has stated in his post-mortem examination report that in his opinion, cause of death is due to shock as a result of severe flame burn injury, approximately 98% (ante-mortem).

5. Investigating Officer recorded statements of witnesses of fact Naib Tehsildar Sri Ram Narain as PW-8, Dr. Rajendra Prasad Vishwakarma as PW-5, other witnesses of fact and formal witnesses and finding complicity of accused persons submitted two charge sheet, one against Achchhey Lal, Prahlad and Rati Lal and other against Aneeta and Prema Devi under Sections 498-A, 304B IPC and 3/4 D.P. Act on 20.8.2017 and 13.11.2018 respectively.

Learned magistrate took cognizance of the offence on the basis of charge sheet and summoned accused persons to face trial. Charge sheeted accused persons were enlarged on bail except accused Achchhey Lal and Prema Devi. Learned Magistrate committed the case for trial to Court of Sessions finding the offence being exclusively trial by the Court of Sessions. On commencement of Session Trial, learned Court concerned framed charges under Sections 498-A, 304B and 3/4 D.P. Act against Achchhey Lal, Prahlad and also alternative charge under Section 302/149 IPC against five accused persons. Case of co-accused Rati Lal (brother-in-law of the victim) was referred for trial to J.J.B as he was found juvenile in conflict of law.

6. Trial Court examined PW-1 Uday Raj Bind (informant), PW-2 Pappu @ Hari Shankar (father of the deceased), PW-3 Heerawati @ Kalawati (mother of the deceased), PW-4 Arjun (other uncle of the deceased), PW-5 Dr. Rajendra Prasad Vishwakarma, who conducted post-mortem on the body of the deceased, PW-6 Mandhata Pratap Singh (then Naib Tehsildar) who conducted inquest on the dead body of the deceased on 27.5.2015 at mortuary of District Hospital, Jaunpur, PW-7 Santosh Kumar Shukla (Naib Tehsildar), who recorded dying declaration of the deceased on 26.5.2017 at C.H.C., Sujanganj, PW-8 Ram Narayan Srivastava(then Head Mohrrir) who is author of Chick F.I.R. and extracts of G.D. of registration of case on the date of lodging of F.I.R., PW-9 Vinay Kumar Dwivedi (C.O.), who investigated the case and filed charge sheet against accused Achchhey Lal, Prahlad and Rati Lal dated 20.8.2017 before the Court, PW-10 Uma Shankar Singh C.O.), who carried out initial investigation in the case and PW-11 Digvijay Singh (then C.O.), is last investigating officer of the case who carried out remaining investigation after transfer of Sri Vimay Kumar Dwivedi (PW-9) and filed charge sheet against Prema Devi, Roshni and Aneeta under Section 498-A and 304B IPC and 3/4 D.P. Act.

7. After conclusion of prosecution evidence, statement of accused persons Achchhey Lal, Rati Lal, Prema Devi, Prahlad, Roshni and Aneeta was recorded by the Trial Court under Section 313 Cr.P.C. in which they stated that witnesses have falsely deposed against them. PW-7 Naib Tehsildar recorded dying declaration of the victim/deceased in conspiracy with informant and police. The case was proceeded against them to extract the money after death of the deceased Roshni.

8. In defence evidence accused persons examined DW-1 Sita Devi, mother-

in-law of accused-Roshni and DW-2 Ram Bali, who is father-in-law of accused Aneeta, DW-3 Rama Pati, who is neighbour of accused Prahlad where he stalls a tea shop.

9. Trial Court heard the arguments of learned counsel for the State as well as defence counsel and after appreciation of evidence on record, gave verdict against accused Achchhey Lal, Prema Devi for charge under Section 498-A, 304B IPC and Section 3/4 D.P. Act and held that prosecution has exclusively proved charges against these two accused persons beyond reasonable doubt, however, learned Trial Court concluded that charge levelled against accused Prahlad, father-in-law of the deceased, Roshni and Aneeta (married sister-in-law of the deceased) have not been proved beyond reasonable doubt and acquitted them of all charges levelled against them during trial. Present appeal has been preferred by convict accused persons feeling aggrieved by the judgment and order passed by learned Trial Court.

10. Learned counsel for the appellants submitted that in F.I.R. general and omnibus allegations are made by the informant against all accused persons. There is no specific allegation against accused-appellants. In dying declaration of the victim, main allegation is made against co-accused Rati Lal (dewar of the deceased) regarding whom it is stated that he ignited a match box and burnt the deceased, however, learned Trial Court in impugned judgment has not placed reliance on said dying declaration recorded by PW-7. There is no allegation or evidence regarding demand of dowry prior to or during marriage against accused-persons. Allegations of demand of dowry after marriage are afterthought and concocted. Learned Trial Court has acquitted the co-accused Prahlad (father-in-law of the deceased) on the ground that on the basis of evidence adduced it is found that he runs a tea shop in some other village and it is natural that he would be living outside home through out the day and in these circumstances the allegation of demand of dowry and subjecting the victim to cruelty is not found reliable qua him. Learned Trial Court has also observed that statement of PW-4 is not in consonance of other witnesses of fact who are his family members. There is no document in support of the theory that deceased was referred to District Hospital, Jaunpur. Learned Trial Court has relied upon defence version that married sister-in-law of the deceased Aneeta and Roshni were not present on the date of incident, inasmuch as, Roshni was married shortly of the fateful incident in present case. Appellants are held in jail custody from the stage of investigation. Learned Trial Court has miserably failed to appreciate the evidence on record while convicting and sentencing the present appellants and mis-appreciated the evidence adduced during trial. There is no cogent and reliable evidence against the appellants to support their conviction for charges allegedly proved against them. He further submitted that deceased's side witnesses never made any complaint after marriage of the deceased with accused Achchhey Lal till her unfortunate death, to any person or Authority regarding demand of dowry or torture against accused persons. In fact, deceased has committed suicide by pouring kerosene oil over her body and burnt herself. Accused Achchhey Lal was outside home as he used to work as labourer at some other place. The other family members were also not present at the time of incident, therefore, they could not see her when she burnt herself but as

soon as they noticed the said incident, they attempted to save her and brought her to C.H.C., Sujanganj from where she was sent to District Hospital, Jaunpur but died on way to District Hospital. They informed parental side of the deceased at the earliest and members of her parental side also reached at C.H.C. Sujanganj where she was lying in critical condition and she was not in a position to speak any person because of having 98% burn injury and she was unconscious. In alleged dying declaration also no specific role has been assigned to present appellants.

11. Per contra, learned A.G.A. appearing for the State opposed and contended that the grounds taken in present appeal are not sustainable. The case of prosecution has been proved by cogent evidence of witnesses of fact as well as the statements of doctor who conducted post-mortem of the deceased. Executive Magistrate conducted inquest on the dead body and recorded statements of I.O.s who investigated the case and submitted charge sheet against accused persons. The acquittal of co-accused persons cannot be a ground for acquittal of present appellants as learned Trial Court distinguished the case of acquitted and convicted the accused persons. The judgment of learned Trial Court is based on evidence on record and it requires no interference at appellate stage. Allegations against accused persons are of very serious nature and there is cogent evidence regarding their complicity in the offence of demand of dowry, practising matrimonial cruelty against the deceased and causing dowry death of the deceased on the date and time of the incident who admittedly died in her matrimonial home i.e. home of accused persons.

12. During trial of the case following documents were proved by evidence of witnesses who appeared before the Trial Court.

Ext. Ka-1	Written report	By PW-1
Ext. Ka-2	P.M. report of the Roshni	By PW-5
Ext. Ka-3	Inquest report	By PW-6
Ext. Ka-4 and Ka-8	Police papers related to P.M. of the deceased	By PW-6
Ext. Ka-9	Dying declaration of the deceased	By PW-7
Ext. Ka-10	Chick F.I.R. dated 26.5.2017	By PW-8
Ext. Ka-11	Extracts of G.D. dated 26.5.2017	By PW-8
Material Ext.-1	Marriage invitation card	By PW-9
Ext. Ka-12	Charge Sheet against Achhey Lal and others	By PW-9
Ext. Ka-13	Site plan	By PW-10
Ext. Ka-14	Charge Sheet against accused Aneeta and	By PW-11

others

13. In present case appellants are convicted for charge under Section 498-A, 304-B IPC and Section 4 D.P. Act and sentenced to various terms of imprisonment and fine awarded in impugned judgment.

14. 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."

15. Present case is based on circumstantial evidence as it is admitted that there is no eye-witness of the incident. The main and major charge framed against the appellants and other accused persons in present case by trial court is that of Section 304-B IPC. The motive of commission of offence by the accused persons is suggested by prosecution is that of demand of dowry and non-fulfillment thereof. Learned trial Court has not placed reliance on dying declaration of the deceased recorded by Santosh Kumar Shukla, Naib Tehsildar, which is marked as Ext. Ka-9, wherein she has stated that on 26.5.2017, the date of incident, she was brought to C.H.C., Sujanganj in burnt condition by her father-in-law Prahlad and husband of named accused Aneeta at around 1:25 pm. In this dying declaration she has stated that on that date her father-in-law Prahlad, mother-in-law Prema Devi, sisters-in-law Roshni and Aneeta and brother-in-law Rati Lal picked quarrel with her, which continued up to afternoon. Her husband poured kerosene oil upon her and her devar caught hold of her and ignited matchstick and set her ablaze due to which her body started burning. It is further stated that she did not know as to who brought her to hospital. This dying declaration is signed by PW-7 Satnosh Kumar Shukla, Naib Tehsildar, who has proved this document by her sworn testimony in which he has stated that he had recorded her dying declaration on being informed by S.D.M., Machhlishahar, Jaunpur. For recording of statements of the victim, he visited C.H.C., Sujanganj, District Jaunpur, where injured was lying in burnt condition and her treatment was being carried out in supervision of doctor. She was in a position of hearing, speaking and understanding. He read over the statement after recording the same to victim as her whole body was burnt and she was unable to affix her signature or thumb impression on her statement.

16. In cross-examination, this witness has stated that he had taken a certificate from doctor who was attending on victim, regarding her ability to speak, but said certificate is not placed on record. He recorded statement at 3:10 pm on 26.5.2017. He admitted in cross-examination that there is overwriting in timing of recording of statement.

17. PW-5, Dr. R.P. Vishwakarma, has stated in his evidence that he was posted as Sr. Medical Officer at Machhlishahar on 27.5.2017. He started post-mortem examination on the dead body of the deceased Roshni, wife of Achchhey Lal on 27.5.2017 at 3:35 pm onwards. The dead body was identified by a Constable of P.S. Machhlishahar, District Jaunpur, who had also brought papers relating to inquest of the deceased. In post-mortem examination superficial and deep flame burn injuries were found present throughout body except

both sole of feet. Dust particles were present on upper respiratory track. Line of redness was found. The approximate time of death was one day before. In stomach, pale and semi digested food particles were present. In large intestine faecal matter was present. In his opinion cause of death was due to shock as a result of sever flame burn injury, approximately 98% (ante-mortem). Dr. has stated that burn injuries found on the person of the deceased were sufficient to cause death.

18. Prosecution has produced four witnesses of fact to prove its case out of whom PW-1 Udairaj Bind is informant and uncle of the deceased, who is author of the written report which found basis of lodging of F.I.R. against accused persons with regard to present incident. He has proved written report as Ext. Ka-1 during his examination before the Court. This written report is scribed by one Swaminath Pandey, who is his co-villager. PW-1 has stated that Swaminath Pandey also accompanied him when he visited hospital after coming to know that his niece was burnt. The report was scribed by Swaminath Pandey on his dictation. He is in total three brothers. The elder brother Harishankar is father of the deceased who was having four issues, two sons namely Arun and Ajit and two daughters namely Roshni (deceased) and Archna. Roshni was married to Achchhey Lal (accused) on 24.4.2014. They had given Rs. 1,00,000/- cash and valuable in marriage of Roshni. Roshni gave birth to a son namely Himanshu who was around 18 months of age at the time of incident. Accused persons Achchhey Lal, Rati Lal, Prema Devi, Aneeta and Roshni started demanding dowry through Roshni after birth of Himanshu and began to torture her for dowry. On 24.5.2017 Roshni called his elder brother Arjun (PW-4) and told that accused persons were beating her and called him to come and take her along with him then he visited the house of accused persons with his brother Arjun. When Roshni got prepared to go with them at her parental place, accused persons had snatched the child from her lap and for that reason she declined to go with them without her child and the witnesses came back to their home empty handed. After two days on 26.5.2017 at 12:00 hours they received a phone call from accused persons that their daughter got burn. The witnesses and his family members reached the place of victim, but while reaching there they found that none was present there. The people of the neighbourhood told them that family members of Roshni had taken her to hospital, then they visited hospital and found that Roshni was lying there. She was alive and able to speak. When they spoke to her, she stated that Achchhey Lal had poured kerosene oil on her persons and devar Rati Lal had ignited a matchstick on her person. Her mother-in-law Prema Devi, sister-in-law Aneeta and Roshni had caught hold of her. Her statement was recorded by magistrate in the hospital. She was treated in the hospital but observing her condition, doctor of C.H.C. referred her to District Hospital, Jaunpur but she breathed her last in District Hospital, Jaunpur on same date.

19. In cross-examination this witness has stated that C.H.C. and P.S. both are lying in nearby at town Sujanganj. He stated that all the three brothers Udairaj, Harishankar and Arjun resided together. At the time of marriage Roshni was 19 years of age. His brother Arjun visited place of accused persons in connection with marriage of Roshni. Prahlad has a shop of tea and betel at Belwar market. His home lies 2 km. away from Belwar market. Prahlad sits in his shop in day hours and

visits her home in the evening after closing the shop. His brother Harishankar (father of the deceased) works for gain in Mumbai. The marriage of Roshni was settled by his brother Arjun. At the time of marriage accused persons had not made any demand of dowry. The witness and his family members visited the place of accused persons after four days of marriage and thereto no demand of dowry was made and they brought back Roshni with them. She used to come to her parental place and go back to her matrimonial home in routine manner after marriage. When the deceased last time left his home for her matrimonial home having her 18 months old child with her, it was her last visit of her parental place. Thereafter she died at her matrimonial home after three months. He also visited her matrimonial home to participate in marriage of Roshni (sister-in-law of the deceased) where he met family members of Prahlad and husband of the deceased. He also met his niece Roshni there. He visited the hospital on fateful day at around 2:00 pm but he did not found Prahlad and Achchhey Lal there. His brother Arjun was taking Roshni to District Hospital from C.H.C. at around 4:00 pm. He was not accompanying them at that time. It would be wrong to say that Roshni had committed suicide by setting herself ablaze. It would be wrong to say that she has not given any statement to magistrate or Tehsildar. He has not found any other injury on the person of the deceased except burn injuries.

20. PW-2 Pappu @ Harishankar, who is father of the deceased, his statement is consistent with the statement of PW-1 on factual aspects. He stated that on 24.5.2017 his daughter Roshni was beaten by accused persons in connection with demand of dowry. She was also subjected to torture prior to 24.5.2017. She failed to visit his place as the accused persons had snatched her child from her lap. When he met his daughter in hospital, she told that accused persons had set her ablaze by pouring kerosene oil on her body. He also stated that no demand of dowry was made at the time of marriage or just thereafter. Prior to the incident his daughter Roshni had visited his place in the marriage of his brother Arjun and resided with them for two to three months at his home. In said marriage Rati Lal, brother-in-law, of the deceased and Roshni (sister-in-law of the deceased) had visited his home to take Roshni with them. Some dispute occurred at the time of Bidai (send off) of Roshni from his place. When Roshni visited his home in the marriage of his niece, accused Achchhey Lal abused her on telephone. No dispute occurred at the time when Roshni was send off to her matrimonial home along with Rati Lal and Roshni, however she did not proceed happily and she was not willing to go to her matrimonial home. He was present in his home at that time. This was her last Bidai (send off) from her home to the place of her in-laws. Roshni died after seven months of last send off from his home. When his daughter died he was in Bombay. His daughter would speak to his wife and his wife told him that her in-laws are demanding dowry after marriage of his niece (daughter of Arjun). He came back to his home after three days of death his daughter. This is true that quarrel used to take place between Roshni and Achchhey Lal with regard to dowry, however, his daughter did not inform him regarding this dispute. Whatever he was apprised of the dispute between his daughter and her husband through his wife.

21. PW-3 Heerawati @ Kalawati, who is mother of the deceased, has stated in her

evidence that her daughter had told her that accused persons were demanding Rs. 5,00,000/- in dowry. She was beaten by the accused persons, six months before her death and Roshni herself informed her about the incident. Her husband had visited the place of her daughter and persuaded the accused persons and thereafter the peace prevailed for sometime, however, in the marriage of daughter of her brother-in-law Roshni visited her home to participate in the marriage. Her Devar had also participated in invitation in said marriage and after returning to his home, he told him that much gift and dowry was given in said marriage by parental side of deceased Roshni. Achchhey Lal (her husband) got infuriated after knowing this and he abused the deceased on telephone. She also reached in the middle of telephonic talk of Roshni and Achchhey Lal and then Roshni gave telephone to her and when she spoke to Achchhey Lal, he abused her also and thereafter demand of dowry of Rs. 5,00,000/- aggravated and Roshni was beaten and subjected to torture by accused persons. She was ultimately done to death by them by setting her ablaze. She also stated that Achchhey Lal holds a tea shop at his home.

22. PW-4, Arjun, who is uncle of the deceased, has stated that when he visited his niece after four days of Bidai (departure) to matrimonial home, she told that his brother and sister-in-law used to tease her for bringing less dowry. On 11.5.2016 marriage of her daughter scheduled and he had brought the deceased ten days back to his home for her participation in the marriage. In marriage of his daughter his in-laws had given much gifts which was noticed by accused Rati Lal (brother-in-law of Roshni) and he told this fact to Achchhey Lal after returning to his home and Achchhey Lal abused the deceased on mobile phone and was demanding Rs. 5,00,000/- as dowry and also stated that he will not permit her to enter in his home without said dowry. He also abused the mother of deceased on telephone in same sequence. When the witness and others had visited the hospital on fateful day Tehsildar was recording the statements of the deceased. Thereafter doctor referred her to District Hospital. They were taking her to District Hospital in ambulance but she died on way. Prahlad holds tea and betel shop at Belwar market where he has also constructed four rooms on road. Marriage of Roshni and Achchhey Lal was solemnized on 24.4.2014 and he visited her parental place eight to ten times after marriage before her death. He also stated that demand of dowry began after marriage of Roshni and not prior to that. The investigating officer had not interrogated him. Rati Lal had not made any demand of dowry when he participated in marriage of his daughter. Roshni went to his matrimonial home after marriage of his daughter unwillingly and thereafter never came back to her parental place. The Tehsildar had taken statement of victim on 26.5.2017 at around 2:00 pm and she was referred to District Hospital at 1:40 hours. He bellied the defence suggestion that no statement of deceased was recorded by Naib Tehsildar. He also denied the defence suggestion that Roshni committed suicide due to non-fulfillment of her aspirations on account of lack of money.

23. PW-7, Santosh Kumar Shukla, Naib Tehsildar admitted in cross-examination that there is overwriting in timing of recording of dying declaration. It was taken at 3:30 pm. He cannot explain as to how this overwriting occurred. He denied the defense suggestion that he had

not recorded any dying declaration and there was no instruction to him for recording the same.

24. PW-9 Vinay Kumar Dwivedi is second Investigating Officer of the case. He has proved charge sheet filed in the case against accused persons which is marked as Ext. Ka-12. He admitted that he did not take into account of the fact from author of dying declaration as to her ability to speak at the time of recording of her dying declaration.

25. PW-10 Uma Shankar Singh (first investigating officer) has stated that accused Achchhey Lal had surrendered in the Court on 23.6.2017. He has proved site plan of the place of incident as Ext. Ka-13.

26. This is admitted fact that the marriage of deceased and accused Achchhey Lal was solemnized on 24.4.2014 and she died on 26.5.2017 within seven years of her marriage at her matrimonial home in unnatural circumstances due to extensive burn injuries received.

27. The defense case is that due to want of money and dis-satisfaction on account of non-fulfillment of her aspirations, she committed suicide by pouring kerosene oil on her person, whereas the prosecution case is that deceased was burnt to death by accused persons including her husband and in-laws on account of non-fulfillment of demand of dowry and she was subjected to cruelty soon before her death on 26.5.2017 as well as prior to that.

28. The accused side had failed to specify exact time and manner in which deceased allegedly committed suicide. They have taken a case that none of the family members were present in the house when incident occurred and her in-laws had rushed to C.H.C., Sujanganj as soon as they got apprised of the incident and did whatever they could to save her. None from the side of informant was present at the time of incident and they came to the place of accused persons and thereafter to hospital where victim was admitted after coming to know about the incident. The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mindSection 106of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Where an offence like murder or dowry death is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence.

29. Hon'ble Apex Court in the case of ***Sandeep Vs. State of U.P., (2012) 6 SCC 107, Prithipal Singh Vs. State of Punjab 2012(76) ACC 680 (SC) and Trimukh Maroti Kiran versus State of Maharashtra, (2006) 10 SCC 681***, observed that burden would be comparatively of alike character. In view of Section 106 of the 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 quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

30. Learned trial court has assigned one reason in disbelieving the dying declaration of the deceased that Magistrate failed to produce a certificate from the doctor regarding mental fitness of the declarant and her capacity to speak in the impugned judgment i spite of the presence of doctor at that time as stated by PW-7, author of dying declaration, however, judgment of Hon'ble Apex Court in ***Laxman Vs. State of Maharashtra, (2002) 6 SCC 710*** is relevant here wherein a Constitution Bench placed reliance in ***Koli Chunilal Savji vs. State of Gujarat, 1999 (9) SCC 562***, wherein it is stated that when it was held that ultimate test is whether the dying declaration can be held to be a truthful one and voluntarily given. It is no doubt true that before recording the declaration, the concerned officer must find that the declarant was in a fit condition to make the statement in question. The Constitution Bench held that where it is proved by the testimony of the Magistrate that declarant was fit to make statement even without examination by the doctor, the declaration cannot be acted upon, provided the Court ultimately holds the same to be voluntary and truthful. The certification by the doctor is essentially a rule of caution and, therefore, the voluntary and truthful nature of the declaration can be established otherwise.

31. In ***V.K. Mishra and Anr. Vs. State of Uttarakhand, (2015) 9 SCC 588*** Hon'ble Apex Court held that before recording conviction of an accused under Section 304 B IPC, following conditions must be proved:-

"1. The death of a woman should be caused by burns or bodily injury or otherwise than under a normal circumstance.

2. Such a death should have occurred within seven years of her marriage.

3. She must have been subjected to cruelty or harassment by her husband or any relative of her husband.

4. Such cruelty or harassment should be for or in connection with demand of dowry.

5. Such cruelty or harassment is shown to have been meted out to the woman soon before her death."

32. In ***Surinder Singh Vs. State of Haryana, (2014) 4 SCC 129***, Hon'ble Apex Court held that for presumption contemplated under Section 304-B IPC and Section 113-B of the Evidence Act to spring into action, it is necessary to show that the cruelty or harassment was caused soon before victim's death. The question as to how "soon before". This would obviously depend on facts and circumstances of each case. Section 113-B of Evidence Act provides regarding presumption as to dowry death. In Suresh Kumar Vs. State of Haryana, 2014 Cri.L.J. 551 (SC), it is held that Section 113-B of the Evidence Act introduces a reverse onus, it is to say that though it is ordinarily for prosecution to prove its case beyond reasonable doubt but when a reverse onus is introduced, it is for the accused to refute the case of the prosecution and prove his innocence.

33. Section 113-B of the Indian Evidence Act provides as under:-

*"**113B. Presumption as to dowry death.**-- When the question is whether a*

person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death.

Explanation. *For the purposes of this section, dowry death shall have the same meaning as in section 304B of the Indian Penal Code (45 of 1860)."*

34. In present case, this fact has been proved that on the basis of evidence of witnesses of fact specifically that demand of dowry was initiated by accused Achchhey Lal, husband of the deceased when he was apprised by his younger brother Rati Lal that his in-laws had given much gift and dowry in the marriage of daughter of Arjun, cousin of the deceased as Rati Lal had visited said marriage on invitation from in-laws of his brother Achchhey Lal. Achchhey Lal had telephoned the deceased even when she was at her parental place in connection with marriage of her niece, few months before her unfortunate death, and demanded dowry and abused her as well as her mother PW-3 on telephone and when the deceased came back to her matrimonial home, she was subjected to torture and cruelty which continued till her death, therefore, this fact has been proved beyond reasonable doubt that death of the deceased occurred within seven years of marriage by physical burns and in unnatural circumstances at her matrimonial place. She was subjected to cruelty by her husband Achchhey Lal, soon before her death. Accused failed to divulge any plausible explanation of her death which occurred due to extensive burn injuries received by the deceased at her matrimonial home. Accused Achchhey Lal is husband of the deceased and in view of relations with the deceased, he bears responsibility for upkeep welfare, nurturing and good health of deceased who was his wife but even in his statement under Section 313 Cr.P.C., he has not given any explanation of unfortunate death of his wife within seven years of her marriage. He is simply denied the allegations made against him regarding causing dowry death of the deceased, therefore, he failed to discharge reverse burden imposed under law by virtue of Section 106 of the Evidence Act as well as Section 113-B of the Act. He has also not taken specific plea of alibi in his statement under Section 313 Cr.P.C.

35. DW-1 Seeta Devi is mother-in-law of co-accused Roshni who stated to the effect that on fateful day Roshni was present in her home as her marriage had taken place on 11.5.2017 with her son namely Dinesh. On 25.5.2017 marriage of daughter of her Jeth was scheduled and that time, Roshni was in her matrimonial home. She has also proved marriage invitation card of Pinki, daughter of her brother-in-law which was scheduled on 25.5.2017, a day before fateful incident in this case. She has proved invitation card as Ext. Kha-2.

36. DW-2 Rambali has stated that his younger brother Udal was married to Aneeta (daughter of Prahlad). Aneeta had gone to her parental place in connection with marriage of her younger sister Roshni, five days back to said marriage and after four days of the said marriage, he brought back Aneeta to his home and Aneeta was present at his home on the date of incident.

37. DW-3 Ramapati Vishwakarma has stated in his evidence that Prahlad and Aneeta used to reside at Belwar market where Prahlad runs a shop. He himself informed Prahlad about the incident of burn

of Roshni and thereafter Prahlad rushed to home along with his wife where incident occurred. Witness also holds a shop in a nearby place to the shop of Prahlad. He received information of the incident at around 12:00 hours from some villager but he had not visited the place of incident.

38. From the perusal of statements of witnesses, it appears that these witnesses have stated nothing regarding the innocence of accused Achchhey Lal but these witnesses have been produced to support the fact that accused Aneeta, Rati Lal, Prema Devi and Achchhey Lal were present at the place of incident when burn incident of the victim took place.

39. As regards Prema Devi, no specific allegation has been levelled against her either with regard to demand of dowry or practised matrimonial cruelty or causing death of the deceased against her in dying declaration of the deceased although the same has not been relied upon in impugned judgment as well as in the statement of PW-1 and PW-3. This fact has emerged that accused Achchhey Lal, Rati Lal were directly instrumental in burning of the deceased. General role has been assigned to the accused Prahlad, Prema Devi, Aneeta and Roshni out of whom three were already acquitted by learned Trial Court and accused Prema Devi and accused Achchhey Lal have been convicted by learned Trial Court. No cross appeal appears to be filed with regard to acquittal of the accused Prahlad, Aneeta, Roshni either by State or by first informant, therefore it can be concluded that as the co-accused who have been assigned similar role to that of present appellant Prema Devi, have already been acquitted by learned Trial Court, accused Prema Devi deserves to be extended benefit of doubt in present appeal. Learned Trial Court has concluded in impugned judgment that deceased was not done to death by accused persons by setting her ablaze but she had committed suicide. Even in dying declaration, Ext. Ka-9, which is relied upon by prosecution and is proved by PW-9, the Naib Tehsildar, no specific role has been assigned to Prema Devi and general allegation is made against all the named accused persons that prior to setting her ablaze by Achchhey Lal and Rati Lal, all the accused persons had engaged in altercation with her till the noon on that date.

40. Be that as it may, on the basis of meticulous analysis of evidence appearing on record, this Court is of the considered opinion that prosecution has proved its case beyond reasonable doubt against appellant Achchhey Lal for charge under Section 498-A, 304B IPC and 4 D.P. Act and order of learned Trial Court in respect of accused Achhey Lal is liable to be affirmed. However, in view of above discussion Prema Devi, mother-in-law of the deceased, deserves to be acquitted of all the charges for which she has been convicted and sentenced along with appellant Achchhey Lal. Consequently, appeal is **partly allowed**. The verdict of conviction and sentence imposed on appellant Prema Devi is set aside and she is acquitted of all the charges framed against her by learned Trial Court. Appeal in respect of appellant Achchhey Lal is dismissed and verdict of guilt and sentence awarded to him by learned Trial Court in impugned judgment is affirmed.

41 Let a copy of this judgment along with lower court record be forwarded to the Court concerned for compliance and release order will be issued by the Court concerned through Superintendent of Jail to

release the accused Prema Devi, if she is not wanted in any other case.

(2023) 3 ILRA 940
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.02.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 3811 of 2011
and
Criminal Appeal No. 3812 of 2011
and
Criminal Appeal No. 2350 of 2011

Vijai Shankar ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Arvind Kumar Kushwaha, Ms. Pooja, Sri Upendra Kumar Rai, Sri R.S. Yadav, Sri Amit Saxena, Sri Raj Kishore Yadav, Sri S.D. Dwivedi, Sri Sanjay Kumar Yadav

Counsel for the Respondent:
A.G.A.

Criminal Law- Indian Penal Code-1860- Section 304B- Accused persons have set ablaze the victim by pouring kerosene oil on her upon non fulfillment of dowry demand-Conviction U/s 304B IPC- Postmortem report st.s that the injuries on the body of the deceased would be the cause of death and that it was homicidal death- Dying Declaration has to accepted as it is proved that the accused have committed the crime alleged against them-Accident occurred without premeditation-The deceased was taken to hospital and the husband has repented- Quantum of sentence is too harsh and requires to be modified-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-Impugned judgment and order modified.

Appeal partly allowed. (E-15)

List of Cases cited:

1. Maniben Vs St. of Guj., 2009 (5) Supreme 700

2. Sikander and another Vs St. of U.P.(Criminal Appeal No.1030 of 2013) decided on 13.7.2022

3. Gautam Manubhai Makwana Vs St. of Guj. (Criminal Appeal No.83 of 2008) decided on 11.9.2013

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

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

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

7. Pardeshiram Vs St. of M.P., (2021) 3 SCC 238

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

9. Deo Narain Mandal Vs St. of U.P. [(2004) 7 SCC 257]

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

11. Jameel Vs St. of U.P. [(2010) 12 SCC 532]

12. Guru Basavraj Vs St. of Karn., [(2012) 8 SCC 734]

13. Sumer Singh Vs Surajbhan Singh, [(2014) 7 SCC 323]

14. St. of Punjab Vs Bawa Singh, [(2015) 3 SCC 441]

15. Raj Bala Vs St. of Har., [(2016) 1 SCC 463]

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. & Hon'ble Ajit Singh, J.)

1. Heard Sri Arvind Kumar Kushwaha, learned Advocate assisted by Ms. Pooj and Sri Upendra Kumar Rai, learned Advocates for the appellant and learned A.G.A. for the State.

2. A short prelude about the period of incarceration of accused-appellants and the death of the deceased is necessary. Accused, Vijai Shankar and Smt. Meena Devi, are in jail for more than 12 years and Accused-Chandrawati was also incarcerated before she was released on bail by this Court. The deceased died after a period of 01 month and 07 days. In her Dying Declaration the deceased stated that her mother-in-law and father-in-law have brought her to the hospital and therefore, mother-in-law was granted bail by this Court. The incident occurred because of harassment to her. The court below acquitted the accused under Section 498A but convicted them under Section 304B for life imprisonment.

3. All the three appeals arise out of same incident and challenge the judgment and order dated 14.04.2011 passed by Additional Sessions Judge, New Court No.2, Jaunpur in Sessions Trial No.188 of 2010 (State vs. Vijai Shanker & Others) whereby the learned Additional Sessions Judge has convicted accused-appellants under Section 304B of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced them to undergo imprisonment for life.

4. Brief facts as culled out from the record are that on the basis of complaint of the father of the deceased a First Information Report was lodged under Section 498A, 307 of IPC and Section 3/4 of Dowry Prohibition Act, at P.S. Sarai Khwaja, Jaunpur against the accused with an allegation that accused-persons have set ablaze the daughter of informant by pouring kerosene oil on her. She sustained burn injuries and died during the course of treatment. After her death Section 304 B of was added by the investigating agency. The investigating officer recorded the statements of all the witnesses and submitted the charge-sheet to the learned Magistrate. The learned Magistrate summoned the accused and committed them to Court of Sessions as prima facie the case was triable by Sessions Court.

5. On being summoned, the accused-appellant pleaded not guilty and wanted to be tried. The Trial started and the prosecution examined 15 witnesses who are as follows:

1	Savitri Devi	PW1
2	Rajesh	PW2
3	Neetu Devi	PW3
4	Sunil Yadav	PW4
5	Meera	PW5
6	Rajesh Chandra Srivastava	PW6
7	Prakash Kumar	PW7
8	Ramesh Kumar	PW8
9	Shiv Pratap Singh	PW9
10	Dr. Satish Singh	PW10
11	Dr. Prabha Shankar Chaturvedi	PW11
12	Dr. R.K. Jaiswal	PW12
13	Vinod Kumar Singh	PW13
14	Santosh Kumar	PW14

	Singh	
15	Jyoti Sonkar	Prasad P.W.15

6. In support of ocular version following documents were filed and proved:

1	F.I.R.	Ex.Ka.17
2	Written Report	Ex.Ka.1
3	Dying Declaration	Ex. Ka. 10/16/11
4	Injury Report	Ex.Ka. 12
5	Postmortem Report	Ex.Ka.9
6	Charge-sheet	Ex. Ka.8
7	Site Plan	Ex.Ka.14

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

8. It is submitted by learned counsel for the appellants that the incident occurred at the spur of moment which arose due to sudden quarrel and the accused had not premeditated to do away with the deceased.

9. In alternative, it is submitted that at the most, the death can be said to be homicidal death not amounting to murder and punishable under Section 304 II or Section 304 I of I.P.C. If the Court decides that the accused is guilty, then the accused may be granted fixed term punishment of incarceration. In support of his arguments learned counsel for the appellant has relied on the decision passed in **Maniben vs. State of Gujarat, 2009 (5) Supreme 700 &** decision of this Court in Criminal Appeal No.1030 of 2013 (**Sikander and another vs. State of U.P.**) decided on 13.7.2022

10. Per contra, learned A.G.A. for the State submits that there was no grave and sudden provocation from the side of the deceased and that looking to the gruesomeness of the offence and the evidence of prosecution witnesses, this Court should not show any leniency in the matter. It is further submitted by learned A.G.A. that ingredients of Section 304B of IPC are rightly held to be made out by the learned Sessions Judge who has applied the law to the facts in case.

11. We have considered the evidence of witnesses and the Postmortem report which states that the injuries on the body of the deceased would be the cause of death and that it was homicidal death, we concur with the finding of the Court below.

12. The Dying Declaration has to accepted as it is proved and we concur with the Court below in accepting it which shows that the accused have committed the crime alleged against them.

13. Even if we go by the dying declaration, it is clear that the accident occurred without premeditation. The fact that the deceased was taken to hospital and the husband has repented. The deceased died after few days of incident as a result of septicemia and hence the gravity of offence will have to be looked into. Trial Court itself has held that there was no demand of

dowry and have exonerated the accused for the charge under Section 498A of IPC.

14. Even if we consider the offence under Section 304B of IPC and concur with the learned Sessions Judge, it is to be seen whether the quantum of sentence is too harsh and requires to be modified. In this regard, we have to analyse the theory of punishment prevailing in India.

15. We can safely rely upon the decision of the Gujarat High court in **Criminal Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs. State of Gujarat)** decided on 11.9.2013 wherein the Court held as under:

*"12. In fact, in the case of **Krishan vs. State of Haryana reported in (2013) 3 SCC 280,** the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.*

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

*15.1 Similarly, in the case of **Maniben (supra),** the Apex Court has observed as under:*

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch

water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

17. The conviction of the appellants - original accused under Section 302 of Indian Penal Code vide judgment and order dated 19.12.2007 arising from Sessions Case No. 149 of 2007 passed by the Additional Sessions Judge, Fast Track Court No. 6, Ahmedabad is converted to conviction under Section 304 (Part I) of Indian Penal Code. However, the conviction of the appellants - original accused under section 452 of Indian Penal Code is upheld. The appellants - original accused are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/- each in default rigorous imprisonment for six months under section 304 (Part I) of Indian Penal Code instead of life imprisonment and sentence in default of fine as awarded by the trial court under section 302 IPC. The sentence imposed in default of fine under section 452 IPC is also reduced to two months. Accordingly, the appellants are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/-, in default, rigorous imprisonment for six months for offence punishable under section 304(I) of Indian Penal Code and rigorous imprisonment for a period of five years and fine of Rs. 2,000/-, in default, rigorous imprisonment for two months for offence punishable under section 452 of Indian Penal Code. Both sentences shall run concurrently. The judgement and order dated 19.12.2007 is modified accordingly. The period of sentence already undergone shall be considered for remission of sentence qua appellants - original accused. R & P to be sent back to the trial court forthwith."

16. In latest decision in **Khokan@ Khokhan Vishwas v. State of Chattisgarh, 2021 LawSuit (SC) 80**, where the facts were similar to this case, the Apex Court has allowed the appeal of the accused appellant and altered the sentence. The decision of the Apex Court in the case of **Anversinh v. State of Gujarat, (2021) 3 SCC 12** which was related to

kidnapping from legal guardian, wherein it was established that the Court while respecting the concerns of both society and victim, propounded that the twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In our case, this is not that gruesome matter where the accused cannot be dealt with in light of all these judgments. Decisions in **Pravat Chandra Mohanty v. State of Odisha, (2021) 3 SCC 529 & Pardeshiram v. State of M.P., (2021) 3 SCC 238** will also enure for the benefit of the accused as the

17. 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."

18. '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.

19. In ***Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166,*** the Supreme Court referred the judgments in J***ameel 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.

20. 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.

21. 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.

22. The accused-appellants, Vijay Shanker & Meena Devi are reported to have undergone 12 years of sentence and therefore, we hold that the period undergone will be sufficient punishment for them. As far as accused-appellant, Chandrawati (mother-in-law of deceased) is concerned, it has come in the Dying Declaration itself that she along with others has taken the deceased to the hospital and looking to her age, the period undergone by her would be sufficient punishment for her. The accused-appellants be set free forthwith, if not wanted in any other case.

23. In view of the above, the appeal is partly allowed. Judgment and order passed by the learned Sessions Judge shall stand modified to the aforesaid extent. Record be sent back to the Trial Court forthwith.

(2023) 3 ILRA 946
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.03.2023

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE RAJIV JOSHI, J.

Criminal Appeal No. 4587 of 2018
with
Criminal Appeal No. 4646 of 2018

Satish Nagar ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Dileep Kumar, Sri Anshul Kumar Singhal, Sri Ashwini Kumar Awasthi, Sri Jai Prakash Singh, Sri Manish Tiwary, Sri Rajrshi Gupta, Sri V.P. Srivastava(Sr. Advocate)

Counsel for the Respondent:
G.A., Sri indra Kumar Chaturvedi, Sri Kapil Tyagi, Sri Samarth Sinha, Sri Sanjay Singh, Sri Shivam Singh, Sri Brijesh Sahai(Sr. Advocate)

Criminal Law - Indian Penal Code, 1860 - Sections 147, 148, 149, 302 & 506 - Code of Criminal Procedure, 1973 - Sections 157 & 313 – Beyond reasonable doubt - There were 11 bullet injuries on body of deceased and not a single exit bullet of five exit injuries was found in car – Two of witnesses who claimed themselves to be there along with deceased have not received any kind of injury and also no blood stain was found on them - If PW-1 had picked up the deceased and had taken him to hospital then blood would have been there on his clothes - There was non-compliance of provisions of Police Regulations, it was duty of Investigating Officer to looked into affidavits and also other evidence - It becomes doubtful because of testimonies of CW-1 and DW-8 - Fact that there was delayed information to Magistrate u/s 157 Cr.P.C., discovery u/s 27 of Evidence Act was doubtful, ballistic report didn't St. that 10 out of 11 empty cartridges were fired from two pistols which were discovered and also because of fact that exit bullets and glass panes were not considered by investigating authorities - (Para 38, 42, 43)

Evidence Act, 1872 - Section 27 – Recovery Evidence - Draw discovery panchnama - When accused while in custody makes St.ment before two independent witnesses, exact St.ment uttered by accused should be incorporated in panchnama by Investigating Officer - St.ment by accused was of his own free will and he was willing to point out place where weapon was hidden - Police party along with accused and two independent witnesses should have gone to place to which the accused might have led the police party to, this discovery should have formed memo of recovery - Hence, evidence of Investigating Officer was not only unreliable but it could be said that it did not constitute any legal evidence. (Para 34, 35)

Appeals are allowed. (E-13)

List of Cases cited:

1. Arjun Marik & ors. Vs St. of Bihar reported in 1994 Supp. (2) SCC 372

2. Rajeevan & anr. Vs St. of Kerala reported in (2003) 3 SCC 355

3. Meharaj Singh (L/Nk) Vs St. of U.P. reported in (1994) 5 SCC 188

4. Ramanand @ Nandlal Bharti Vs St. of U.P. reported in AIR 2022 SC 5273

5. Subramanya Vs St. of Karn. reported in AIR 2022 SC 5110

6. C. Muniappan & ors. Vs St. of T. N. reported in 2010 (9) SCC 567

7. Badam Singh Vs St. of M.P. reported in (2003) 12 SCC 792

8. Rishi Kesh Singh & ors. Vs The St. reported in AIR 1970 Allahabad 51 (FB)

(Delivered by Hon'ble Rajiv Joshi, J.)

1. Upon a First Information Report being lodged on 19.5.2012 at 23.05 PM, Case Crime No.169 of 2012 was registered under sections 147, 148, 149, 302 and 506 of Indian Penal Code. After the matter went for trial it was numbered as Sessions Trial No.483 of 2012. Before the case was committed to trial the police had investigated the matter and had submitted charge sheets against three accused namely Sripal Singh son of Khachedu Singh, Jagat Singh son of Ratan Lal and Satish Nagar

son of Shahmal. Since, during the investigation arms were recovered viz.-a-viz. Sripal and Jagat, two further charge sheets were submitted under section 25 of the Arms Act and they were numbered as Sessions Trial No.484 of 2012 and Sessions Trial No.485 of 2012. The trials of the three cases were undergone together with the Sessions Trial No.483 of 2012 being the leading case.

2. The case of the prosecution was that Suresh, the elder brother of the first informant Naresh had purchased 3-4 days back certain shops from Data Ram which were situate at Sutyana Bus Stand. Since the accused Sripal was also wanting to purchase the shops, the accused Sripal along with Satish Nagar and Jagat Singh had warned the deceased that if he purchased those shops, then they would kill him. On the day of occurrence in the morning also when the first informant Naresh along with the brother Suresh had gone to the bus stand then Sripal, Satish Nagar and Jagat had reached the shop and had said that despite the fact that they had warned him not to purchase the shops, he had purchased the shops and, therefore, they would teach him a lesson.

3. The prosecution case further is that the first informant and the deceased to avoid any kind of altercation after the warnings etc. had returned home. However, on the same date i.e. on 19.5.2012 at 9.30 PM when the first informant, the deceased Suresh and the third brother Pawan were going by their Scorpio Car No.UP16T0004 to get their vehicle fueled and when they had reached the Habibpur market gate, the accused Sripal in his Santro Car No.UP16W4011 overtook the Scorpio car and parked it in front of it and from the car the three accused Sripal, Jagat and Satish Nagar came out along with two other persons whose names the first informant was not knowing and fired indiscriminately on Suresh who was sitting on the driver's seat after breaking the windowpane. The first informant and his brother Pawan, to save their lives, got-off the scorpio car and ran away. Thereafter the assailants after having killed Suresh got into the Santro car and went towards Surajpur. The first informant and the other brother Pawan took the car of the owner of Pappu Hotel and took their elder brother to Kailash Hospital at night where Suresh was declared dead. It was the case of the prosecution that the first informant and his brother Pawan recognized the accused in the light of the street lights. The First Information Report was got written by the informant Naresh by one Lokendra Nagar. The First Information Report was numbered as Paper No.Ka-1. On the basis of the First Information Report, Case Crime No.169 of 2012 was got registered under sections 147, 148, 149, 302 and 506 I.P.C. The Chik FIR was numbered as Ka-15 and a corresponding entry was made in the General Diary as Entry No.46 at 23.05 PM. As a part of the investigation, inquest report was got prepared which was numbered as Exhibit-Ka-2 by the Investigating Officer B.R. Zaidi (PW-6). Thereafter the body was sent for post-mortem to the Chief Medical Officer. The Investigating Officer had also prepared a site map (Exhibit-Ka-7). During investigation, when it came to the knowledge of the Investigating Officer that Sripal and Jagat had hidden their pistols before they were arrested, then on the pointing of the accused, the pistols were recovered and the recovery memo was also prepared and exhibited as exhibit K-13. This recovery memo was got proved by PW-6, the Investigating Officer.

4. To prove the case of the prosecution, 12 prosecution witnesses and

one Court Witness were examined and cross-examined. They were as follows :-

"PW-1 - Naresh son of Baliram – PW-1
PW-2 - Pawan son of Baliram - PW-2
PW-3 - C.S. Yadav (retired Sub-Inspector) PW-4 - Dr. Rakesh Kumar
PW-5 - HCP 1 Mohd. Naeem PW-6 - B.R. Zaidi, Inspector
W-7 - HCP 26 Virendra Singh PW-8 - Vijendra Singh Tomar
PW-9 - Mahesh Kumar Tyagi, SI PW-10- Om Prakash (Retired Inspector)
PW-11- Lokendra Nagar
PW-12- Shiv Prakash Singh
CW-1 - Pappu Kashyap"

The documents which were exhibited and were used by the prosecution for proving their case, were as follows :-

"मूल तहरीर दिनांकित 19.5.2012 (प्रदर्श क-1)
पंचायतनामा (प्रदर्श क-2)
फर्द लेने कब्जा खून आलूदा सीट कवर व सादा सीट कवर का टुकड़ा (प्रदर्श क-3)
शव विच्छेदन आख्या (प्रदर्श क-5)
कार्बन प्रति नकल रपट संख्या 46, समय 23.05 दिनांकित 19.05.2012 (प्रदर्श क-6)
नक्शा नजरी (प्रदर्श क-7)
चिट्ठी सी०एम०ओ० (प्रदर्श क-8)
चालान लाश (प्रदर्श क-9)
फोटो लाश (प्रदर्श क-10)
नमूना सील (प्रदर्श क-11)
फर्द लेने कब्जे में कार सैन्ट्रो (प्रदर्श क-12)
फर्द बरामदगी आला कत्ल (प्रदर्श क-13)
फर्द बरामदगी एक अदद पिस्टल 9 एमएम (प्रदर्श क-14)
चिक एफ०आई०आर० ;प्रदर्श क-15)
नक्शा नजरी मु०अ०सं० 206/12 (प्रदर्श क-16)
जिलाधिकारी अनुमति पत्र (प्रदर्श क-17)
आरोप पत्र मु०अ०सं० 206/12 (प्रदर्श क-18)
जिलाधिकारी अनुमति मु०अ०सं० 208/12 (प्रदर्श क-19)
आरोप पत्र मु०अ०सं० 208/12 ;प्रदर्श क-20)
चिक एफ०आई०आर० मु०अ०सं० 206/12 (प्रदर्श क-21)
छायाप्रति नकल रपट संख्या 52 समय 21.50 (प्रदर्श क-22)
नक्शा नजरी मु०अ०सं० 169/12 (प्रदर्श क-23)
नक्शा नजरी मु०अ०सं० (प्रदर्श क-24)
नक्शा नजरी मु०अ०सं० 169/12 (प्रदर्श क-25)
आरोप पत्र मु०अ०सं० 169/12 (प्रदर्श क-26) ता 26/1
नक्शा नजरी (प्रदर्श क-27)
चिक एफ०आई०आर० मु०अ०सं० 208/2012(प्रदर्श क-28)
पी०डब्लू०6 वादी द्वारा थानाध्यक्ष को लिखा पत्र (प्रदर्श ख-1)
विधि विज्ञान प्रयोगशाला, उत्तर प्रदेश आगरा द्वारा प्रेषित आख्या (प्रदर्श क- 29) लगायत क-33"

6. The accused gave their statements under section 313 Cr.P.C. and they refused having committed any crime. They had also stated that the recovery of the firearms were wrongly done from the accused Sripal and Jagat Singh. They had also stated that on the basis of the faulty investigation, the prosecution had implicated the accused. From the side of the accused, 9 Defense Witnesses were produced and examined. They were as follows :-

DW-1 - Brajpal
DW-2 - Rupesh Kumar
DW-3 - Jaypal Bhagat Ji
DW-4 - Shahmal
DW-5 - Rammi
DW-6 - Anju Bhati
DW-7 - Satyaprakash
DW-8 - Vinod
DW-9 - Anuj Kashyap

7. PW-1, the first informant in his examination-in-chief had stated that the incident was of 19.5.2012. The name of his elder brother who had died in the incident was Suresh Chand. The incident had taken place at around 9.30 PM at the crossing of Kacchi Sadak and the Service Road. He had stated that he along with his younger brother Pawan and the eldest brother Suresh had gone to get their Scorpio Car No.UP16T0004 fueled and while they were heading towards the Fuel Station, a Santro Car overtook the Scorpio Car and parked itself in front of Scorpio Car which was numbered as UP16W4011. From that car, Sripal, Satish Nagar, Jagat and two other persons had come out. The names of the two others were later on told by his brother Pawan and he had revealed that they were called Pappu and Satpal. He had stated in his statement that he had known the accused from before. He had stated that when they got down from the car, they had small firearms of the type of pistol. After coming towards the driving seat, they had tried to open the window. When that did not open, they broke open the windowpane with the butts of their firearm. When Naresh and Pawan, PWs-1 and 2 objected to the actions of the assailants, the assailants indiscriminately fired on Suresh. Upon the initiation of the firing, the first informant and the younger brother, to save their lives, came out of the car. They had made a hue and cry but no-one had responded to it. When they did not find the ignition key of their car, they found a Maruti Car standing at the Pappu Hotel and in that car they took their brother to the Kailash Hospital. From the hotel, it has been stated that, a child had also accompanied them. Upon reaching the hospital, the doctors examined the elder brother of the first informant and declared him dead. Upon Suresh being declared dead, Naresh had gone to the police station and upon his dictation, his cousin Lokendra had written the First Information Report and on it Naresh had put his signature. He has thus proved the First Information Report. Thereafter he has stated that the police had visited the hospital and had started off with the investigation which included the preparation of the inquest report. He stated that on the inquest report, his signature was also there. He had also stated that from the spot, 11 empty cartridges, along with a live cartridge, were also recovered which were taken in possession by the police. The PW-1 had recognized the accused who were present in the Santro car namely Sripal, Satish Nagar and Jagat.

8. PW-2 Pawan has reiterated the statements as were made by his brother Naresh.

9. PW-3 C.S. Yadav, who had written the Panchnama on the dictation of the Investigating Officer B.R. Zaidi, was also examined and he proved the Panchnama.

10. PW-4 Dr. Rakesh Kumar who had performed the post-mortem proved the post-mortem and gave the details of the injuries which were found on the body of the deceased.

11. PW-5 Head Constable Mohd. Naeem had stated that on 19.5.2012, upon the receiving of the First Information Report, he had made an entry in the General Diary at Entry No.46.

12. PW-6 B.R. Zaidi has given a detailed statement with regard to the investigation. He had stated that on the next date i.e. on 20.5.2012, he had investigated

the spot and had prepared a site plan. He had stated that from the spot he had recovered 11 empty cartridges and one live cartridge. He had taken them all in his possession and had also sealed them. He had also stated the manner in which he had prepared the samples of the blood stains on the seat cover etc. He had also stated that on 20.5.2012, the accused Sripal and Jagat Singh were arrested. On 27.5.2012, the Santro Car No.UP16W4011 was recovered. He has further stated that on 30.5.2012 from the District Jail Dasna, he had taken the statements of the accused Sripal and Jagat and on their pointing he had recovered the firearms. The recovery had taken place on 2.6.2012 from Sripal and on 3.6.2012 from Jagat Singh. He has stated that after the investigation he had thereafter submitted his charge sheet. He had also given his statement that as to how he had sent the firearms to the forensic laboratory.

13. PW-7 Head Constable Virendra Singh had stated that he was posted in Police Station where his duty was to type on the computer. He had stated that on the basis of Exhibit Ka-1, he had registered the case.

14. PW-8 Vijendra Singh Tomar was the Investigating Officer of the case under the Arms Act viz.-a-viz. Jagat Singh.

15. PW-9 Sub-Inspector Mahesh Kumar Tyagi was the Investigating Officer with regard to the case under the Arms Act viz.-a-viz. Sripal.

16. PW-10 was the retired Inspector Om Prakash and was the Investigating Officer for the C.B.C.I.D.

17. PW-11 Lokendra Kumar who had written the First Information Report on the dictation of Naresh was also examined.

18. PW-12 Shiv Prakash Singh was also a police witness.

19. From the side of the defence Brijpal, Rupesh Kumar, Jaipal Bhagat Ji, Shahmal, Rammi, Anju Bhati, Satya Prakash, Anuj Kashyap and Vinod were produced and examined as DWs-1 to 9 respectively and had tried to prove the alibi taken by the accused Satish Nagar.

20. DW-8 Anuj Kashyap had stated on oath that on 19.5.2012 at around 9.30 PM he was at the hotel and when he had closed the hotel and was going homewards then he found that the Scorpio car was parked near his hotel and Suresh was profusely bleeding. He had stated that he had sent a boy to his father to inform him about the incident. Thereafter they had put Suresh in their car and had taken him to Balaji Hospital where the doctors had advised for a better treatment.

21. Pappu Kashyap who was a witness of the inquest report and was also entered as a prosecution witness in the charge sheet was discharged by the prosecution but was examined as a Court Witness. He has stated in his statement that his hotel was at the T Point of Kacchi Sadak in Habibpur Market and on the date and time of the incident, he was not in his hotel but his two sons Anuj and Ankur were there at the hotel. He was informed by them that Suresh had been injured. The children had informed him that they had taken Suresh to Balaji Hospital where the doctors had refused to take him and that thereafter Pappu had taken the deceased to the hospital where he was declared dead. In his cross-examination, he had categorically stated that Naresh and Pawan, the brothers of the deceased, were not there along with him. He has further stated that Jagat, one of the accused, had reached the hospital.

22. Upon evaluating all the evidence which were brought before it, the Court of Sessions Trial 2nd ADJ, Gautam Budh Nagar on 22.6.2018 convicted the assailants and hence the instant appeals.

23. Two appeals were filed. One being Criminal Appeal No.4646 of 2018 which was filed by Sripal and Jagat and the other being Criminal Appeal No.4587 of 2018 which was filed by Satish Nagar.

24. Sri V.P. Srivastava, Senior Advocate assisted by Sri J.P. Singh and Sri Jai Shankar Audichya, learned counsel for the appellants in Criminal Appeal No.4646 of 2018 and Criminal Appeal No.4587 of 2018 have stated that though the instant incident had occurred, it was very doubtful that it was the accused who were responsible for it. To bolster this argument, learned Senior Counsel has made the following submissions :-

i. Learned counsel has questioned the presence of the eye-witnesses i.e. PW-1 and PW-2. He has stated that if the testimony of CW-1 Pappu Kashyap and that of his son Anuj Kashyap is perused then it would become abundantly clear that the two brothers Naresh and Pawan were not there at the spot. He has made the Court go through the testimony of Pappu Kashyap and has submitted that Pappu Kashyap was the person who had been informed by his son about the firing which was done on Suresh. He has stated in his examination that initially the children had taken Suresh to Balaji Hospital and when Balaji Hospital had refused to admit Suresh, then they had approached him i.e. Pappu Kashyap and Pappu Kashyap thereafter had driven the car to Kailash hospital. He has categorically stated that he alone had taken Suresh to Kailash hospital and no-one else. He has categorically stated that Naresh and Pawan were not there at the hospital.

ii. Learned counsel has further drawn the attention of the Court to the statement of Anuj Kashyap who has stated that he was 22 years of age at the time of the giving of the statement in the year 2018. This meant that in the year 2012 he must have been 16 years of age. He has stated that at the time when the incident had occurred, he had found Suresh covered in blood in his Scorpio car. He has further stated that while he himself and his brother had taken Suresh to Balaji hospital, he had also sent words to his father through one Guddan son of Sabu. After the doctors at Balaji hospital had refused to admit the case, Anuj had driven back to his village where his father had taken charge of the car. He has also stated that at the time when he had taken out Suresh from his car, neither Naresh nor Pawan were present at the spot. He has also submitted that when his father Pappu Kashyap had taken Suresh then also Naresh and Pawan were not to be found. He has also stated that his village from the place of occurrence was 100 to 150 meters away only.

iii. The other argument which the learned counsel for the appellants has advanced is that on 19.5.2012 from the telephone number of the deceased Suresh namely telephone no.9910104300, calls were made to mobile no.9910669785 at 21.33 PM, 21.40 PM and 21.55 PM. Learned counsel submits that when PW-1 says that he had taken charge of the mobile of his brother Suresh at 9.35 PM then how was it possible that phone calls were made from that phone to 9910669785.

Further he submits that from the mobile no.9910104300 there was a phone call on the phone number of PW-1 Naresh being mobile no.8510004300 at 21.57 and

21.56 PM on 19.5.2012. Learned counsel for the appellant, therefore, states that how it was possible that when the PW-1 was saying that the deceased was killed at 21.30 PM, phone calls were being made thereafter at 21.33 PM, 21.40 PM, 21.55 PM, 21.57 PM and 22.56 PM from the phone of the deceased. Learned counsel states that the call details were brought on record by the prosecution and nobody had denied them.

iv. Learned counsel for the appellants to bolster his argument that PW-1 and PW-2 were not present at the spot and that the deceased had been taken by Pappu Kashyap, has shown to the Court the memo of the Kailash hospital which shows that the deceased was brought by Pappu Kashyap to the hospital.

v. Learned counsel for the appellants has thereafter laid much stress on the fact that when Naresh had lodged the First Information Report and which is exhibited as Exhibit Ka-1, this report was preceded by a First Information Report which was also written in the handwriting of Lokendra and was placed in the police station for being lodged as a First Information Report. This document has been exhibited as Exhibit Kha-1. This First Information Report was, as per learned counsel for the appellants, taken note of by the Police Officer stationed at the police station namely Constable Rajesh Jindal. This fact is corroborated from the statement of PW-7 Sri Virendra Singh who in his cross-examination clearly says that the first informant Naresh had brought a First Information report and which was given to Constable Rajesh Jindal and Sri Rajesh Jindal had marked it for being fed in the computer and had put it in the basket. PW-7 had further stated that Sri Rajesh Jindal had shown that document to him and that it was signed by Naresh-PW-1. On the document there was signature of Rajesh Jindal which was proved by PW-7. He has stated that by that document Naresh had informed the police that Suresh had been killed by unknown assailants. He further states that the Exhibit-Ka-15, the chik report, was placed before him after the computer was got repaired and in his statement, he had stated that the computer was out of order from 19.5.2012 to 21.5.2012. This witness, by an order of the Court dated 20.11.2017, was again brought into the witness box for re-examination. In his examination-in-chief on 2.1.2018, PW-7 stated that Exhibit Kha-1 was not placed before him and that Rajesh Jindal had never given that Tahrir to him. However, in his cross-examination when he was confronted with his earlier statement, he stated that the statement which he had earlier given i.e. the statement which he had given on 19.8.2016 was correct. He further states that when the computer was repaired only then the subsequent First Information Report was brought before him. He in fact emphatically states that Exhibit-Kha-1 was put in the basket on 19.5.2012. He also states that on Exhibit Kha-1 the seal of the police station was also there.

vi. Learned counsel for the appellants further submitted that when the inquest report was prepared, the body was thereafter sent for post-mortem and with the request for the post-mortem, the list of papers which accompanied the dead body was also there. This list clearly showed that Panchayatnama was of three pages; photo nash was of one page; challan nash was of one page; namoona nash was of one page; the report of the Reserve Inspector was of one page; report of the CMO was of one page and the FIR was also of one page. Learned counsel, therefore, submits that when the computer was out of order from 19.5.2012 to 21.5.2012, then the request for

post-mortem which was sent on 20.5.2012 could not have had three paged chik (Exhibit Ka-15) and, therefore, the Exhibit Kha-1 which was the First Information Report, which was lodged earlier in the point of time, alone was there which was of one page. He, therefore, submits that if Exhibit Kha-1 is perused, it would become clear that there was no eye-witness present at the spot.

vii. Learned counsel for the appellant further submits that Pappu Kashyap, who was a witness of the Panchayatnama/inquest report, was also a prosecution witness mentioned in the charge sheet which was submitted by the police then it did not stand to reason as to why the prosecution removed him from the list of prosecution witnesses. He submits that the Court upon being convinced that the prosecution witness Pappu Kashyap was removed mala-fidely from the list of prosecution witness, summoned Pappu Kashyap as CW-1. Learned counsel further submits that the testimony of Pappu Kashyap definitely spoke volumes about the fact that PW-1 and PW-2 were not present at the spot. Learned counsel for the appellants further submitted that if the statement of PW-1 is seen then it becomes clear that he had stated that he was sitting on the back seat whereas Pawan, his brother was sitting on the front seat along with the driver. On the contrary, Pawan (PW-2) had stated that he was sitting at the back seat whereas in the front seat along with the driver, Naresh was sitting. Learned counsel for the appellants, therefore, submits that there was a major contradiction in the statements of PW-1 and PW-2. Learned counsel submits that this contradiction could have been ignored but in the instant case when the witnesses are unable to clearly state as to where they were sitting at the time of incident then it definitely becomes a major point for consideration. Learned counsel for the appellants further states that had it been just a mistake as to on which side of the back seat which witness was sitting then also it could have been ignored but when the witnesses are confused as to whether they were sitting in the front seat or the back seat then definitely it becomes a point which requires consideration and, therefore, he submits that in fact the PW-1 and PW-2 were not there on the spot and that they were coming up with a concocted story.

viii. Learned counsel for the appellants submits that the First Information Report as is required to be sent after the lodging of it to the Magistrate under section 157 Cr.P.C. ought to have been sent forthwith to the Magistrate empowered to take cognizance of the offence upon the police report. He submits that if the report was not sent under section 157 Cr.P.C. "forthwith" then it was a major lacuna on the part of the prosecution. Learned counsel for the appellants relied upon the decision of the Supreme Court in **Arjun Marik & Others vs. State of Bihar** reported in **1994 Supp. (2) SCC 372** to support his case. In this regard, learned counsel for the appellants also relied upon the decision of the Supreme Court in **Rajeevan & Anr. vs. State of Kerala** reported in **(2003) 3 SCC 355** and Meharaj Singh (L/Nk) vs. State of U.P. reported in **(1994) 5 SCC 188**.

ix. Learned counsel for the appellants further submitted that at the place of occurrence 11 empty cartridges along with one live cartridge were found. The post-mortem indicates that there were as many as 11 entry wounds and 5 exit wounds. He submits that when 11 empty cartridges were found then definitely 11 wounds were there but the five bullets which caused exit wounds were not found anywhere in the

scorpio car. He, therefore, submits that definitely the deceased was pulled out of the car and killed outside the car and thereafter placed inside the scorpio car at the driver's seat.

x. Learned counsel for the appellants further submitted that when the assailants had broken the windowpane and then had fired from the outside, then the Investigating Officer should have collected the glass pieces of the broken window. He, therefore, suggested that it appears that at the time when the body was discovered, the windowpane was intact and mischievously later on the glass pane was smashed and, therefore, there was no mention of the broken glass pieces in the report of the Investigating Officer.

xi. Learned counsel for the appellants further submits that when there was such an incessant firing taken place, it was but natural that the two other eye witness who had claimed were sitting inside the car also ought to have been hit by the bullets and that at least some blood stains ought to have been there on their clothes.

xii. Learned counsel for the appellants submits that if the eye-witnesses had taken the deceased out from the scorpio car and had placed him in a Maruti car of Pappu Kashyap then also there would have been some blood stains on their clothes and since no blood was found on their clothes, the story that they had carried the deceased to the hospital was improbable. Learned counsel states that the PW-1 and PW-2 had wrongly stated that they had washed their clothes. He submits that when such a major murder had taken place then they would not have got the time to wash clothes..

xiii. Learned counsel for the appellants states that on 2.6.2012 on the pointing of Sripal in village Jalpura near Pani Ki Tanki at the T point of Hindon Pushta, the Investigating Officer had got recovered a 9mm pistol made in Bulgaria. He also stated that the Investigating Officer had also got recovered a 9mm pistol made in USA on the pointing of Jagat Singh on 3.6.2012 from near the Hindon Pushta. Learned counsel for the appellants submits that these two recoveries which were allegedly under section 27 of the Evidence Act were absolutely bad in law as under Section 27 of the Evidence Act, the accused who is in the custody when intends to show that he is the author of the concealment of an armed weapon and he wishes to get it discovered then all his statements ought to have been made before two independent witnesses and the exact statements uttered by him ought to have been incorporated in the Panchnama and therefore, the Investigating Officer ought to have drawn the recovery memo as per law. This ought to have been done at the police station in the presence of the independent witnesses so as to lend credence that the particular statement was made in fact by the accused expressing his willingness that he was on his own free will and volition wanting to lead to the place where the weapon of the offence had been hidden. Learned counsel for the appellants submitted that once that part of the Panchnama was completed, the police party along with the accused and two independent witnesses ought to have proceeded to that particular place where the accused might have led the police party and if from that particular place the weapon of the offence had been discovered then the process would have formed the second part of the Panchnama.

25. In the instant case, learned counsel for the appellants states that on both dates i.e. 2.6.2012 and 3.6.2012, the recovery was not made as was required to be made under section 27 of the Evidence Act. In this regard, learned counsel for the

appellants relied upon two judgments of the Supreme Court in **Ramanand @ Nandlal Bharti vs. State of Uttar Pradesh** reported in **AIR 2022 SC 5273** and in **Subramanya vs. State of Karnataka** reported in **AIR 2022 SC 5110**.

26. Learned counsel for the appellants, therefore, submits that when the recovery under section 27 of the Evidence Act becomes erroneous, the whole case of the prosecution, so far as the recovery of firearm is concerned becomes erroneous.

27. Learned counsel for the appellants further submitted that the firearms were sent to the ballistic experts much after the charge sheet was submitted. He further submitted that if the report of the Forensic Laboratory is seen then it becomes clear that there were 11 empty cartridges sent. One empty cartridge which was marked as EC-1 was of 9mm; 8 empty cartridges were of 7.62mm and two empty cartridges were of 7.65mm. There was one live cartridge of 7.65mm. There were other bullets also found from the body of the deceased. When the ballistic report came from the Forensic Laboratory, it was of the view that one 9mm empty cartridge could have been fired from the pistol numbered as 11111 and was marked as 1/2012. This was the pistol which was found, as per the prosecution case, from the pointing of Sripal. The other cartridges could not be related to either the pistol no.11111 marked as 1/2012 or with the pistol no.7700 marked as 2/2012 which was found from the pointing of Jagat Singh. Learned counsel for the appellants, therefore, submitted that when just one empty cartridge matched the gun which was found from the pointing of Sripal, made the whole case doubtful. He submitted that the gun which was found from the pointing of Sripal was the gun which was made in Bulgaria and this fact was mentioned in the recovery memo but the ballistic report does not mention about the fact as to which country the pistol was made in. Further, learned counsel for the appellants submitted that in the recovery memo with regard to the pistol which was found from the pointing of Jagat Singh, it was found that it was a 9mm pistol numbered as 7700 and was made in USA but this fact as to which country the pistol was made in was not to be found in the ballistic report. He, therefore, again submitted that the whole case becomes doubtful. Learned counsel for the appellants further submitted that when the pistols were produced in the Court, then PW-6, the Investigating Office Sri B.R. Zaidi had stated that he had not sealed the pistols and empty cartridges himself. He had categorically stated upon seeing a string (dori) attached to one of the pistols, that there was no string (dori) on the pistols which he had sent. Learned counsel for the appellants stated that therefore the pistol which was sent by the Investigating Officer did not have any string (dori) but once it was opened in the Court, the pistol had a string (dori). Learned counsel for the appellants, therefore, submitted that the recovery of the pistol becomes doubtful in view of the fact that the ballistic report did not match the empty cartridges with the gun which was found from the pointing out of Jagat. He also submitted that in all probability, the pistol which was attributed to the pointing of Sripal was a planted pistol. He, therefore, submitted that the case became absolutely doubtful.

28. With regard to the Criminal Appeal No.4587 of 2018 (Satish Nagar vs. State of U.P.), learned counsel for the appellant argued that Satish Nagar was not there on the spot. The Investigating Office

(PW-6) Sri B.R. Zaidi has stated that during the course of investigation, he was informed that Satish Nagar was in Rajasthan for some religious purpose. PW-10 Om Prakash has stated that he had received 31 affidavits in support of the fact that Satish Nagar was in Rajasthan. He has also stated that the phone of Satish Nagar was not found within the NCR. Learned counsel for the appellant took the Court through various statements of various DWs who had deposed in support of the fact that Satish Nagar was not on the spot but was in Rajasthan. No recovery of any firearm had also been found from Satish Nagar. Learned counsel, therefore, stated that Satish Nagar was not on the spot.

29. In reply, learned AGA Sri S.N. Mishra and Sri Brijesh Sahai, learned Senior Advocate assisted by Sri Sanjay Singh, learned counsel appearing for the first informant argued that minor contradictions/discrepancies in the statements of witnesses would not affect the prosecution case. To bolster his case, Sri Brijesh Sahai relied upon a decision of the Supreme Court in **C. Muniappan & Ors. vs. State of Tamil Nadu** reported in **2010 (9) SCC 567** and since learned counsel specially relied upon paragraph 85 of the judgment, the same is being reproduced here as under :-

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

30. Learned counsel for the first informant had stated that the manner of assault had to be seen. Whether the broken glasses of the windowpane was taken into account by the investigating authorities would not go to the root of the matter. Also that the exit bullets were not found by the Investigating Officer would not change the fact that the appellants had murdered the deceased Suresh. He further submitted that it mattered little that the PW-1 and PW-2 were getting confused with regard to the fact that as to on which seat the two of them were sitting when the incident had occurred. He further submitted that there were two independent witnesses i.e. PW-1 and PW-2 and their testimonies cannot be lightly done away with. He submitted that the spot of occurrence was identified; that the incident occurred could not be denied and that there were eye-witnesses of the incident was established from the evidence on record. Learned counsel for the informant stated that the five counts on which the defence had tried to dislodge the prosecution case namely the absence of the eye-witness; manner of assault; date and time of the incident; the spot of the incident and the timing of the First Information Report, all were absolutely established and, therefore, the appellants had no case. So far as the argument of the appellants with regard to section 27 of the Evidence Act was concerned, learned counsel for the first informant submitted that the discovery was

from a person who was in custody and was having the information which he told about the authorship of the concealment. Therefore, the discovery was proper and could be looked into. He submitted that it mattered little that there was no deposition of the accused before the appellants proceeded for the discovery. Learned counsel for the first informant had argued that the call details and the paper by which the dead body was brought to the Kailash hospital were not exhibited in the case and, therefore, they were waste papers and could not be relied upon.

31. Having heard Sri V.P. Srivastava, learned Senior Advocate assisted by Sri J.P. Singh, learned counsel for the appellants in Criminal Appeal No.4646 of 2018 and Sri Jai Shanker Audichya, Advocate assisted by Sri Shyam Shankar Shukla and Sri Vijay Pratap Singh learned counsel for the appellants in Criminal Appeal No.4587 of 2018 and Sri Brijesh Sahai, learned Senior Advocate assisted by Sri Sanjay Singh, learned counsel for the informant as well as learned A.G.A. for the State we are of the view that the Court of Sessions Trial erred in convicting the appellants in both the criminal appeals.

32. To begin with we find that after the First Information Report was lodged, the report as is required to be sent to the Magistrate under section 157 Cr.P.C. was sent almost after 10 days. This as per the judgments of the Supreme Court in **Arjun Marik & Ors. vs. State of Bihar** reported in **1994 Supp. (2) SCC 372; Badam Singh vs. State of M.P.** reported in **(2003) 12 SCC 792; Rajeevan & Anr. vs. State of Kerala** reported in **(2003) 3 SCC 355 and Mehraj Singh (L/Nk) vs. State of U.P.** reported in **(1994) 5 SCC 188** makes the case doubtful. In the instant case, the informant had reported the matter to the police, as per the prosecution case, on 19.5.2012. The police has stated that a GD entry was made on the same date. Why the special report took such a long time is not made clear. From the statement of PW-7 Virendra Singh, the Head Constable, the Court finds that Sri Virendra Singh was on duty on the date of the incident i.e. on 19.5.2012. He has stated that he had received a written complaint on the basis of which Case Crime No.169 of 2012 under sections 147, 148, 149, 302 and 506 IPC was registered. He had further stated that he had prepared the chik on that very date. However, in his cross-examination he states that from 19.5.2012 to 21.5.2012 the computer was out of order. He also, however, has stated that he could not tell as to for what reason the special report was sent under section 157 Cr.P.C. on 30.5.2012. Coupled with this, when we see that when the Investigating Officer had sent the dead body to the Chief Medical Officer for post-mortem, he had prepared a list of documents which he had sent. This list of documents had 3 pages of panchayatnama; one page of photo nash; one page of challan nash; one page of namoona nash; one page of report of Reserve Inspector; one page of report to the CMO and one page of the First Information Report. The First Information Report as was on record was running into three pages. Why the report when was prepared and was there on record was sent after 10 days is not known and, therefore, for this reason definitely the prosecution story becomes doubtful.

33. After the post mortem report was prepared and after the accused were incarcerated, Sripal and Jagat were in judicial custody. They were taken into police remand and under section 27 of the Evidence Act, on their pointing, the guns

were discovered on 2.6.2012 from Sripal and on 3.6.2012 from Jagat.

34. A perusal of the statement of PW-6 B.R. Zaidi, at page 132 of the paper book, clearly states that there were no disclosure statements of the two accused. We find that as per the judgment of the Supreme Court in **Ramanand @ Nandlal Bharti vs. State of Uttar Pradesh** reported in **AIR 2022 SC 5273** and in **Subramanya vs. State of Karnataka** reported in **AIR 2022 SC 5110** the disclosure was a must. When the accused while in custody makes a statement before two independent witnesses, the exact statement or rather the exact words uttered by the accused should be incorporated in the panchnama by the Investigating Officer and, therefore, the first part of the deposition for the purpose of section 27 of the Evidence Act ought to have been drawn in the police station in the presence of the two independent witnesses. This would have lend credence that a particular statement made by the accused was of his own free will and that he was willing to point out the place where the weapon of offence was hidden. It is only after the first part of the deposition is complete, the police party along with the accused and two independent witnesses should have gone to the place to which the accused might have led the police party to and this discovery should have formed the second part of the memo of recovery. The judgment cited above has held as follows :-

"This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter."

35. Applying the aforesaid principle of law, we find that the evidence of the Investigating Officer was not only unreliable but it could be said that it did not constitute any legal evidence.

36. Furthermore, we find that the incident as has been stated by the PW-1 Naresh who is the first informant does not stand to scrutiny. It has been stated that the incident occurred at 9.30 PM but from the evidence of PW-6, we find that there were phone calls made from the phone of the deceased even after 9.30 PM. What is more, the statement of CW-1-Pappu Kashyap when read along with the statement of Anuj Kashyap-DW-8 definitely shows that the prosecution case was week. The CW-1-Pappu Kashyap has stated in his testimony on oath that he was the person who had taken the deceased in his car after his children had informed that Suresh had been injured. He very categorically states that there was no one present at the time of the incident. He had stated that his children had taken out Suresh from the Scorpio car and had put him in their own car and had taken Suresh to Balaji hospital. When in Balaji hospital, the authorities had not accepted the case, then the children had brought the body back and Pappu Kashyap had taken Suresh to Kailash hospital. He had very categorically stated that there was no one present at the time when all this was going on. Along with this if the statement of DW-8-Anuj Kashyap is perused, we find that the case of CW-1 gets corroborated with the statements of DW-8. He has stated that Suresh when was hit by the assailants then he, Anuj Kashyap, had taken Suresh to the hospital and when the hospital people had refused to take the case then they had gone to their village and then his father had taken Suresh for treatment. In the statement

it is very categorically stated that the spot of the occurrence was only 100 to 150 meters away from the village where the father Pappu Kashyap was. Therefore, we find that even the Trial Court has, for no reason, disbelieved the DW-8 and CW-1. If both the statements are read together, it would become clear that Anuj Kashyap was present at the hotel when the incident had occurred. He had rushed with Suresh to the hospital called Balaji and when the case was refused, from there he took assistance of his father who thereafter had taken Suresh to Kailash hospital.

37. What is more the Court definitely finds that PW-1 at page 72 of the paper-book states that he was sitting on the back seat whereas PW-2, at page 91 of the paper-book, states that he was sitting on the back seat. This even though could have been, under normal circumstances, a minor discrepancy but when such a grave incident had taken place wherein their own brother had been murdered then the whole picture would have been etched in the minds of the witnesses and they could not have forgotten as to which seat they were occupying at the time of incident. In the instant case, when they are not clear as to who sat on which seat, it becomes doubtful that they were at all there.

38. What is more, the Court finds that there were 11 bullet injuries on the body of the deceased and not a single exit bullet of the five exit injuries was found in the car. Also the two of the witnesses who claimed themselves to be there along with the deceased have not received any kind of injury and also no blood stain was found on them. What is more, if the PW-1 had picked up the deceased and had taken him to the hospital then admittedly blood would have been there on his clothes. He simply says that he had washed away all the clothes and therefore could not explain the absence of blood on his clothes. This definitely raises a doubt in the mind of the Court.

39. Also if the forensic report is seen, we find that only one empty cartridge out of the 11 empty cartridges could be related to a particular gun and all the other 10 empty cartridges did not match with either of the two guns which were discovered by the Investigating Officer with the help of the two accused Sripal and Jagat. This again makes the case extremely doubtful.

40. So far as the case taken by the counsel for the appellants with regard to the fact that the PW-1 Naresh had lodged a prior First Information Report which they had brought on record as exhibit Kha-1, the Court tried to examine as to whether that document was there. If the statement of PW-7 Virendra Singh is seen, it becomes clear that he had stated that a document of that kind was brought to the police station and also the officer in-charge Sri Rajesh Jindal had made a note on the document that the document had to be registered and had put it in the basket (tokari). He recognized the signature of Rajesh Jindal also. However, the Court is circumspect in accepting this document as the document was proved in a very flimsy manner. The signatures of Naresh were not verified from the admitted signature which was there on the exhibit-Ka-1 and also the Court feels that this document ought to have been brought in the open when the investigation was going on.

41. Under such circumstances, even though the PW-7 Virendra Singh had

proved the document, the Court does not find it very reliable and, therefore, it is not being used in any manner to come to any conclusion whatsoever.

42. We have also gone through the statements of DW-1 to 7 who had given their statements that Satish Nagar had gone to Rajasthan. They had also relied upon various affidavits which the 31 individuals had given for proving the fact that Satish Nagar had gone to Rajasthan on that particular date. However, neither the Investigating Officer nor the CBCID looked into those documents and, therefore, it cannot, with any certainty, be said that Satish Nagar had gone to Rajasthan. We do find substance in the argument of learned counsel for the appellant that there was non-compliance of the provisions of paragraph 107 of the Police Regulations as it was the duty of the Investigating Officer to have looked into the affidavits and also it was his duty to have seen all the other evidence. Since nothing was looked into, it cannot be said with certainty as to where Satish Nagar was at the time of incident.

43. However, the case certainly becomes doubtful because of the testimonies of CW-1 and DW-8 namely Pappu Kashyap and Anuj Kashyap respectively; the fact that there was delayed information to the Magistrate under section 157 Cr.P.C.; the discovery under section 27 of the Evidence Act was doubtful; the ballistic report did not state that 10 out of 11 empty cartridges were fired from the two pistols which were discovered and also because of the fact that the exit bullets and the glass panes were not considered by the investigating authorities.

44. The prosecution must prove its case beyond all reasonable doubt as has been held by a Full Bench judgment of this Court in **Rishi Kesh Singh & Ors. vs. The State** reported in **AIR 1970 Allahabad 51 (FB)**. The operative portion of the judgment is reproduced here as under :-

"177. In accordance with the majority opinion, our answer to the question referred to this Full Bench is as follows:--

The majority decision in 1941 All LJ 619 = AIR 1941 All 402 (FB) is still good law. The accused person is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the general exception) a reasonable doubt is created in the mind of the Court about the guilt of the accused."

45. The prosecution definitely failed to prove the case which was taken by it beyond all reasonable doubt.

46. Under such circumstances, both the appeals are allowed. The judgment and order dated 22.6.2018 passed by the Additional District & Sessions Judge/Fast Track (Second), Gautam Budh Nagar is set-aside. The appellants, if are not required in any other case, be released forthwith.

(2023) 3 ILRA 961
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.03.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Criminal Appeal No. 4926 of 2012

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

Counsel for the Appellant:
Sri Mohit Singh, Sri Mohd. Kalim, Ms. Mary Puncha

Counsel for the Respondent:
G.A.

(A) Criminal Law - Criminal Procedure Code, 1973 - Section - 313 - Indian Penal Code, 1860 -Sections 304, 323, 326 & 452 - Indian Evidence Act, 1872 - Section - 3 - Appeal – against conviction & sentence - allegation of illicit relation with accused - conviction without any oral or documentary evidence - all the injured have turned hostile - name of appellant was not present in dying declaration accused appellant pleaded not guilty - Rigorous imprisonment - examination of evidences & Post-mortem report - cause of death was homicidal death - Whether the sentence awarded is too harsh - analyzing the 'reformative theory of punishment' & 'doctrine of proportionality' - Held, conscious of society will have to be kept in mind and all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream - Accused has already been in jail for a period of 13 years - She has a young son who is litigating for her and all contours of sentencing policy would go to show that would be to hold that accused is to undergo years of incarceration u/s 304 I.P.C - in this case lust act was committed by accused main conspirator and there is no question of showing leniency but a fixed term incarceration would be just and proper - court of the view that, on basis of reformative theory incarceration of 9 years to be just and proper - hence, Appeal partly Allowed - direction accordingly.
(Para - 11, 15, 16, 17, 18, 19)

Appeal partly allowed. (E-11)

List of Cases cited:

1. St. of Pun. Vs Bawa Singh, 2015 0 Supreme (SC) 38,

2. Deo Narain Mandal Vs St. of U.P., 2004 0 Supreme (SC) 944,

3. Kali Prasad Vs St. of U.P., Criminal Appeal No. 1007 of 1996,

4. Pintu Gupta Vs St. of U.P., Criminal Appeal No. 4083 of 2017,

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

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

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

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

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

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

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

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

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. & Hon'ble Arun Kumar Singh Deshwal, J.)

1. Heard Ms. Mary Puncha assisted by Sri Mohd. Kalim, learned counsel for the appellant- Smt. Tasleema who has been incarcerated for a period of 12 years and 9 moths without remission and learned A.G.A. for the State.

2. This appeal challenges the judgment and order dated 10.10.2012 passed by Additional Sessions Judge, Court No.11, Moradabad in Sessions Trial No. 1256 of 2010 (State vs. Ateek Ahamad and another) whereby the learned Sessions Judge has convicted accused-appellant under Section 452 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced him to undergo five years rigorous imprisonment with fine of Rs.2000/-, for commission of offence u/s

326 I.P.C. for ten years rigorous imprisonment with fine of Rs.5000/- and for commission of offence u/s 304 I.P.C. for life imprisonment with fine of Rs.10,000/-. All the sentences were directed to run concurrently.

3. The main accused Ateek Ahmad was the main person who caused death along with the present appellant and two unknown persons and breathed his last long back and qua him the appeal, which he had preferred, has already been abated.

4. On investigation being put into motion, the investigating officer recorded the statements of all the witnesses and submitted the charge-sheet to the learned Magistrate. The learned Magistrate summoned the accused and committed him to Court of Sessions as prima facie charge was under Sections 452, 304, 326, 323 IPC.

5. On being summoned, the accused-appellant pleaded not guilty and wanted to be tried. The Trial started and the prosecution examined 8 witnesses who are as follows:

1	Kasim	PW1
2	Nadeem Ahmed	PW2
3	Hazi Hakim Naeem	PW3
4	Salim	PW4
5	Genda Lal	PW5
6	Vidya Ram Diwakar	PW6
7	Dr. Kulbhushan	PW7
8	Dr. T.K. Panth	PW8

6. In support of ocular version following documents were filed and proved:

1	F.I.R.	Ex.Ka.2
2	Written Report	Ex.Ka.1
3	Recovery Memo of Burnt Piece of Rug	Ex.Ka.7
4	Injury Report	Ex.Ka.11
5	Injury Report	Ex. Ka.12
6	Injury Report	Ex.Ka.13
7	Post Mortem Report	Ex.Ka.10
8	Charge-sheet	Ex.Ka.9
9	Site Plan with Index	Ex.Ka.6

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

8. Ms. Mary Puncha submits that the herein appellant had illicit relation with the accused Ateek Ahmad who breathed his last when he was in jail. When the incident had occurred she was in her late 40s and now she is in her early 60s and is in jail. It is further submitted that the evidence, led before the court below, was so scanty that the conviction could not have been recorded. The incident occurred on 22.5.2010 and the injuries, which were caused, were not such which can be said to have been caused by the appellant herein. The appellant also had sustained injuries. The death certificate of deceased Mushtak

Ali has been considered to be homicidal death and not a murder. The witnesses PW-1 to PW-4 have not supported the prosecution case. The learned court below has convicted the accused without any oral or documentary evidence and has come to the conclusion that Mushtak Ali, Hasim and Najim were injured. All the three injured have turned hostile. The injured had testified as per the provisions of Section 32 Indian Evidence Act being treated as Dying Declaration and have named the accused Ateek Ahmad only and not the present appellant, therefore, her conviction is bad in the eye of law.

9. Ms. Mary Puncha has relied upon the judgements of the Supreme Court in the cases of **State of Punjab vs. Bawa Singh,** reported in **2015 0 Supreme (SC) 38 and Deo Narain Mandal vs. State of U.P.**, reported in **2004 0 Supreme (SC) 944** and judgements of this Court passed in **Criminal Appeal No. 1007 of 1996** ***(Kali Prasad vs. State of U.P.)*** and **Criminal Appeal No. 4083 of 2017** ***(Pintu Gupta vs. State of U.P.)*** so as to contend that the punishment awarded is too harsh as the appellant herein is not the sole author of the incident.

10. Per contra, learned A.G.A. for the State submits that there was no grave and sudden provocation from the side of the deceased. It is further submitted that the Dying Declarations categorically show that the appellant was also involved in the act. The act was committed at night. The learned trial court has rightly accepted the Dying Declaration and the reasoning given in paragraphs- 57 to 62 are such which require to be confirmed by this Court. It is further submitted that looking to the gruesomeness of the offence and the evidence of prosecution witnesses, this Court should not show any leniency in the matter.

11. We have considered the evidence of witnesses and the Postmortem report which states that the injuries on the body of the deceased would be the cause of death and that it was homicidal death, we concur with the finding of the Court below. However, it is to be seen whether the sentence awarded is too harsh. In this regard, we have to analyse the theory of punishment prevailing in India.

12. 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."

13. '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.

14. 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.

15. 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.

16. The Apex Court in the judgement of ***Raj Bala (supra)*** has held that the proportionate punishment would be just and proper. The conscious of society will have to be kept in mind. The accused has already been in jail for a period of 13 years. She has a young son who is litigating for her and, therefore, all the contours of sentencing policy would go to show that

would be to hold that the accused is to undergo 13 years of incarceration u/s 304 I.P.C. This Bench is further fortified in its view by the judgement in the case of ***Pintu Gupta (supra)*** where the Court, after considering all facts and circumstances on proper sentence as on the basis of reformative theory, gave incarceration of 9 years to be just and proper. In this case the lust act was committed by accused Ateek Ahmad, the main conspirator, and, therefore, there is no question of showing leniency but a fixed term incarceration would be just and proper.

17. 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.

18. As far as Section 452 I.P.C. is concerned, the accused has already undergone incarceration of 5 years; as far as Section 326 I.P.C. is concerned she has already been in jail for 10 years, therefore all that remains to be decided is the sentence u/s 304 I.P.C., namely, life sentence. We substitute the life sentence to fixed period of 13 years. Fine and default sentence maintained. The accused be set free on completing 13 years of incarceration with remission.

19. In view of the above, the appeal is **partly allowed**. Judgment and order dated 10.10.2012, passed by the learned Sessions Judge, shall stand modified to the aforesaid extent. Record be sent back to the Court below forthwith.

20. This Court is thankful to Sri Mohd. Kalim and Ms. Mary Puncha, learned counsel.

(2023) 3 ILRA 966
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.02.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 5347 of 2010

Anees @ Gama & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri N.I. Jafri, Sri Ajay Kumar Mishra, Ms. Akanksha Yadav, Sri Anil Raghav, Sri J.M. Nasir, Sri Mohd. Khalil, Sri Noor Mohammad, Sri Yogesh Srivastava

Counsel for the Respondent:
G.A., Sri Lokesh Kumar Mishra

A. Criminal Law- Indian Penal Code, 1860 – Section 149 – There was common intention or object to do away with the deceased, there was no premeditation of minds as the F.I.R. St.s that the deceased had gone to the residence of the accused to demand his money and that infuriated the accused and non lethal weapon was used, deceased did not receive any fire arm injury nor was a fire arm used, the deceased did not succumbed to the injuries on the spot, during treatment, he was declared dead, the offence cannot be punished under Section 149 I.P.C. (Para 22)

B. Criminal Law- Indian Penal Code, 1860 – Sections 300, 302 & 304 – The accused was not premeditated, though had knowledge and intention to cause bodily harm to the deceased but did not want to do away with the deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of I.P.C- Held - offence is not punishable under Section 302 of I.P.C. but is culpable homicide not amounting to murder, punishable under Section 304 Part I of I.P.C. (Para 18, 20)

The appeal is partly allowed. (E-13)

List of Cases cited:

1. Santosh Vs St. of U.P. (Criminal Appeal No. 5657 of 2011)

2. Hardev Singh & anr. Vs St. of Punj., AIR 1975 SC 179

3. Zahoor & Others Vs St. of U.P., 2011 (15) SCC 218

4. Kandhai & ors. Vs St. of U.P., 2014 (0) Supreme (All) 2597

5. Ram Roop Vs St. of U.P.

6. Smt. Rama Devi Vs St. of U.P., 2017 (0) Supreme (All) 2554

7. Bengai Mandal @ Begai Mandal Vs St. of Bihar, 2010 (1) Supreme 49

8. Sampat Babso Kale & anr. Vs St. of Mah., 2019 0 Supreme (SC) 415

9. Dukhmochan Pandey Vs St. of Bihar, 1997 LawSuit, (SC) 1219

10. Jainul Haque Vs St. of Bihar, AIR 1974 SC 45

11. K. Ramachandra Reddy Vs Public Prosecutor, 1976 LawSuit (SC) 214

12. Sanjay Maurya Vs St. of U.P., 2021 (0) Supreme (All) 132

13. Tukaram & ors. Vs St. of Maharashtra. reported in (2011) 4 SCC 250

14. B.N. Kavatakar & anr.Vs St. of Karn. reported in 1994 SUPP (1) SCC 304

15. Veeran & ors. Vs St. of M.P. Decided, (2011) 5 SCR 300

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

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

18. Pardeshiram Vs St. of M.P., (2021) 3 SCC 238

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. & Hon'ble Ajit Singh, J.)

1. Heard Sri Ajay Kumar Mishra, learned counsel for the appellants and learned A.G.A. for the State. Sri Lokesh Kumar Mishra, learned counsel for the informant has absented himself.

2. This appeal challenges the judgment and order dated 5.8.2010 passed by Additional Sessions Judge Fast Track Court No.1, Meerut in Sessions Trial No. 735 of 1997 (State vs. Anees and others) convicting accused-appellants under Section 302/149 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced the accused-appellants to undergo imprisonment for life with fine of Rs.2,000/- each and in case of default of payment of fine, further to undergo imprisonment for a period of two years.

3. The five accused were alleged to have committed an offence, on 15.4.1997 when all of them pursuant to their common intention to do away with Ajeej s/o Ahmad Majeed, who had borrowed the sum of Rs.50,000/- from one Anees @ Gama. On 15.4.1997 at about 6:00 PM, when informant and his brother went the residence of Anees @ Gama for getting back the money. At that time, Anees @

Gama holding an iron rod, Nasreen also had an iron rod, Firoz was having a brick, Nafees had stick in his hand and Hafeez Khurshid, Ujer and Anees @ Gama tried to assault the persons and exalted that as the deceased and his brother were daily demanding money, they be done to death. A quarrel ensued between the parties. Anees @ Gama did away with Ajeej on F.I.R. being lodged, the prosecution was moved into motion and accused were alleged to have committed an offence under Section 147, 148 read with section 302 I.P.C.

4. On investigation being put into motion, the investigating officer recorded the statements of all the witnesses and submitted the charge-sheet to the learned Magistrate. The learned Magistrate summoned the accused and committed to them to Court of Sessions as prima facie charges were for offences under Sections 302 I.P.C.

5. On being summoned, the accused-persons pleaded not guilty and wanted to be tried. The Trial started and the prosecution examined 6 witnesses who are as follows:

1	Mohd. Tahir	PW1
2	Summar Ahmad	PW2
3	Dr. N. Nathani	PW3
4	Dev Dutt Sharma	PW4
5	Sagir Ahmad	PW5
6	Ranvir Singh	PW6

6. In support of ocular version following documents were filed:

1	F.I.R.	Ex.Ka.3
2	Written Report	Ex.Ka.4
3	Recovery memo	Ex. Ka.6, 7, 8 & 16
4	Postmortem Report	Ex.Ka.2
5	Site Plan	Ex.Ka.9

7. After prosecution witness were over and the documents being exhibited, the accused-appellants examined D.W.-1 & 2 namely, Mohd. Yamin and Mohd. Nausad. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the appellants as mentioned aforesaid.

8. The main assailant Anees @ Gama has passed away during the pendency of this appeal. The other co-accused, who is assigned the role and portrayed as Nasreen @ Naseem, Firoz and Uzair. The three accused, who have been assigned the role of doing away with the deceased, the accused have been tried for commission of offence under Section 302 read with section 149 I.P.C. and have been convicted for the same.

9. Learned counsel for the appellants has submitted that the alteration of charge, after the trial was over, could not have been framed and this is bad in the eye of law. In support of this submission he has relied on the decision of the Division Bench of this Court penned by one of us (Dr. K.J. Thaker) in Criminal Appeal No. 5657 of 2011 (**Santosh vs. State of U.P.**) decided on 22.2.2021. Charges could not have been re-framed so as to take it to the higher charge.

10. It is further submitted that the incident occurred at the spur of moment.

There is no premeditation between the accused to do away with the deceased. It was only after the deceased demanded the amount of Rs.50,000/- borrowed from him, which caused this incident to occur.

11. It is further submitted that conviction under Section 302 is not made out. In alternative, it is submitted that at the most, the death can be homicidal death not amounting to murder and punishable under Section 304 II or Section 304 I of I.P.C. If the Court decides that the accused is guilty, then the accused may be granted fixed term punishment of incarceration.

12. In support of his arguments, learned counsel for the appellant has relied on the decisions in **Hardev Singh and another vs. State of Punjab, AIR 1975 SC 179, Zahoor & Others Vs. State of U.P., 2011 (15) SCC 218 and Kandhai & Others Vs. State of U.P., 2014 (0) Supreme (All) 2597**, decisions of this Court in Criminal Appeal No.4722 of 2015 **Ram Roop Vs. State of U.P., Smt. Rama Devi Vs. State of U.P., 2017 (0) Supreme (All) 2554, Bengai Mandal @ Begai Mandal vs. State of Bihar, 2010 (1) Supreme 49, Sampat Babso Kale and Anr. Vs. State of Maharashtra, 2019 0 Supreme (SC) 415, Dukhmochan Pandey vs. State of Bihar, 1997 LawSuit, (SC) 1219 & Jainul Haque v. State of Bihar, AIR 1974 SC 45, K. Ramachandra Reddy vs. Public Prosecutor, 1976 LawSuit (SC) 214, Sanjay Maurya vs. State of U.P., 2021 (0) Supreme (All) 132.**

13. Learned counsel for the State has submitted that though role of surviving accused is not that of assailants, the punishment with the aid of Section 149 of IPC will not permit this Court to show any leniency in the matter. It is further submitted by learned A.G.A. that the decisions referred by counsel for the appellants will not apply to the facts of this case.

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. The conviction under Section 302 I.P.C. is bad in the eye of law and the matter would fall within Section 304(I) of I.P.C.

15. 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."*

16. 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.

17. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra**, reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka**, reported in **1994 SUPP (1) SCC 304**, we are of the considered opinion that it was a case of homicidal death not amounting to murder.

18. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused though had knowledge and intention to cause bodily harm to the deceased but did not want to do away with the deceased. Hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

19. In latest decision in **Khokan@ Khokhan (Supra)** where the facts were similar to this case, the Apex Court has allowed the appeal of the accused appellant. The decision of the Apex Court in the case of **Anversinh v. State of Gujarat, (2021) 3 SCC 12** which was related to kidnapping from legal guardian, wherein it was established that the Court while respecting the concerns of both society and victim, propounded that the twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In our case, this is not that gruesome matter where the accused cannot

be dealt with in light of all these judgments. Judgments in **Pravat Chandra Mohanty v. State of Odisha, (2021) 3 SCC 529 & Pardeshiram v. State of M.P., (2021) 3 SCC 238** will also enure for the benefit of the accused.

20. The judgments cited by the learned counsel for the appellant and facts and evidence as sited above, would permit us to uphold our finding which we conclusively hold that the offence is not punishable as per Section 302 of I.P.C. but is culpable homicide not amounting to murder, punishable U/s 304 (Part I) of I.P.C.

21. We now come to the role of the accused-appellants. All the four accused-appellants were convicted for the offence punishable under Section 302 read with Section 149 of IPC.

22. On perusal of the record in the light of Section 149 of I.P.C., It cannot be said that there was common intention or object to do away with the deceased. There was no premeditation of minds as the F.I.R. itself states that the deceased had gone to the residence of the accused to demand his money and that infuriated the accused and non lethal weapon was used though a cartridge and a country made pistol has been recovered from the accused Anees @ Gama but while going through the record and while going through the post-mortem report, while going through the medical report it is very clear that fire arm is not used and the deceased did not receive any fire arm injury nor was a fire arm used, which shows that there was no intention of doing away with the deceased and the object was only to teach a lesson to the deceased. The deceased did not succumbed to the injuries on the spot, the informant @ brother of the deceased took him to the hospital and during treatment, he was declared dead. Therefore, the offence cannot be said to be one under which can be punished with the aid of Section 149 I.P.C.

23. The accused-appellants are convicted for culpable homicide not amounting to murder with punishment of sentence of ten years and fine of Rs.1,000/- each. If the fine is not paid, default sentence of three months, which would start after the tenth year of incarceration. The ten years of incarceration would be with remission.

24. The appeal is partly allowed. In view of the matter, the case would fall within Section 304-I I.P.C. Fine substituted to Rs.1,000/- each and if the fine is not paid, the default sentence would start after ten years of incarceration with remission. If the accused has served out their period, they released.

25. Record and proceedings be sent back to the Court below forthwith.

26. This Court is thankful to learned Advocates for ably assisting the Court.

(2023) 3 ILRA 971
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.03.2023

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE RAJIV JOSHI, J.

Criminal Appeal No. 5567 of 2011

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

Counsel for the Appellants:
Sri Apul Misra, Sri P.N. Misra, Sri Ritesh Singh, Sri R.P. Misra

Counsel for the Respondent:
G.A.

Criminal Law- Indian Penal Code-1860-Sections 34 & 302-Deceased was attacked by a sword by one of the accused resulting death of the deceased-Conviction U/s 302 r/w section 34 IPC-When there was a sword being used the injuries could not be as wide as have been shown in the post mortem report. The first injury is of 7cm X 3cm which is a very wide injury and which could be caused only by an object which was not sharp-Definitely the injury of 12cm X 4cm also could not be caused by a sword which is a very sharp weapon-Injuries which are 7cm and 12cm in the length were there cannot be explained-St.ment of Ramdayal (prosecution's eyewitness) who was brother in law of the deceased in his cross-examination absolutely falsifies the case of the prosecution and in his cross-examination he had divulged the truth- No reason to believe that accused appellants had committed the crime-Appellants acquitted.

Appeal allowed. (E-15)

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

1. A First Information Report was lodged by one Rampal on 24.05.1995 stating that the accused had gone to the house of Vidyasagar and had searched for him and thereafter one of them had hit him by a sword which had resulted in such an injury that Vidyasagar could not stand. The first informant resultantly had gone out to search for a vehicle to carry Vidyasagar to get medical aid. In the First Information Report, it was stated that Rampal along with Ramdayal had gone to Sherpur where the first informant and Ramdayal (Vidyasagar's brother-in-law (behnoi)) had met the Gram Pradhan and Ramavtar Kurmi and they had narrated to them about the incident.

2. The further case of the First Informant is that when the first informant and Ramdayal could not get any vehicle they went back to the house of Vidyasagar where it was found that he had died and, therefore, they approached the Police Station Katra, Sahjahanpur, to lodge a First Information Report. A chik FIR was prepared and handed over to the first informant. The police visited the spot and recovered the blood stained earth and plain earth. The police also recovered the cot on which Vidyasagar was sitting.

3. The police also prepared a spot map. Thereafter, a Panchayatnama was prepared and the body was sent for post mortem.

4. Upon the First Information Report being lodged which gave rise to Case Crime No. 90 of 1995, the police further investigated and took statements under Section 161 Cr.P.C. and, thereafter, submitted its charge-sheet on 23.06.1995. The Magistrate took cognizance of the matter and placed the case for trial before the Sessions Judge, who on 31.10.1996 framed charges against Baikunthnath, Dharamvir, Totaram and Ram Ashrey @ Nanhika. At the trial stage, the prosecution produced seven prosecution witnesses. The accused persons gave their statements under Section 313 Cr.P.C. and thereafter when the trial concluded and resulted in a conviction against the alive accused persons, namely, Ram Asre @ Nanhika and Dharamvir, under Section 302 IPC read with Section 34 IPC, the instant appeal was filed.

5. Before the High Court in Appeal, Shri Apul Mishra, learned counsel for the appellants has, therefore, argued that;

I. On the date and time when Vidyasagar was attacked it was 07:30 pm in the evening of 24.05.1995. Thereafter the First Information Report was lodged on 11:05 pm by P.W.-1 Rampal and, therefore, it was a very belated FIR.

II. Learned counsel for the appellants has further argued that, in fact, Rampal was an illiterate person and, therefore, he had tried to get the assistance of Ramdayal and, therefore, he had waited for Ramdayal to come to the village of the deceased from where he was residing and that took some time.

III. The FIR version given by Rampal was very different from the version of the other eye-witnesses namely, PW-2 and PW-3 who have actually assigned the role of assailing by sword to the appellant Ram Ashrey.

IV. Learned counsel for the appellants states that when Rampal was accompanied by Ramdayal to village Sherpur where they had gone to fetch a vehicle then Ramdayal must have told that who had hit the deceased by sword yet he had chosen to narrate that it was not clear as to who had hit the deceased by sword while he was lodging the First Information Report. Learned counsel for the appellants states that definitely Ramdayal knew the name of Ram Ashrey as he has through out mentioned the name in his statement in the Court.

V. Learned counsel for the appellants stated that Ramavtar whom the PW-1 and PW-3 met for the purposes of getting vehicle was never produced in the Court as witnesses.

VI. While in the FIR it was stated that Urmila the sister of the deceased was present as an eye witness at the time of the incident, she was never produced as an eye witness in the Court.

VII. The sword is a large thing which could have been recovered from either the possession of the assailants or it could have been found lying at the place of incident but the sword had never been discovered.

VIII. The motive which the prosecution has attributed for the killing of Vidhyasagar that Vidhyasagar, who was a mason, had refused to work as mason for Totaram, Baikhund Nath, Ramashrey and Dharamvir could not be believed.

IX. Learned counsel for the appellants had argued that even if the case of killing was proved, it could not be said that it was a culpable homicide amounting to murder and, therefore, the accused could not have been punished for murder.

To support his argument, learned counsel for the appellants has stated that it appears that there was a heated altercation between Baikhund Nath and Vidhyasagar and, therefore, just to conclude the argument, the four assailants had gone and in the heat of the moment the sword was used.

X. Learned counsel for the appellants states that injuries on the body of deceased were not such which could be attributed to a sword.

XI. Learned counsel for the appellants states that Ram Dayal had stated in his examination-in-chief that Ram Ashrey had inserted the sword in the body of Vidhya Sagar and this version, he says, did not match with the injury report.

XII. Learned counsel for the appellants states that if the cross-examination of P.W. -3, namely, Ram Dayal, who was the brother-in-law of the deceased, is seen then it could easily be said that the story which was told by the

first informant at the time of lodging of the first information report was absolutely a fallacious one as the P.W.-3 had stated that he had come to his in-laws place in the afternoon where he had met Vidhyasagar. Vidhyasagar had entertained the P.W.-3 and, throughout, Vidhyasagar was present with him. He further states that Vidhyasagar never went out of the house. He further states that Vidhyasagar had, till the evening when he died, remained at home. He does not corroborate the story that Vidhyasagar had gone and had verbal altercation with Baikuntnath. He also does not support the story that he was the one who had brought Vidhyasagar back from the place of verbal altercation and, therefore, learned counsel for the appellants states the whole story that Ram Dayal had brought Vidhyasagar from the location where the verbal altercation had taken place with Baikuntnath and Vidhyasagar is falsified.

6. Learned counsel for the appellants, therefore, states that this statement of Ramdayal absolutely falsifies the case of the prosecution. He states that there was no verbal altercation and Vidyasagar was not brought by Ramdayal and also there was no premeditation with regard to the commission of crime between the four accused.

7. At the time of the trial seven prosecution witnesses were examined. PW-1 was the first informant. He had narrated the story that Baikunthnath and Vidyasagar had verbal altercation, thereafter, Ramdayal the brother-in-law (Behnoi) of Vidyasagar had brought Vidyasagar back to his house. Subsequently, at 07:30 pm Baikunthnath and Totaram came in from the southern side of the house where Vidyasagar was residing and Dharamvir and Ram Ashrey came to the house from the eastern side of the house of Vidyasagar where Vidyasagar was sitting in the cot. He states that four of them had surrounded Vidyasagar and Vidyasagar tried to stand up but Baikunthnath, Totaram and Dharamvir held Vidyasagar from the back and thereafter he nowhere says that he had not seen as to who had actually assailed Vidyasagar with sword and, thereafter, he states that the four of them had run away from the eastern side.

8. PW-1 further states that he had gone to arrange for the vehicle for taking Vidyasagar for medical treatment but could not get any vehicle and, therefore, he come back to the village where he found that Vidyasagar had died. He, therefore, had proved the FIR.

9. The prosecution witness no. 2 Smt. Kalavati was the mother of the deceased. She had tried to give a motive for the murder and she had said that Vidyasagar was a mason. He had, before he died, worked as a mason in the house of the accused persons. The accused persons were not giving wages to the deceased and, therefore, Vidyasagar had refused to work and when he refused to work at the house of the accused, the accused had killed Vidyasagar. She also tells the same story as was told by PW-1 with regard to the fact as to how the assailants entered in the house and had killed Vidyasagar with a sword.

q10. PW-3 Ramdayal who is the brother-in-law (behnoi) of Vidyasagar in his cross-examination in chief stated that at around 07:00 pm, he had gone to the crossing where Vidyasagar and Baikunthnath were having altercation and had brought Vidyasagar back to his home and at around 07:30 pm accused persons had come and had killed Vidyasagar. However, as has

been pointed out by the counsel for the appellants that in the cross-examination, the PW-3 had given an absolutely different statement which is being reproduced here as under:

"जिस समय लाश सील की गई तो उस समय रात्रि थी। घटना वाले दिन मै दोपहर को अपनी ससुराल में आ गया था। विद्यासागर मिले थे। खिलाया पिलाया, बातचीत की। विद्यासागर ने मेरे साथ खाना नहीं खाया। रोटी खाई थी। मैंने जब खाना खाया तो विद्यासागर मौजूद था। मुझे नहीं ध्यान की विद्याराम मेरे पास कितनी देर रहा। घर से कही नहीं गया। शाम को उसकी मृत्यु हो गई। मैंने दस मिनट खाना खाया। विद्यासागर घर में रहा। शाम तक घर पर रहा। शाम को घटना हो गई।

11. PW-4 was the doctor who had conducted the post mortem. PW-5 was the Sub-Inspector, Jagbeer Singh Tomar who had done the initial investigation. PW-6 was the Sub-Inspector who had further conducted the investigation and the PW-7 was also an Investigating Officer.

12. The doctor, PW-4 had given a medical report which was proved by him and the report was never challenged by any of the prosecution in which he had given the following injuries:

i. At the left shoulder on the back side there were injuries by a sharp weapon within an area 15cm X 12cm. He had stated that on the back of the left shoulder there were three injuries:

1. 3cm X 7cm.
2. Small injury 1.5cm X 1cm deep.
3. 12cm X 4cm deep till the bone.

13. Further it was found that at the time of post mortem, the bone had fractured and the ribs were also fractured.

14. Under Section 313 Cr.P.C. the defence had denied having committed the crime.

15. Learned A.G.A. opposed the appeal and stated that when there were eye witnesses, there was no reason to come to any other conclusion which had been arrived by the trial Court.

16. Having heard learned counsel for the appellants, Shri Apul Mishra and one learned A.G.A., Shri S.N. Mishra, we are of the view that the appeal deserves to be allowed.

17. We have closely scrutinised the evidence on record and the statements made by the witnesses. The sword was never discovered; a very important witness i.e. the sister of the deceased Smt. Urmila who was also the wife of Ramdayal never came to the witness box; there was definitely a great delay in the FIR. All these were such arguments from the side of the appellants which could be said that they could be interpreted both in favour of the accused and also against them. However, the arguments which would be analysed henceforth would make any person of prudence come to the only conclusion that the appellants were innocent. Firstly, when there was a sword being used the injuries could not be as wide as have been shown in the post mortem report. The first injury is of 7cm X 3cm. It is a very wide injury which could be caused only by an object which was not sharp. Definitely the injury of 12cm X 4cm also could not be caused by a sword which is a very sharp weapon.

18. Still further if the statement of Ramdayal is perused, we find that he states that assailants including Ram Ashrey had inserted the sword. He uses the word "ghop' which means stabbing. That would mean that the sword is directly inserted in the body from the sharp end of the sword. How then the injuries which are 7cm and 12cm

in the length were there cannot be explained.

19. Further the statement of Ramdayal in his cross-examination absolutely falsifies the case of the prosecution. Throughout the prosecution he has said that Ramdayal is the person who had gone to fetch Vidyasagar, the deceased, from the place where he had entered into a verbal altercation with Baikunthnath but in his cross-examination Ramdayal had given out a different picture and which was that when Ramdayal had come to his in-laws house in the afternoon and from that time and till the time vidyasagar was killed, Vidhyasagar never moved out of the house. Ram Dayal is the prosecution's eyewitness. Also this witness cannot be disbelieved as he is not related by blood and therefore while he was giving this statement in his cross-examination he had divulged the truth.

20. Under such circumstances, we have no reason to believe that Dharamvir and Ram Ashrey had committed the crime and, therefore, we are of the view that the Appeal deserves to be allowed and Ram Ashrey and Dharamvir deserve to be acquitted.

21. Since Totaram and Baikunthnath had died during the Trial and the Trial had abated vis-a-vis them, there is no requirement to give any verdict with regard to their roles.

22. The Appeal is allowed. The appellants are acquitted.

23. The appellants if are not wanted in any other case may be released.

(2023) 3 ILRA 976
APPELLATE JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 21.02.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 5955 of 2018

Smt. Rajendri Devi ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Rajiv Lochan Shukla, Sri Ashfaq Ahmed Ansari, Sri Neeraj Kumar Sharma, Sri Shanda Prasad Mishra

Counsel for the Respondent:
G.A.

Criminal Law- Indian Penal Code, 1860 – Accused was convicted under Section 498A, 304B, 302/34 of I.P.C. & Section 4 of D.P. Act – deceased was being harassed for dowry - incident occurred on 29.04.2017, she was set ablaze by pouring kerosene on her in which, she suffered grievous injuries - she died on 06.05.2017 - accused is in jail since 15.07.2017 - the question which falls for consideration is whether conviction of the accused under Section 302 of I.P.C. should be upheld or the conviction to be converted under Section 304 Part-I or Part-II of the I.P.C (Para 3, 4, 9, 16)

Held - Death was due to septicemia - Offence is not under Section 302, I.P.C. but is culpable homicide and therefore, accused convicted under Section 304 (II) I.P.C. **(Para 24, 27)**

The appeal is partly allowed. (E-13)

List of Cases cited:

1. Sohan Lal alias Sohan Singh & ors. Vs St. of Punj., AIR 2003 SC 4466

2. Panchdeo Singh Vs St. of Bihar, AIR 2002 SC 526

3. Kanti Lal Vs St. of Raj., (2009) 12 SCC 498

4. Krishna Chandra Vs The St. of U.P., 1996 Crl. LJ 1507

5. Sher Singh Vs St. of Punj., AIR 2008 SC 426

6. Tukaram & ors.Vs St. of Mah., reported in (2011) 4 SCC 250

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

8. Veeran & ors. Vs St. of M.P. Decided, (2011) 5 SCR 300

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

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

11. Pardeshiram Vs St. of M.P., (2021) 3 SCC 238

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

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

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

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

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

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

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

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

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

1. Heard Sri Rajiv Lochan Shukla, learned counsel assisted by Sri Neeraj Kumar Sharma, Sri Shanda Prasad Mishra, learned counsels for appellant, learned A.G.A. for the State.

2. The record is before this Court hence instead of deciding application for release on bail we venture to decide the main appeal as appellant is in fact since 15.07.2017 and is an aged lady.

3. This appeal challenges the judgment and order dated 12.09.2018 passed by Additional Sessions Judge, Court No.5, Ghaziabad in Sessions Trial No.07 of 2018 convicting accused-appellant under Sections 498A & 304B of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and Section 3/4 of the Dowry Prohibition Act, Police Station Masoori, District Ghaziabad alternate charge under Section 302 IPC read with Section 34 IPC and sentenced the accused to undergo imprisonment for life with fine of Rs.20,000/- under Section 302 of I.P.C. and half of the amount of the total fine has to be paid to Munni, the mother of the deceased.

4. Factual scenario as culled out from the record and the judgment of the Court below is that the complainant lodged a complaint that his daughter was married with Sumit alias Bholu. After she went to matrimonial home, she was being harassed for dowry. The family members of the accused and accused demanded motorcycle and Rs.50,000/-. Incident occurred on 29.04.2017, she was set ablaze by pouring kerosene on her in which, she suffered grievous injuries and she was sent to Safdarganj Hospital, Delhi for further treatment where she died on 06.05.2017. The complainant lodged the complaint on 30.04.2017.

5. Investigation was moved into motion. After recording statements of various persons, the investigating officer submitted the charge-sheet against accused under 498A & 304 B of I.P.C. and Section 3/4 of Dowry Prohibition Act, 1961 (in short 'D.P. Act'). The learned Chief Judicial Magistrate before whom charge sheet was laid put the same before the learned Sessions Judge. The learned Sessions Judge, on hearing the learned Government Advocate and learned counsel for the accused, framed charges under Section 498A, 304B, 302/34 of I.P.C. & Section 4 of D.P. Act.

6. On being summoned, the accused pleaded not guilty and wanted to be tried, hence, the trial started and the prosecution examined 9 witnesses who are as follows:

1	Rama	PW1
2	Keshpal	PW2
3	Munni	PW3
4	Kuldeep	PW4
5	Esha	PW5
6	Dr. Vedant Kulshrestha	PW6
7	Ravindra Kumar Singh	PW7
8	Atar Singh	PW8
9	Pawan Kumar	PW9
10	Jogendra	PW10
11	Ishwar Singh	PW11
12	Aatish Kumar Singh	PW12
13	Danish Alam	PW13
14	Rajkumar Pandey	PW 14
15	Ravindra Yadav	PW15

7. In support of ocular version following documents were filed:

1	F.I.R.	Ex.Ka.7
2	Written Report	Ex.Ka.1
3	Statement of Gunjan	Ex. Ka.3
4	Medico-Legal Report	Ex.Kha.1
5	Postmortem report & Death Report	Ex.Ka.2
6	Death summary	Ex.Kha.2
7	Final Form/Report	Ex.Ka.8

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 appellants as mentioned aforesaid.

9. It is submitted by learned counsel for accused-appellant that the accused is in jail since 15.07.2017.

10. Learned counsel for the appellant has vehemently submitted that dying declaration is not worth believing. It is submitted that it is an admitted position of fact that deceased died out of septicemia after seven days of incident.

11. It is further submitted by learned counsel for the appellant that most of the witnesses have turned hostile (thereby have not supported the prosecution) despite that, learned Sessions Judge has convicted accused/appellant for commission of offence under Section 302 of I.P.C.

12. In support of the his submission, learned counsel for the appellant has relied on **(i) Sohan Lal alias Sohan Singh and others v. State of Punjab, AIR 2003 SC 4466; (ii) Panchdeo Singh v. State of Bihar, AIR 2002 SC 526; (iii) Kanti Lal v. State of Rajasthan, (2009) 12 SCC 498; (iv) Krishna Chandra v. The State of U.P., 1996 Crl. LJ 1507; (v) AIR 2008 SC 426, Sher Singh v. State of Punjab, so as to contend that the dying declaration has being wrongly relied by court below so as to convict the accused who is innocent.**

13. In alternative, it is submitted that if this court concerns with the trial court that it was accused who was author of the offence at the most punishment can be under Section 304 II or Section 304 I of I.P.C as the deceased died after few days. If the Court feels, as the accused has been in jail for more than 5 years without remission, she may be granted fixed term punishment of incarceration. It is submitted that accused had no intention to do away with the deceased.

14. Learned A.G.A. for the state has vehemently submitted that facts of this case will not permit the Court to convert the sentence to that under Section 304 Part I of I.P.C. as none of the judgments relied by the accused-appellant will apply to the facts of this case as the accused is proved to have committed the offence.

15. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind that it was homicidal death. The question whether it was accused who was perpetrator. The dying declaration of deceased corroborates with medical evidence Section 32 of Evidence Act for believing dying declaration that it was accused who was guilty of committing the offence.

16. 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."*

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

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

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

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

19. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

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

21. All others judgments which were pressed into service by the learned counsel for the appellant are not discussed as that

would be repetition of what we have decided.

22. 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."

23. '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.

24. 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.

25. 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.

26. 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.

27. We come to the definite conclusion that the death was due to septicemia. The judgments cited by the learned counsel for the appellant would permit us to uphold our finding which we conclusively hold that the offence is not under Section 302 of I.P.C. but is culpable homicide and, therefore, we convict accused under Section 304(II) IPC and sentence of the accused appellant is reduced to the period already undergone till date.

28. Appeal is **partly allowed.** Record and proceedings be sent back to the Court below forthwith.

29. This Court is thankful to learned Advocates for ably assisting the Court.

(2023) 3 ILRA 982
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.02.2023

BEFORE

THE HON'BLE PRITINKER DIWAKER, A.C.J.
THE HON'BLE SURENDRA SINGH-I, J.

Criminal Appeal No. 6904 of 2011
with
Criminal Appeal No. 6903 of 2011

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

Counsel for the Appellant:
Sri Apul Misra, Sri P.N. Misra, Sri Vindeshwari Prasad, Sri Sushil Kumar Dwivedi, Sri Dhirendra Kumar Srivastava

Counsel for the Respondent:
Sri H.M.B. Sinha, A.G.A.

Criminal Law- Indian Penal Code-1860-Sections 34, 96-106, 302, 304 (I) - Evidence Act, 1872-Sections 3 & 134-Accused attacked the deceased with sickle (hasiya) and *lathis* over dispute regarding cutting of the clump of bamboo trees (banskot) in which the deceased received fatal injuries and resultantly died-Conviction U/s 302 r/w Section 34 IPC-

No reason to refuse to act upon the testimony of P.W.3 merely because he is the son of the deceased since the evidence is reliable- Accused (Rajjan) exceeded his right of private defence and shall not be fully exonerated from the offence of causing the death of the deceased- Attack without pre-meditation in a sudden quarrel- Offence committed will not be murder, but culpable homicide not amounting to murder which is punishable under Section 304 I.P.C- Presence and participation of other co-accused in the crime is not proved. Result-Conviction of appellants in Criminal Appeal No.6903/2011 is set aside & Conviction of appellant in Criminal Appeal No.6904/2011 is converted into conviction u/s 304 (I) I.P.C. (E-15)

List of Cases cited:

1. Dhirendra Kumar Vs St. of Uttarakhand, 2015 SCC Online SC 163

2. Suresh & anr. Vs St. of U.P., (2001) 3 Supreme Court Cases 673

3. Gangadhar Chandra Vs St. of W. B., (2022) 120 ACC 267

4. Maqsoodan & Ors. Vs St. of U.P, 1983 SC 1926

5. Laxmibai (Dead) thru LRs Vs Bhagwantbura (Dead) thru LRs, AIR (2013) SC 1204

6. Brijbasi Lal Vs St. of M.P., 1991 SCC (Crl.) 546

7. Chinniah Servai Vs St. of Madras, AIR 1957 SCC 614

8. Darshan Singh Vs St. of Pun., (2010) 2 SCC 333

(Delivered by Hon'ble Surendra Singh-I, J.)

As these appeals arise out of judgment and order of conviction and sentence dated 19.11.2011 passed by the Additional Sessions Judge (Ex Cadre), Court No. 23, Allahabad in Sessions Trial No. 18 of 2001 (State Vs. Kallu and others) arising out of Crime No. 88 of 1999 Police Station- Lalapur, District- Allahabad, convicting accused-appellants Kallu, Sushil and Rajjan and sentencing each of them under Section 302 read with Section 34 of IPC to undergo imprisonment for life and a fine of Rs. 10,000/- with default stipulation, they are being disposed of by this common order.

2. According to prosecution case, informant, Nankau, son of Chhedi Lal Mishra, resident of Othagitarhaar, Police Station- Lalapur, District- Allahabad, submitted written report (Ext.Ka.1) on 07.11.1999 in Police Station- Lalapur, stating that on 07.11.1999 at 11.00 a.m., accused-appellants Kallu, Sushil and Rajjan, sons of Sangam Lal came to forcibly cut clump of bamboo trees (banskot) of the informant situated at village- Ashwanipur Mazra Goisara of the informant. When they were forbidden by Chhedi Lal from cutting the clump of bamboo trees (banskot), they started beating his father by sickle (hasiya) and lathis. On hue and cry being raised, the brothers of informant, Shivakant and Dayakant, came to save him, then accused also assaulted them by lathi causing severe injury to them. Accused, Rajjan, with the intention of causing death, assaulted his father on his head and back of body causing grievous injury to him. On the basis of the written report of the informant, FIR (Ext.Ka.6) was lodged in P.S.- Lalapur as Crime No. 88 of 1998 under Section 307 of IPC against accused-appellants Kallu, Sushil and Rajjan on 07.11.1999 at 11.30 o'clock. While undergoing medical treatment, injured Chhedi Lal Mishra died on 07.11.1999 at 13.00 o'clock and the case was converted to one under Section 302 of

IPC. The investigation of the case was done by P.W.4 S.I. Prem Kumar Yadav. He visited the place of occurrence and on the pointing out of informant, prepared site plan thereof (Ext.Ka.2). He collected blood-stained and plain earth from the place of occurrence and kept in container and sealed the collection. The recovery memo regarding collection of plain and blood-stained earth was prepared which is (Ext.Ka.3). Accused-appellants Kallu, Sushil and Rajjan were arrested and on their pointing out, the weapons of offence, 2 lathis and 1 sickle (hasiya) were recovered from the courtyard of the house of the accused-appellants. These recovered articles were wrapped in cloth and sealed. The recovery memo thereof (Ext.Ka.4) was prepared.

3. The inquest proceedings of the dead body of Chhedi Lal Mishra was conducted on 07.11.1999 at 15.00 o'clock in the supervision of HCP Ramhit Verma. The inquest report is (Ext.Ka.11).

4. The postmortem of the dead body of deceased Chhedi Lal Mishra was done by P.W.6 Dr. Mohd. Farukh, who was posted as Medical Officer in Moti Lal Nehru District Hospital, on 08.11.1999 at 2.00 p.m.. According to the postmortem report (Ext.Ka.10), following antemortem injuries were found on the body of the deceased :-

(i) one triangular incised wound of size 15 cm x 6 cm cavity deep on the back side of head which was situated 14 cm away from the right ear.

(ii) An incised wound of size 6 cm x 1/2 cm muscle deep situated on the right temporal region of the head.

(iii) An incised wound of size 3 cm x 1 cm muscle deep situated on right buttock.

(iv) An incised wound of size 2 cm x 1 cm muscle deep situated at lower right side of the back.

(v) An incised wound of size 5 cm x 1 1/2 cm muscle deep situated on the lower side of the back.

(vi) An incised wound of size 2 cm x 1 cm muscle deep situated on behind the back between both scapula.

5. External examination :- There were fractures in the back side and right side of the skull of the head. The membrane of brain was congested. The brain cavity was found cut. There was no blood in the heart or the lungs.

6. In the opinion of the Medical Officer, death was caused due to trauma and haemorrhage by antemortem injuries.

7. The Investigating Officer, (P.W.4) S.I. Prem Kumar Yadav recorded the statement of witnesses of fact and formal witnesses under Section 161 CrPC in the case diary and after investigation, submitted charge-sheet under Section 302 IPC against accused-appellants Kallu, Sushil and Rajjan.

8. On 22.02.2001, learned trial Judge framed charge under Section 307/34 and 302/34 IPC against the accused-appellants. The accused denied the charge and claimed trial.

9. The prosecution examined (P.W.1) Shivakant, (P.W.2) Dayakant and (P.W.3) Nankau as witnesses of fact. The prosecution also examined Investigating Officer, S.I. Prem Kumar Yadav (P.W.4), Constable Bade Lal at P.S. Lalapur (P.W.5), Dr. Mohd. Farrukh, who conducted postmortem of deceased Chhedi Lal Mishra

(P.W.6) and Constable Abhinav Tiwari (P.W.7).

10. (P.W.1) Shivakant and (P.W.2) Dayakant turned hostile and did not support the prosecution case. The eyewitness (P.W.3) Nankau proved written report (Ext.Ka.1). He deposed in support of the charge framed against the accused-appellants.

11. The Investigating Officer (P.W.4) S.I. Prem Kumar Yadav by his evidence proved, site plan of the place of occurrence (Ext.Ka.2), recovery memo regarding plain and blood-stained mud collected from the place of occurrence (Ext.Ka.3), memo relating to recovery of weapon of offence, two lathis and sickle (hasiya) on the pointing out of accused Kallu, Sushil and Rajjan respectively (Ext.Ka.4). He also proved, by his evidence, blood-stained mud, (material Ext.1), plain mud (material Ext.2), weapon of offence Hasiya (material Ext.3) and charge-sheet sent against accused Kallu, Sushil and Rajjan (Ext.Ka 5). (P.W.5) Constable Clerk Bade Lal proved chik FIR of Crime No. 88/1999 under Section 307 IPC (Ext.Ka.6), the copy of G.D. Report No. 9, dated 07.11.1999, at 11.30 o'clock regarding institution of aforesaid case crime number (Ext.Ka.7), the report sent from the office of HCP Allahabad regarding the destruction of original G.D. (Ext.Ka. 8), carbon copy of G.D. Report No. 11, dated 07.11.1999, at 13.00 o'clock regarding conversion of Crime No. 88 of 1999 into Section 302 IPC (Ext.Ka.8) after the death of deceased Chhedi Lal Mishra. Dr. Mohd. Farrukh (P.W.6), the Medical Officer, conducting postmortem of deceased Chhedi Lal Mishra, proved his postmortem report as (Ext.Ka.10).

12. Since HCP Ramhit Verma, who had conduced inquest proceedings of Chhedi Lal Mishra had died, P.W.7 Constable Abhinav Tiwari who had worked with the aforesaid HCP and was familiar with his handwriting and signature, proved the inquest report as (Ext.Ka.11) and other police papers relating to postmortem of deceased Chhedi Lal Mishra i.e. (Ext.Ka.12) to (Ext.Ka.16), which were prepared by late HCP Ramhit Verma.

13. On 14.08.2007, the trial Judge recorded statement under Section 313 Cr.P.C. of accused-appellants Kallu, Sushil and Rajjan. They stated that false case was registered and the witnesses gave false evidence. Accused-appellant, Sushil Kumar stated in his statement under Section 313 Cr.P.C. that on 07.11.1999 at 11.00 o'clock, he and his two brothers, namely, Kallu and Rajjan were cutting the clump of bamboo trees (banskot) in their Field No. 573/574 situated at village- Ashwanipur Mazra Goisara. Chhedi Lal and his sons Shivakant, Babu Yadav and Lallan arrived there and started abusing them. They caused fatal injuries by assaulting with lathi and danda. In the exercise of right of private defence, the accused-appellants also assaulted them with lathi, danda in which, Chhedi Lal sustained injury. The informant and his party members fired on the accused-appellants by a country-made pistol (katta). Their medical examination was done by the Medical Officer through the police.

14. By the impugned judgment and order dated 18.11.2011, the trial Judge acquitted the accused-appellants under Section 307 read with Section 34 IPC and convicted them under Section 302 read with Section 34 IPC and sentenced them, as aforesaid.

15. It has been argued on behalf of the accused-appellants that two witnesses of fact (P.W.1) and (P.W.2) turned hostile and did not support the prosecution case. The statement of evidence of (P.W.3) Nankau has several contradictions and is not reliable. Thus, the conviction cannot be based on the single testimony of (P.W.3) Nankau. It has also been argued on behalf of the accused-appellants that they were cutting clump of bamboo trees (banskot) of their ownership. Deceased Chhedi Lal Mishra and his sons Shivakant, Dayakant and Nankau tried to prevent them from cutting the clump of bamboo trees (banskot) and attacked them in the course of which injuries were caused to the accused-appellants. In exercise of their legitimate right of private defence, the accused-appellants attacked deceased Chhedi Lal Mishra and his sons to repel them during which some injuries have been caused to Chhedi Lal Mishra resulting his death for which the accused-appellants could not be made liable.

16. It has been argued on behalf of the State that there is cogent, reliable and convincing evidence of (P.W.3) Nankau, which has not shaken during the prolonged and detailed cross-examination done on behalf of the accused-appellants. The evidence of P.W.1 has been corroborated by the confessional statement of accused-appellants and recovery of weapon of offence on the pointing out of the aforesaid accused-appellants.

17. We have heard learned counsel for the parties and perused the entire lower court record.

18. The definition of the offence punishable under Section 302 of IPC is given in Section 300 IPC which is as follows:-

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

2ndly.--If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-- .

3rdly.--If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or--

4thly.--If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

19. In Section 300 IPC, above four exceptions are given. If the act committed, comes under the gamut of any of these exceptions, accused shall not be punished for murder under Section 302 I.P.C., but for having committed culpable homicide not amounting to murder punishable under Section 304 I.P.C. The accused-appellants have claimed that they inflicted injury on Nankau and his companions in exercise of their right of private defence. The provision relating to right of private defence of person or property with reference to committing the murder of the attacker is given in Exception 2 of Section 300 IPC which is as follows:-

Exception 2.--Culpable homicide is not murder if the offender in the exercise in

good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

20. In the case of "Dhirendra Kumar Vs. State of Uttarakhand, 2015 SCC Online SC 163," the Supreme Court has laid down the parameters, which are to be taken into consideration, while deciding the question as to whether the case falls under Section 302 I.P.C. or Section 304 I.P.C. which are as follows :-

(a) the circumstances under which the incident took place;

(b) nature of weapons used;

(c) whether the weapon was carried or was taken from the spot;

(d) whether the assault was made on vital parts of the body;

(e) the amount of force used;

(f) whether the deceased participated in the sudden fight;

(g) whether there was any previous enmity;

(h) whether there was any sudden provocation;

(i) whether the attack was in the heat of passion; and

(j) whether the person inflicted injury or took undue advantage or acted in cruel or unconscious manner.

21. From the analysis of the oral as well as documentary evidence produced by the prosecution, it has to be seen whether charge under Section 302 read with Section 34 I.P.C. is proved against the appellants.

22. (P.W.1) Shivakant, who is son of deceased Chhedi Lal, has fully denied that in pursuance of common intention of all, accused-appellants Kallu, Sushil and Rajjan inflicted fatal injury on deceased Chhedi Lal by assaulting him with lathis and sickle (hasiya) causing his death. He has stated that he was not present at the place of occurrence and that he does not know who caused injury to Chhedi Lal due to which he died. He further stated in his evidence that on 07.11.1999 at 5.00 a.m. in the morning, when there was slight darkness, his father who was expert in the use of lathi had gone to the orchard for exercise as well as for training others.

23. (P.W.1) Shivakant stated that Nankau and Dayakant are his real brothers. They did not receive any injury in the incident. (P.W.1) Shivakant stated that accused-appellants are sons of his father's sister (bua). He had no enmity with the accused-appellants. There was no dispute regarding the clump of bamboo trees (banskot) with them. (P.W.1) Shivakant has denied that since the accused-appellants are sons of his father's sister (bua), they have compromised the matter and out of their fear, he is giving false evidence to protect them from punishment.

24. (P.W.2) Dayakant has given identical evidence as that of (P.W.1) Shivakant in his deposition.

25. The son of the deceased (P.W.3) Nankau has stated in his evidence that the occurrence took place on 07.11.1999. He was present at the place of occurrence. Accused-appellants, Kallu, Sushil and Rajjan were cutting his clump of bamboo trees (banskot). His father, Chhedi Lal forbid them from cutting it. Then, accused-appellants started beating his father by

lathi, danda and sickle (hasiya). On hue and cry being raised by his father, he and his brothers, Shivakant and Dayakant went to save his father from being assaulted by accused-appellants. He and his brothers, Shivakant and Dayakant were also beaten by lathi and danda by the accused-appellants. He further deposed that his father received injury on back of his head. Accused-appellant, Rajjan, with an intention of causing death, has assaulted his father by sickle (hasiya) and other appellants assaulted him with lathi. After the incident, he lodged FIR in the concerned police station by submitting written report (Ext.Ka.1).

(P.W.3) Nankau has stated in his cross-examination that the clump of bamboo trees *(banskot)* is situated about one kilometre away from his house. The marpeet took place about fifty steps away in the west direction from the clump of bamboo trees *(banskot)*. He admitted that during the course of marpeet, he has witnessed injury in the body of accused-appellant, Sushil from which blood was oozing and there was no injury on the body of other two accused. He stated that, at the time of occurrence, he was present in his adjoining agricultural land. The marpeet lasted for 10 minutes. After the incident, he wrote a written report. He went to the concerned police station. He proves the written report (Ext.Ka.1).

In his cross-examination, he deposed that the clump of bamboo trees *(banskot*) is of his ownership and that of his family. He denied that the clump of bamboo trees *(banskot)* is situated in the agricultural land of the accused-appellants. He has emphatically denied that accused-appellants, Kallu, Sushil and Rajjan were cutting their own clump of bamboo trees *(banskot)*. He also denied that when accused-appellant did not stop cutting the clump of bamboo trees (banskot) then his father Chhedi Lal and brothers, Shivakant and Dayakant, had beaten the accused-appellants with lathi and danda. He also denied that his father Chhedi Lal had fired with firearms. P.W.3 has expressed his ignorance that the number of the plot on which the quarrel took place is 573/574. He has also expressed his ignorance that he does not know whether the clump of bamboo trees (*banskot*) is situated in Plot No. 573/574. He denied that he was not present at the time of occurrence. He has also denied that when Chhedi Lal and his brothers, Shivakant and Dayakant were beating the accused-appellants, they assaulted in their right of private defence in the course of which his father Chhedi Lal received injuries. (P.W.3) Nankau has deposed in his evidence that when his father prevented the accused from cutting his clump of bamboo trees (*banskot)*, then accused-appellants, Rajjan armed with sickle (*hasiya*), Sushil and Kallu, armed with lathi and danda respectively assaulted his father and caused fatal injuries to him. He has also deposed that when P.W.3 Nankau and his brothers, (P.W.1) Shivakant and (P.W.2) Dayakant, reached there, accused-appellants, Kallu and Sushil assaulted them with lathi, danda causing injuries to them. According to postmortem report (Ext.Ka.10) of deceased Chhedi Lal, incised wounds are found on temporal region of head, back of head, right buttock, lower side of back and behind the back between both scapula. Incised wounds can only be caused by attack with sickle (hasiya), and it cannot be caused by lathi, danda. Although (P.W.3) Nankau has deposed that accused, Sushil and Kallu, assaulted Shivakant and Dayakant with lathi, danda causing them injuries, but

Shivakant and Dayakant have stated that they were not assaulted by the accused in the alleged occurrence. They have also stated that they did not receive any injury caused by the accused-appellants in the incident. There is no visible injury caused by lathi and danda on the person of deceased Chhedi Lal or P.W.1 Shivakant and P.W.2 Dayakant.

26. The law relating to vicarious liability u/s 34 I.P.C. has been settled by the Apex Court. The Supreme Court in ***Suresh and Another Vs. State of U.P., (2001) 3 Supreme Court Cases 673,*** has held as under :

"The special feature of Section 34 is only that such participation by several persons should be "in furtherance of the common intention of all". Hence, under Section 34 one criminal act, composed of more than one act, can be committed by more than one persons and if such commission is in furtherance of the common intention of all of them, each would be liable for the criminal act so committed. Section 34 is intended to meet a situation wherein all the co-accused have also done something to constitute the commission of a criminal act. Thus to attract Section 34 I.P.C. two postulates are indispensable : (1) the criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person. (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons. Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of Section 34 I.P.C. should have done some act which has a nexus with the offence. Such an act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an illegal omission to do a certain act in a certain situation can amount to an act. But an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section and if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34 I.P.C. cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34 I.P.C. There may be other provisions in the I.P.C. like Section 120-B or Section 109 which could then be invoked to catch such non-participating accused. Thus, participation in the crime in furtherance of the common intention is a sine qua non for Section 34 I.P.C. Exhortation to other accused, even guarding the scene etc. would amount to participation. Of course, when the allegation against an accused is that he participated in the crime by oral exhortation or by guarding the scene the court has to evaluate the evidence very carefully for deciding whether that persons had really done any such act."

The Apex Court in ***Gangadhar Chandra Vs. State of West Bengal, (2022) 120 ACC 267*** held :

"common intention contemplated by Section 34 I.P.C. presupposes prior concert. It requires meeting of minds. It requires a pre-arranged plan before a man can be

vicariously convicted for the criminal act of another, the criminal act must have been done in furtherance of common intention of all the accused. In a given case, the plan can be formed suddenly."

27. Therefore, appellants, Kallu and Sushil can be held vicariously liable for the murder of Chhedi Lal only if it is proved that they assaulted Chhedi Lal with lathi and danda and Rajjan attacked Chhedi Lal with sickle in pursuance of the common intention of himself as well as other accused persons. Thus, the prosecution has to prove that appellants, Kallu and Sushil shared a common intention of causing murder in pursuance of which appellant, Rajjan caused fatal injury by sickle on the head and other parts of the person of Chhedi Lal, resulting in his death.

28. (P.W.3) Nankau, son of deceased Chhedi Lal, has deposed in his evidence that on 07.11.1999 at about 11 a.m., accused-appellants Rajjan, Kallu and Sushil, were cutting clump of bamboo trees (banskot) situated in his land and when his father Chhedi Lal forbid the appellants from cutting the clump of bamboo trees (banskot), accused-appellant, Rajjan assaulted his father with sickle (hasiya) and appellants, Kallu and Sushil assaulted (P.W.3) Nankau and his brothers, Shivakant and Dayakant with lathi and danda causing fatal injuries to his father, Chhedi Lal due to which he died later on. He has admitted that in the fighting and altercation, accused Sushil also received injury and blood was oozing from his body. P.W.3 has deposed that at the time of occurrence, he was present in his nearby agricultural land.

29. (P.W.3) Nankau has been cross-examined in detail by the defence but nothing emerges which may shake or demolish his deposition regarding assault by Rajjan with sickle on Chhedi causing his death. Thus, the evidence of P.W.3 appears to be cogent, truthful and reliable. P.W.3 has mentioned that due to assault of the appellants, his father, Chhedi Lal received injury on the head and his back. P.W.1 and P.W.2 have not supported the evidence of (P.W.3) Nankau regarding the assault by Sushil and Kallu by lathi and danda to them or their father, Chhedi Lal. The evidence of P.W.1 and P.W.2 is supported by the postmortem report of Chhedi Lal where only incised injuries caused by sickle is mentioned and no injury caused by lathi and danda is mentioned. Hence, participation of accused, Kallu and Sushil in the murder of Chhedi Lal is not proved. The oral evidence of (P.W.3) Nankau regarding the date, time, place of occurrence and manner of assault by appellant, Rajjan, by sickle and injury received by Chhedi Lal due to which he died later and lodging of first information report are corroborated by the documentary evidence, written report (Ext.Ka.1), chik F.I.R. (Ext.Ka.6), recovery memo of weapons (sickle and lathi) used in the offence (Ext.Ka.4) blood-stained and plain earth (Ext.Ka.3), the inquest report (Ext.Ka.11), postmortem report of deceased (Ext.Ka.10) and charge-sheet (Ext.Ka.5).

30. It has been argued by the learned counsel for the appellants that only one prosecution witness (P.W.3) Nankau, who is the son of deceased Chhedi Lal, has supported the prosecution case. The other two witnesses, (P.W.1) Shivakant and (P.W.2) Dayakant have not supported the prosecution case. They have also denied that these two prosecution witnesses have not received any injury in the incident. He has also argued that the appellants cannot be convicted on the basis of the testimony

of single witness who is relative/son of the deceased Chhedi Lal. The provisions relating to number of witnesses required for proving a fact is given under Section 134 of Indian Evidence Act which is as follows :

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

31. It has been held by the Apex Court in ***Maqsoodan & Ors. Vs. State of U.P, 1983 SC 1926*** that neither the number of witnesses nor the quantity of evidence is material, it is the quality that matters. There is general public reluctance in appearing as witnesses, hence there should be no insistence that there should be more witnesses than one.

32. The Apex Court in ***Laxmibai (Dead) through LRs Vs. Bhagwantbura (Dead) through LRs, AIR (2013) SC 1204*** has held that it is time-honoured principle that evidence must be weighed and not counted. It is whether the evidence as ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Evidence Act.

33. In ***Brijbasi Lal Vs. State of M.P., 1991 SCC (Crl.) 546***, the Apex Court convicted the accused on the sole testimony of P.W.1 who was son of deceased Vishwanath after finding that his evidence was wholly acceptable. The Apex Court in ***Chinniah Servai Vs. State of Madras, AIR 1957 SCC 614*** laid down that "plurality of witnesses is not necessary to prove a criminal charge and that the conviction can be based even on the sole testimony of a witness provided the testimony of that witness is wholly acceptable.

34. Applying the above test, we, at the same time, bearing in mind the relationship of P.W.3 with the deceased, examined the evidence carefully and are satisfied that the evidence of P.W.3 is reliable and free from any infirmity. Therefore, we have no reason to refuse to act upon the testimony of P.W.3 merely on the ground that he is the son of the deceased since the evidence of P.W.3 is otherwise reliable and acceptable. We have no hesitation in agreeing with the finding of the trial court.

35. In view of the law laid down by the Apex Court regarding the testimony of single testimony of related witness, the arguments advanced on behalf of the defence counsel are not acceptable.

36. (P.W.3) Nankau has admitted in his cross-examination that during the occurrence, he had seen blood on the person of appellant, Sushil. The appellants during their trial, in cross-examination of P.W.3 Nankau as well as in their statement recorded under Section 313 Cr.P.C., had put forward the plea of right of private defence. Appellant Sushil has stated in his statement under Section 313 Cr.P.C. that their clump of bamboo trees were situated in plot nos. 573/574, village- Ashwanipur Mazra Goisara. On 07.11.2019 at 11 o'clock. He and his two other brothers were cutting their clump of bamboo trees. Chhedi, Shivakant, Babu Yadav andLallan abused them and caused fatal injury to them by assaulting them with lathi and danda. In their defence, they also used lathi and danda. They received injury in the incident and were got medically examined through policemen in the Government hospital.

37. The Investigating Officer (P.W.4) Prem Kumar Yadav has accepted in his cross-examination that on the date of incident, he had also got all the three appellants medically examined by sending police constable to the government hospital. He has stated that he had not seen the documents relating to the field in which clump of bamboos trees were growing. In the file of trial court, the appellants have as per list 92Kha/1 filed documents no. 92Kha/2 is khasra of the year 1413 year fasli relating to plot no. 574 area 0.888 hectare, which is in the name of Sangam Lal, father of appellant. In this Khasra, it is mentioned that apart from imli and amla trees, clump of bamboo trees are situated. The appellants have also filed khatauni of aforesaid plot 92Kha/3 relating to the year 1410 to 1415 fasli in respect of plot no. 574 area 0.888 hectare of village- Ashwanipur Mazra Goisara, the aforesaid plot is in the name of Sangam Lal, son of Ram Prakash. The appellants have also filed in the trial court document no. 92Kha/4 Ch format 26 relating to which village- Ashwanipur Mazra Goisara. In this document, it is mentioned that appellant's father, Sangam Lal, son of Ram Prakash, obtained the ownership of plot no. 524/3 in which clump of bamboo trees is situated by paying Rs. 240/- as compensation for it. Vide aforesaid list number 92Kha/1, the appellants had filed document nos. 92Kha/5 to 92Kha/7. The F.I.R. of cross-case relating to the incident which was registered as Crime No. 88A/1999 under Section 147, 148, 307, 323, 504 I.P.C. against Chhedi Lal Mishra, son of Ram Pratap, Shivakant and Dayakant, son of Chhedi Lal Mishra and two other persons. Thus, accused-appellants have lodged cross-case relating to the incident against deceased Chhedi and his two sons, Shivakant and Dayankant and two other persons.

38. The accused-appellants had also filed document nos. 92Kha/9, injury report of accused Rajjan, 92Kha/10 injury report of Sushil Kumar and 92Kha/11 injury report of Kallu, who have received 5, 5 and 6 injuries respectively. On the behalf of informant, per list 95Kha, documents 95Kha/1 and 95Kha/2 were filed which are khasra khatauni of plot nos. 655 area 0.514 hectare situated in village- Ashwanipur Mazra Goisara in which clump of bamboo is situated, which is in the name of informant's mother, Rajkali and his five brothers. Thus, it appears that the disputed clump of bamboo trees were claimed by both the appellants and the informant, as being situated in the agricultural field of their ownership. During the cutting of the clump of bamboo trees by the appellants, altercation and fight took place in which Chhedi Lal received fatal injuries and he died later on. Appellants, Rajjan, Kallu and Sushil also received injuries. Cross-case was registered by both the parties. The informant and his sons were acquitted in criminal case and appellants were convicted in the related cross-case by the impugned order passed by the trial court.

39. From the above discussion, the right of private defence of appellant, Rajjan is established that they have caused injury while they were obstructed in cutting the clump of bamboo trees which was allegedly situated in the land of their ownership. They were attacked by informant, his father and brothers in which, they received injuries. They were medically examined and they also lodged the F.I.R. against the informant and persons on his side. The law relating to right of private defence of persons and property has been given in Sections 96 to 106 of the Indian Penal Code. The Apex Court in the case of "***Darshan Singh Vs. State of Punjab,***

(2010) 2 SCC 333 has given the summary of principles regarding the right of private defence which is as follows :-

(i) Self-preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self-defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is co-terminus with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The IPC, 1860 confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self-defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened.

40. (P.W.3) Nankau has admitted in his evidence that the incident of marpeet took place about 50 fts away from the field where clump of bamboo trees were situated and were cut by the appellants. The statement of P.W.3 is also corroborated by the site plan (Ext.Ka.2) which was prepared by the Investigating Officer on the pointing out of informant.

41. From the aforesaid appreciation of evidence, it is proved that appellant, Rajjan caused injury to Chhedi Lal (deceased) by attacking with sickle (hasiya), a person who was unarmed and an old man, and exceeded his right of private defence. Therefore, he shall not be fully exonerated from the offence of causing the death of Chhedi Lal since he has proved that he caused the injury to Chhedi Lal, resulting in his death in the exercise of his right of private defence. The offence committed by him will not be murder, but culpable homicide not amounting to murder which is punishable under Section 304 I.P.C.

42. Now, it has to be seen that the injury caused by appellant, Rajjan by sickle and appellants, Sushil and Kallu by lathi and danda in furtherance of their common intention to cause culpable homicide not amounting to murder of deceased, so that they could be vicariously held guilty collectively under Section 304 (1) I.P.C.

43. From the oral evidence of (P.W.1) Shivakant, (P.W.2) Dayakant and (P.W.3) Nankau and other prosecution evidence, it is not

proved that the attack was pre-planned and there was prior meeting of mind of the appellants and they unitedly decided to cause death of deceased Chhedi Lal by attacking him with sickle, lathi and danda. There is no allegation of exhortation by one accused-appellant to other, to attack and kill deceased, Chhedi Lal. From the evidence on record, it is clear that only appellant, Rajjan attacked deceased, Chhedi Lal without pre-meditation in a sudden quarrel. He did not go anywhere else to procure the weapon of offence i.e. sickle, but it was lying nearby, while he was cutting the clump of bamboo trees.

44. From the above oral and documentary evidence, the presence of appellants, Kallu and Sushil at the place of occurrence and their participation in the assault on Chhedi Lal, Shivakant and Dayakant, becomes doubtful. Thus, from the evidence on record, presence and participation of appellants, Kallu and Sushil in the crime is not proved.

45. Thus, from the evidence on record, it is not proved that appellants, Sushil and Kallu, attacked deceased (Chhedi Lal) but only appellant, Rajjan attacked him with sickle. From the evidence of P.W.3 and the postmortem report, it is proved that the fatal injuries due to which Chhedi died were caused by sickle on his head and his back. Thus, from the aforesaid evidence, it is proved that appellant, Rajjan attacked Chhedi Lal with sickle in his right to private defence with the intention of causing death or with causing such bodily injury as is likely to cause death. It is clear that only appellant, Rajjan, attacked deceased Chhedi Lal without pre-meditation in sudden quarrel. He did not go anywhere else to procure sickle, but it was lying nearby while he was cutting the clump of bamboo trees (banskot). There is no allegation of exhortation by any accused-appellant to attack and kill the deceased.

46. The prosecution has failed to prove the charge under Section 302 I.P.C. r/w 34 I.P.C. against appellants, Rajjan, Sushil and Kallu. The prosecution is successful in proving beyond reasonable doubt the charge u/s 304 (I) I.P.C. against appellant, Rajjan and has failed to prove the charge under Section 302 I.P.C. or Section 304 I.P.C. against appellants, Kallu and Sushil.

47. In view of above, the appeal is allowed qua appellants, Kallu and Sushil. Their conviction u/s 302 r/w 34 I.P.C. is set-aside. The appellants are on bail. They need not surrender. Their bail bonds are cancelled and sureties are discharged.

48. So far as the appeal of appellant, Rajjan, is concerned, the same is partly allowed. His conviction and sentence u/s 302 r/w 34 I.P.C. is converted into conviction u/s 304 (I) I.P.C. He is sentenced to 10 years rigorous imprisonment, with a fine of Rs.10,000/- and in default in payment of fine, simple imprisonment for six months. Appellant, Rajjan is in jail. He will undergo the sentence as imposed above.

49. Let a copy of this judgement and trial court record be sent to the concerned Sessions Judge for compliance.

(2023) 3 ILRA 994
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.01.2023

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Crl. Revision No. 52 of 2023

Asgar Ali ...Revisionist
Versus
State of U.P. & Anr. ...Respondent

Counsel for the Revisionist:
Ramakar Shukla

Counsel for the Respondent:
G.A.

Criminal Law- Code of Criminal Procedure, 1973-Section-319-FIR lodged u/s 498A,304B IPC and section 3/4 DP Act-Charge-sheet was filed against the other alleged co-accused persons and the final report was submitted in respect with the present revisionist-Trail court summoned the revisionist under Section 319 CrPC-Courts should not exercise its power under Section 319 of CrPC in a supine and cavalier manner but if the Court is on a material conclusion that there are more than prima facie evidence against an accused-No satisfaction recorded by the Court below with respect to the fact that prosecution succeeded to establish more than prima facie or much stronger case against the revisionist and if such an evidence are adduced, there are chances of conviction of the revisionist.

Revision allowed, impugned summoning order set-aside. (E-15)

List of Cases cited:

1. Hardeep Singh Vs St. of Pun., (2014) 3 SCC 92

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

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard Sri Ramakar Shukla, learned counsel for the revisionist, Sri Anirudh Kumar Singh the learned AGA-I for the State.

2. Notice to the the opposite party no. 2 is hereby dispensed with.

3. By means of the instant revision a challenge has been made to the impugned summoning order dated 09.12.2022 passed by the learned Additional Sessions Judge, Court No. 8, Sultanpur in Sessions Trial No. 1249 of 2021 arising out of case crime no. 484 of 2021, under Sections 498A, 304B of the IPC and Section 3/4 of the DP Act, Police Station Gusaiganj, District Sultanpur.

4. Contention of the learned counsel for the revisionist is that an first information report was lodged by the opposite party no. 2, against the revisionist and other family members on 07.08.2021 at 7:19 PM, showing the incident dated 05.08.2021 at 4:00 PM and while lodging the first information report, the opposite party no. 2 has made an allegation that on 05.08.2021 at about 04:00 PM, she received a phone call from Jabir at Bombay who informed that Rashida (deceased) is ill and when she called on mobile phone of Rashida, then father-in-law picked up the phone and said that he is at work, far away from house and immediately cutoff the phone. Thereafter, five minutes later, Asgar called on mobile phone and informed that Rashida has hanged herself. He added that allegation is that the marriage of the deceased, namely, Rashida was performed, two years ago, from the date of the incident and she was having six years' child but after the marriage, husband and other family members started harassing the deceased while taunting over her and due to the same, she hanged herself.

5. He submits that it is an admitted fact that the revisionist was not on the place of occurance at the time of alleged incident and thereafter when he came back, he informed to the opposite party no. 2 regarding the incident and without knowing the truthfulness of the incident, the informant lodged the instant first

information report and the revisionist is implicated. He next added that after lodging of the first information report, a thorough investigation was done and the charge-sheet was filed against the other alleged co-accused persons and the final report was submitted in respect with the present revisionist.

6. Adding his arguments, he submits that no evidence was found by the Investigating Officer during course of investigation against the present revisionist, so far as, the allegation of dowry death is concerned and considering the statements of the witnesses under Section 161 and other evidences, the final report was submitted by the Investigating Officer and thus there was no occasion for the trial Court to summon the revisionist under Section 319 of CrPC.

7. During the course of his arguments, he has also drawn attention towards the order impugned, wherein, in the finding clause, the trial court has taken the note of the statement of the witnesses recorded under Section 161 of CrPC and the case diary. He submits that the trial Court has erred to pass the impugned order, as it has been a settled law that only on the basis of the statement under Section 161 or the reiteration of the same by the PWs in their statements, would have no ground to summon an accused under the provisions of Section 319 of CrPC.

8. In support of his contention, he has drawn attention towards the case reported in **(2014) 3 SCC 92, Hardeep Singh Vs. State of Punjab** along with the other connected petitions and has referred paragraphs 105 and 106 of the judgement.

9. Paragraph 105 and 106 of the judgement are read as under:-

"105. 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.

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 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. "

10. Referring the aforesaid, he submits that Hon. Apex Court has held that the power under Section 319 CrPC is discretionary and an extraordinary power and thus the same should be used sparingly and it has further been held that much

stronger evidences than mere probability of complicity is the rule, where the trial court exercises power under Section 319 of CrPC.

11. He has further drawn attention towards the case reported in (2017) 7 SCC 706, Brijendra Singh Vs. State of Rajasthan and referred paragraph 14 and 15 of the judgement.

12. Paragraph 14 and 15 of the judgment are quoted hereinunder:-

"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 kms. 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 Cr.P.C. 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 appellants plea of alibi was correct.

15. This record was before the trial court. Notwithstanding the same, the trial court went by the deposition of complainant and some other persons in their examination-in-chief, with no other material to support their so- called verbal/ocular version. Thus, the 'evidence' recorded during trial was nothing more than the statements which was already there under Section 161 Cr.P.C. recorded at the time of investigation of the case. No doubt, the trial court would be competent to exercise its power even on the basis of such statements recorded before it in examination-in-chief. However, in a case like the present where plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty bound to look into the same while forming prima facie opinion and to see as to whether 'much stronger evidence than mere possibility of their (i.e. appellants) complicity has come on record. There is no satisfaction of this nature. Even if we presume that the trial court was not apprised of the same at the time when it passed the order (as the appellants were not on the scene at that time), what is more troubling is that even when this material on record was specifically brought to the notice of the High Court in the Revision Petition filed by the appellants, the High Court too blissfully ignored the said material. Except reproducing the discussion contained in the order of the trial court and expressing agreement therewith, nothing more has been done. Such orders cannot stand judicial scrutiny. "

13. Relying upon the ratio of the judgement aforesaid, he submits that it has been settled by the Apex Court that mere possibility of complicity is not sufficient ground to issue summons under Section 319 of CrPC, but stronger evidences are required to be there. He submits that from

bare perusal of the order-sheet it is evident that learned Trial Court while passing the order impugned dated 09.12.2022 has not recorded its satisfaction with respect to the fact that the case comes under the purview of much stronger case and has only considered the statements recorded under Section 161 and statements of P.W. 1 and there was no such material which could substantiate that there is more than prima facie case.

14. Concluding his arguments; he submits that the order impugned vitiates in the eyes of law as the same is not only against the law propounded by the Apex Court but it is against the object of the provisions of law also and therefore, the order impugned is liable to be set-aside.

15. Per contra, the learned counsel appearing for the State has opposed the contention aforesaid and submits that the detailed order has been passed on 09.12.2022 while considering the material available before the trial Court. He added that finding in the order is evident that the trial Court has gone through the statement of the witnesses recorded under Section 161 CrPC as well as the statement of PW1 and after application of judicial mind, he has passed the order. He submits that the statement of PW1 has been recorded during the trial, wherein, the trial Court found that the same will lead to the conviction of the revisionist as much stronger case was established. The statement of PW1 has been discussed by the learned trial Court in the impugned order. Further argued that everything has been discussed thoroughly in the order and therefore the order impugned do not assail any illegality or infirmity, hence the revision is liable to be dismissed.

16. Having heard the learned counsel for the parties and after perusal of material placed on record, it emerges that the final report was submitted by the Investigating Officer in the case of present revisionist and the charge-sheet was filed against the other co-accused persons. Learned trial Court while passing the summoning order dated 09.12.2022 has considered the statement of the witnesses under Section 161 and the statement of PW1 deposed before the trial Court including the case diary which indicates that those are the foundation of the impugned order.

17. Further Section 319 of CrPC envisages an extraordinary power conferred upon a Court to do substantial justice and thus should be exercised cautiously as the investigating agency found no evidence against such allegedly accused person during course of the investigation. The very purpose of Section 319 of CrPC is to avoid any escape of a guilty person from the trial and therefore discovery of the further evidence must disclose more than prima facie case.

18. The settled law is that the Courts should not exercise its power under Section 319 of CrPC in a supine and cavalier manner but if the Court is on a material conclusion that there are more than prima facie evidence against an accused, certainly this power can be exercised.

19. In case of Hardeep Singh Vs. State of Punjab (Supra), it has categorically been held that Section 319 of CrPC is a discretionary and extraordinary power which is to be exercised when there is a strong and cogent piece of evidence against an accused person and thus it should be exercised sparingly. The apex Court has very cautiously interpreted the abovesaid provision and held that for exercising of power under Section 319 CrPC, it requires

much stronger evidence than mere probability of complicity.

20. The Apex Court later on, in case of Brijendra Singh and Others (Supra) has also discussed the law enunciated in Hardeep Singh's case and has held that power under Section 319 CrPC can be exercised by the trial Court at any stage during the trial and any person can be summoned as an accused for facing the trial. The Apex Court has very clearly held that the word 'evidence' means the material brought before the Court during trial. The material/evidence collected by the Investigating Officer at the stage of enquiry can only be utilised for corroboration thereof.

21. When this Court examines the instant matter in its facts and in the law propounded by the Apex court, it borne out that the learned trial Court while passing the impugned order has considered the statement of the complainant under Section 161 of CrPC and has also perused the case diary. Much reliance has been placed on the case diary though the case of the revisionist is, that he is the father-in-law of the deceased and the statement of the witnesses which was recorded under Section 161 CrPC and the other materials, are insufficient to file a charge-sheet against the revisionist and therefore the Investigating Officer has filed the charge-sheet against all the accused persons except the present revisionist.

22. It is settled law that the trial Court can take step to add such persons as accused on the basis of evidence adduced and not on the basis of materials available in the charge-sheet or the case diary as, such materials do not constitute 'evidence'. In the case in hand, it is, prima facie, evident that the learned revisional Court has not only gone through the case diary but has also placed reliance on the first information report, the statement of the witnesses recorded under Section 161 CrPC and the statement of PW1 before the trial Court therefore there was no any material evidence other than the aforesaid before the trial Court while passing the impugned summoning order.

23. Further no satisfaction has been recorded by the Court below with respect to the fact that the prosecution succeeded to establish that there are more than prima facie or much stronger case against the revisionist and if such an evidence are adduced, there are chances of conviction of the revisionist. Further, the learned trial Court has also skipped the law enunciated by the Apex Court.

24. Resultantly, the revision is hereby **allowed** and the impugned summoning order dated 09.12.2022 is hereby **set-aside**.

25. The matter is remitted to the trial Court concerned to pass a fresh order, after considering the ratio of the judgements passed by the Apex Court in Hardeep Singh (Supra) and Brijendra Singh (Supra) including the other materials available before it, within period of 45 days from the date of the certified copy of the order.

26. Office is also directed to inform this order to the trial Court forthwith.

(2023) 3 ILRA 999
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.03.2023

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Crl. Revision No. 232 of 2023

Mujtaba Ali Khan ...Revisionist
Versus
Jud. Magistrate-III, Lko. & Ors.
...Opp. Parties

Counsel for the Revisionist:
Ghaus Beg

Counsel for the Respondent:
G.A.

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 397 r.w. section 401 - Revision , Section 451 - Order for custody and disposal of property pending trial in certain cases , Indian Penal Code, 1860 - Section 279, 337, 427 - It is of no use to keep a seized vehicle at police station for a long period - Magistrate must release vehicle after taking sufficient guarantee/surety - production of the vehicle not necessary during trial - photograph of the vehicle would be sufficient to be proved in evidence.(Para - 10,16)

Revisionist is the registered owner of a vehicle - involved in an accident - lodged FIR against unknown person - vehicle was seized and detained - vehicle of revisionist kept in police custody for about approximately 3 years and 6 months - application by revisionist for release of vehicle - Magistrate rejected application – ground - accused failed to surrender & driver's license was not verified.**(Para - 3 to 10)**

HELD:- Revisionist entitled to the possession of the seized vehicle, which is related to the accident matter. Magistrate has no power to enquire about the validity of the driver's license and pollution certificate, as he is not a police officer or transport department officer.**(Para - 15)**

Criminal revision allowed. (E-7)

List of Cases cited:

1. Sunderbhai Ambalal Desai Vs St. of Guj. , AIR 2003, S.C., Page No. 638

2. General Insurance Council Vs St. of A.P. , 2010 (6) SCC

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

1. Heard learned counsel for revisionist Sri Ghaus Beg, learned AGA and perused the record.

2. Learned counsel for revisionist submitted that he inadvertently impleaded Judicial Magistrate in the array of opposite party and learned counsel for revisionist submitted that he want to delete the opposite party no.1 Judicial Magistrate-III. Submission of learned counsel for revisionist is hereby allowed and it is directed to delete the same.

3. This Criminal Revision has been preferred u/s 397 read with Section 401 of Code of Criminal Procedure 1973 against the impugned order dated 21.1.2023 passed by the Judicial Magistrate-III, Lucknow, whereby without assigning any cogent reason the learned trial court has rejected the application dated 24.1.2020. Being aggrieved with impugned order dated 24.1.2020 this revision preferred by the revisionist in respect of release of vehicle bearing registration no. UP-32/CN5543 (Bus).

4. Learned counsel for revisionist submitted that revisionist is the registered owner of vehicle no. UP-32/CN5543 (Bus). On 18.10.2019 the above mentioned vehicle met with an accident near Purniya Chaurah under P.S. Madiyaon, Lucknow with motor cycle bearing registration no. UP32-KR-1795. In the said incident no one has got injury. However, the said motor cycle was partially damaged. In this behalf, Sri Krishan Kant Kushwaha lodged FIR on 18.10.2019 against unknown person as a Case Crime No. 947/2019 u/s 279, 337, 427 IPC, P.S. Madiyaon, Lucknow which is annexed as Annexure No. 4. The vehicle of the revisionist was seized and detained at P.S. Madiyaon on 18.10.2019.

5. The revisionist preferred the application on 27.1.2020 before ACJM, IV, Lucknow for release of the vehicle but the Magistrate concerned vide the order dated 5.3.2020 rejected the said release application on flimsy grounds in an illegal and arbitrary manner by stating that accused of this crime failed to surrender before the court and the license of the driver is not duly verified.

6. Being aggrieved with the impugned order dated 5.3.2020 passed by learned Magistrate the revisionist preferred the Revision No. 204/2020 on 17.8.2020. Learned Additional District and Sessions Judge, Lucknow allowed the said revision and set aside the order dated 5.3.2020 and remanded the matter to the learned trial court with direction to consider the release application. After hearing the parties the revisional court passed the order dated 15.12.2021 in the light of the judgement passed by Hon'ble Apex Court in case of **Sunderbhai Ambalal Desai V/s State of Gujarat, AIR 2003, Supreme Court, Page No. 638** which is annexed as Annexure No. 8.

7. The relevant portion of which is being reproduced hereunder:

"In our view, whatever be the situation it is of no use to keep seized vehicle at the police stations for a long period so it is for the magistrate to pass appropriate order immediately by taking appropriate bond and guarantee as well as security return of the said vehicle at any point of time. This can be done pending hearing of application for return of such vehicle.

In any case,before handing over possession of such vehicles, appropriate photographs of the said vehicle could be taken and detailed panchnama should be prepared.

However those powers are to be exercised by the concerned Magistrate. We hope and trust that the concerned Magistrate would take immediate action for seeing that powers under section 451 CrPC are properly and promptly exercised and articles are not kept for a long time at the police station, in any case for not more than fifteen days to one month."

8. In pursuance of order dated 15.12.2021 passed by learned Revisional Court, revisionist approached before the Judicial Magistrate-III and again moved the application in the light of the direction given by the learned Revisional Court. But the learned Magistrate rejected the release application dated 21.1.2003 without considering the direction given by learned Revisional Court to consider the release application of the revisionist as law propounded by Hon'ble Apex Court in Sunderbhai Ambalal Desai V/s State of Gujarat (Supra).

9. Order dated 21.1.2023 passed by learned Judicial Magistrate, III, Lucknow reads as under:

"न्यायालय न्यायिक मजिस्ट्रेट तृतीय, लखनऊ।

मुजतबा अली खां

बनाम

सरकार

मु०अ०सं० 947/2019 धारा- 279,337,427 आई०पी०सी०

थाना- मड़ियांव, जनपद लखनऊ

दिनांक 21.01.23

प्रार्थना पत्र वास्ते रिलीज किये जाने वाहन सं०- यू०पी०-32 सी०एन०-5543, प्रार्थी मुजतबा अली खाँ की ओर से प्रस्तुत करते हुए कथन किया गया है कि वह उपरोक्त वाहन की पंजीकृत स्वामी है। उपरोक्त वाहन मु०अ०सं० 947/19 में लिखित रुप से

दर्ज है। अतः उक्त वाहन को उसके पक्ष में अवमुक्त किये जाने की कृपा की गई है।

उपरोक्त प्रार्थना पत्र पर प्रार्थी के विद्वान अधिवक्ता एवं विद्वान अभियोजन अधिकारी को सुना एवं अभियोजन आख्या एवं थाने से प्राप्त आख्या का अवलोकन किया।

सहायक अभियोजन अधिकारी की आख्या के अनुसार डी०एल० व पल्यूशन का सत्यापन होना शेष है। आवेदक का अवमुक्त प्रार्थना पत्र स्वीकार किये जाने योग्य नही है।

थाने से प्राप्त आख्यानुसार वाहन प्राईवेट बस सं० यू०पी०-32 सी०एन०-5543 मु०अ०सं० 947/2019 धारा-279,337,427 आई०पी०सी० थाना मड़ियांव के अभियोग से संबंधित है। उक्त वाहन थाने के मालखाने में दाखिल है.

अतः मामले के तथ्यों एवं परिस्थितियों को दृष्टिगत रखते हुये आवेदक का अवमुक्त प्रार्थना पत्र स्वीकार किये जाने योग्य नहीं है।

आदेश

तदनुसार आवेदक / प्रार्थी मुजतबा अली खां का प्रार्थना पत्र वास्ते अवमुक्त किये जाने वाहन प्राईवेट बस सं० यू०पी०-32-सी०एन०-5543निरस्त किया जाता है।"

10. Thus, learned counsel for revisionist submitted that it is the settled law of the land that it is of no use to keep the seized vehicle at police station for a long period and it was directed to the Magistrate to release the above vehicle after taking sufficient guarantee/surety. Even, that learned trial court did not consider the provisions enshrined in Section 451 CrPC and due to impugned order dated 21.1.2023 the vehicle of revisionist is unnecessary kept in police custody for about approximately 3 years and 6 months. Thus the revisionist suffer irreparable loss and he prayed that his revision to be allowed.

11. Learned AGA vehemently opposed and submitted that this is the case of property.

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

"Section 451 in The Code Of Criminal Procedure, 1973 reads as under:

Order for custody and disposal of property pending trial in certain cases. When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of. Explanation.- For the purposes of this section," property" includes-

(a) property of any kind or document which is produced before the Court or which is in its custody,

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence"

13. On perusal of the order of learned Judicial Magistrate dated 21.1.2023, learned Magistrate rejected the release application without assigning any reason in very cursory manner. It was the bounden duty of Magistrate to follow the direction issued by the revisional court vide order dated 15.12.2021 but the Magistrate fail to follow the order of revisional court. Learned Revisional Court in his findings dated 15.12.2021 clearly gave direction to the learned trial court that verification of license of driver is not required in this case and the revisionist is agree to compensate the victim adequately and clearly indicated that due to passage of time the seized vehicle became deteriorated.

14. This fact is undisputed that the chargesheet has already been filed before the trial court, so, in these circumstances, learned trial court without application of judicial mind wrongly rejected the release application. Even the learned trial court did not bother to follow the direction issued by revisional court and the learned trial court neither read the Section 451 of CrPC nor follow the dictim of Hon'ble Apex Court in Sunderbhai Ambalal Desai (Supra).

15. It is clear that the revisionist is entitled to the possession of above vehicle. This seized vehicle is related to the accident matter and only on the basis of the pollution certificate or verification of license of driver the release of the vehicle could not be denied. Learned Magistrate has no power to enquire about validity of license of driver and pollution certificate as Magistrate is not a police officer or officer of the transport department.

16. In this matter, it is also desirable that the production of vehicle is not inevitable. In **General Insurance Council v/s State of AP 2010 (6) SCC** Hon'ble Apex Court held that the production of the vehicle is not necessary during trial and the photograph of the vehicle would be sufficient to be proved in evidence and the learned Apex Court directed to release the vehicle immediate forthwith.

17. The purpose of revisional jurisdiction is to examine the correctness or propriety of order. It is indicated that the order passed by the learned Magistrate is non speaking without application of judicial mind and without reading the relevant provisions as well as Apex Court law. Order passed by the learned Magistrate is cryptic and this practice is highly deprecated. Conduct of the learned Magistrate is against the Judicial Propriety and it amounts to contempt also.

18. Learned Magistrate is hereby warned in future to pass the order in accordance with law.

19. Consequently, the revision is hereby allowed.

20. Thus, in above discussion I quash the impugned order dated 21.1.2023 passed by Judicial Magistrate-III and court concerned is directed to release the above vehicle in favour of the revisionist forthwith after taking proper surety.

21. Senior Registrar of this Court is hereby directed to communicate the order of this Court to learned Judicial Magistrate, III, Lucknow through District Judge Lucknow. It is also directed to District Judge, Lucknow to keep vigil against the officer concerned.

22. Accordingly, this Criminal Revision is **disposed of.**

(2023) 3 ILRA 1003
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.03.2023

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Crl. Revision No. 242 of 2023

Dilshad Ahmad ...Revisionist
Versus
State of U.P. & Anr. ...Respondent

Counsel for the Revisionist:
Hari Shanker Tewari

Counsel for the Respondent:
G.A.

(A) Criminal Law - The Juvenile Justice (Care & Protection of Children) Act, 2015 - Section 102 - Revision, Section 9 - Procedure to be followed by a Magistrate who has not been empowered under this Act. , Section 94 - Presumption and determination of age , Indian Penal Code, 1860 - Section 354(B) - Assault or use of criminal force to woman with intent to disrobe , Protection of Children from Sexual Offence Act, 2012 - Section 17/18 - juvenility can be claimed at any stage even pendency of the appeal. (Para - 5)

Revisionist preferred an application before trial court - for declaring his juvenility - trial court rejected birth certificate of revisionist issued by Panchayat - in a cursory manner without passing any appropriate order - without considering evidence - procedure prescribed by the Act, 2015 not followed.(Para - 3,5)

HELD:-Direction issued to trial court to decide the application to claim the juvenility of the revisionist within one month, as per sections 9 and 94 of the Act, 2015. Impugned order passed by trial court quashed. (Para -7)

Criminal revision allowed. (E-7)

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

1. Heard learned counsel for the revisionist, Shri Vijay Prakash Dwivedi, learned AGA for the State and perused the material available on record.

2. The instant Criminal Revision under Section 102 of the Juvenile Justice (Care & Protection of Children) Act, 2015 has been filed against the judgment and order dated 28.2.2023 passed by the learned Additional Sessions Judge/Special Judge (POCSO Act), Sultanpur in Special Sessions Trial No. 537 of 2018 arising out of case crime No. 423 of 2017, U/s 354(B) IPC and Section 17/18 of Protection of Children from Sexual Offence Act, 2012, Police Station- Lambhua, District- Sultanpur, whereby the application for declaring the revisionist as juvenile in conflict with law has been rejected.

3. Learned counsel for the revisionist submits that the revisionist preferred an application for declaring his juvenility before the trial court U/s 9 of Juvenile Justice (Care & Protection of Children) Act, 2015 (in short "the Act, 2015"). The trial court recorded the findings that the family register issued by the Panchayat is not admitted as a proof of age under the provision of section 94 of the Act, 2015, which is contrary to the view held by the Apex Court. But the said application of the revisionist was rejected by the learned trial court without appreciating the evidence available on record and without observing the procedure as prescribed U/s 9 and 94 of the Act, 2015 on 28.2.2023. The said sections 9 and 94 of the Act, 2015 read as under:

"9. Procedure to be followed by a Magistrate who has not been empowered under this Act.- *(1) When a Magistrate, not empowered to exercise the powers of the Board under this Act is of the opinion that the person alleged to have committed the offence and brought before him is a child, he shall, without any delay, record such opinion and forward the child immediately along with the record of such proceedings to the Board having jurisdiction.*

(2) In case a person alleged to have committed an offence claims before a court other than a Board, that the person is a child or was a child on the date of commission of the offence, or if the court itself is of the opinion that the person was a child on the date of commission of the offence, the said court shall make an inquiry, take such evidence as may be

necessary (but not an affidavit) to determine the age of such person, and shall record a finding on the matter, stating the age of the person as nearly as may be:

Provided that such a claim may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such a claim shall be determined in accordance with the provisions contained in this Act and the rules made thereunder even if the person has ceased to be a child on or before the date of commencement of this Act.

(3) If the court finds that a person has committed an offence and was a child on the date of commission of such offence, it shall forward the child to the Board for passing appropriate orders and the sentence, if any, passed by the court shall be deemed to have no effect.

(4) In case a person under this section is required to be kept in protective custody, while the person's claim of being a child is being inquired into, such person may be placed, in the intervening period in a place of safety.

94. Presumption and determination of age.- *(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.*

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining --

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

The further submission the counsel for the revisionist is that without proper inquiry and without application of judicial mind, the trial court rejected the aforesaid application of the revisionist in a cursory manner on the same day i.e. on 28.2.2023 without conducting any inquiry under the Act, 2015.

4. Learned counsel for the revisionist submitted that in section 94 of the Act, 2015, it is clearly provided that first preference should be given to the date of birth certificate issued from the school or the matriculation or equivalent certificate issued from the concerned board. But the counsel submitted that the revisionist is illiterate and he never got admitted in any school and thus, his birth certificate issued from the board is not available. It is further submitted that as per section 94(ii) of the

Act, 2015, birth certificate issued by the Panchayat shall be considered. But the learned trial court rejected the birth certificate of the revisionist issued by the Panchayat in a cursory manner without passing any appropriate order. It is also submitted that learned trial court in the judgement mentioned that in 313 CrPC statement, the revisionist himself stated that he was about 20-21 years. The matter pertains to year 2017, which itself shows that six years ago, the age of the revisionist was less than 18 years. Moreover, in pariwar register issued by the Gram Panchayat, the date of birth of the revisionist is 2001. The counsel further submitted that juvenility can be claimed at any stage even pendency of the appeal.

5. Learned AGA vehemently opposed and submitted that the trial court rejected the application of the revisionist after applying judicial mind. Thus, the impugned order passed by the trial court is not liable to be quashed.

6. Considering the entire facts and circumstances of the case, learned trial court is directed to decide the application to claim the juvenility of the revisionist within one month as per sections 9 and 94 of the Act, 2015. Till determination of claim of the juvenility, no final order shall be passed. The impugned order dated 28.2.2023 passed by the trial court is hereby quashed.

7. Accordingly, the instant revision is hereby ***allowed***.

8. Let this order be communicated to the court concerned for necessary compliance.

(2023) 3 ILRA 1006

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.02.2023

BEFORE

THE HON'BNLE RAMESH SINHA, J.
THE HON'BLE RAJIV GUPTA, J.

Crl. Misc. Writ Petition No. 1948 of 2023

Kuldeep Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Brij Raj, Agarwal Archi Piyush

Counsel for the Respondents:
G.A., Sri Susheel Kumar Singh, Sri Ugrasen Kumar Pandey

(A) Criminal Law - Indian Penal Code, 1860 - Sections 323, 376, 504 & 506 - The Protection of Children from Sexual Offences Act, 2012 - Section 3/4 , The Code of criminal procedure, 1973 - Section 73 - Warrant me be directed any person - If during investigation, the Investigating Officer intends to arrest the person accused of the offence, he has to seek for and obtain a warrant of arrest from the Magistrate - Magistrate is fully competent to issue non-bailable warrant to apprehend recalcitrant person who is accused of non-bailable offence and is evading arrest. (Para - 10)

Investigation pending - I.O. filed an application before Special Judge (POCSO Court) – petitioner is wanted accused in F.I.R. - accused/petitioner evading arrest - not appearing before police for getting his statement recorded - not co-operating with investigation - Special Judge (POCSO Court) issued a non-bailable warrant against petitioner – hence petition for quashing of order.**(Para - 3,8)**

HELD:-Special Court (POCSO Act) rightly exercised his power in issuing non-bailable warrant against the petitioner. Impugned order issuing a non-bailable warrant against the

petitioner is not illegal enough to persuade the Court to exercise its inherent jurisdiction under Section 226 of the Constitution of India. **(Para - 7,12)**

Petition dismissed. (E-7)

List of Cases cited:

St. through C.B.I. Vs Dawood Ibrahim Kaskar & ors. , (2000) 10 SCC 438

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

1. This petition seeks issuance of a writ in the nature of Certiorari quashing the impugned order dated 15.10.2022 passed by the Special Judge (POCSO Court), Allahabad, whereby non-bailable warrant has been issued against the petitioner in F.I.R. No. 0136 of 2022, under Sections 323, 376, 504, 506 I.P.C. and Section 3/4 of the Protection of Children from Sexual Offences Act, 2012, Police Station Phaphamau, District Allahabad.

2. Heard Ms. Archi Piyush, learned Counsel for the petitioner, Shri J.K. Upadhyaya, learned Additional Government Advocate for the State/respondents no. 1 to 3 and perused the impugned F.I.R. as well as material brought on record.

3. It appears that the proceedings were commenced pursuant to an FIR dated 18.05.2022, registered as FIR No.0136 of 2022, under Sections 354 (k), 323, 504, 506 I.P.C. and Section 3/4 of the Protection of Children from Sexual Offences Act, 2012, Police Station Phaphamau, District Allahabad, against the petitioner, whereupon the case was investigated. The aforesaid F.I.R. was challenged by the petitioner by filing Criminal Misc. Writ Petition No. 6443 of 2022 before this Court, which was dismissed as withdrawn by means of the order dated 31.05.2022. Thereafter, the petitioner has filed anticipatory bail application, bearing No. 7475 of 2022, which was rejected by the learned Single Judge vide order dated 31.08.2022. During the pendency of the investigation, the Investigating Officer of the case has filed an application before the Special Judge (POCSO Court), Allahabad, stating that the petitioner is the wanted accused in F.I.R. No. 0136 of 2022 but in spite of his best efforts, he could not secure the arrest of petitioner and the petitioner is absconding and there is an apprehension that the petitioner could commit heinous crime, therefore, non-bailable warrant be issued against the petitioner. The Special Judge (POCSO Court), Allahabad, took cognizance of the aforesaid application of the Investigating Officer and upon examining the assertions of the application as well as the case diary, the Special Judge (POCSO Court) issued non-bailable warrant against the petitioner by means of the order dated 15.10.2022. It is at this stage that the present writ petition under Article 226 of the writ petition has been filed by the petitioner, seeking quashing of the aforesaid order dated 15.10.2022 passed by the Special Judge (POCSO Court), Allahabad.

4. Learned counsel for the petitioner has submitted that the Special Judge (POCSO Court), Allahabad has passed the impugned order on the basis of the application moved by the Investigating Officer that the petitioner is not co-operating with the investigation. She argued that the investigation is still continuing and no report has been submitted under Section 173 (2) Cr.P.C. She also argued that informant Shri Hari Shanker Tiwari and the petitioner are the

residents of Nai Basti Rangpura, Banaras Road, Phaphamau, Prayagraj and they have amicably settled the dispute by means of compromise deed dated 16.01.2023, a copy of which has been annexed as Annexure no.6 to the writ petition. Therefore, issuance of non-bailable warrant against the petitioner during pendency of invesigation is liable to be quashed. In support of her submission, she has relied upon the judgment of the Apex Court in **State through CBI Vs. Dawood Ibrahim Kaskar and others** : (2000) 10 SCC 438, wherein the Apex Court has held that the power of issuance of non-bailable warrant can be exercised by the learned Magistrate for appearance of accused before the Court and not before the police in aid of investigation.

5. Learned Additional Government Advocate, on the other hand, has contended that the impugned order has been passed by the Special Judge (POCSO Court), Allahabad, issuing non-bailable warrant against the petitioner, after taking into account the fact that though the Investigating Officer has raided the house of the petitioner, his relative and other places for arrest of the petitioner, but he is absconding, and is also evading himself from arrest, as indicated in the application moved by the Investigating Officer before the Court concerned, hence, under compelling circumstances, the Investigating Officer has moved the application on 13.10.2022, requesting the Court to issue non-bailable warrant. Therefore, the Special Court (POCSO Court), Allahabad, has rightly passed the impugned order against the petitioner. He also argued that the case of **Dawood Ibrahim Kaskar (supra)** relied upon by the learned counsel for the petitioner is not applicable in the instant case as the facts of the both cases are entirely different.

6. We have examined the submissions advanced by the learned counsel for the parties and gone through the record as well as material brought on record.

7. Perusal of the impugned order indicates that the Special Court (POCSO Court), Allahabad has examined the assertions of the application filed before it that a raid was conducted at the house of the petitioner as well as the house of his relative and other places but he is absconding and he is also trying to evade himself from arresting here and there and there is an apprehension that the petitioner could commit serious offence. The Special Court (POCSO Court), Allahabad has also examined the office report to the effect that no application on behalf of the petitioner/accused for surrendering himself is pending in the Court. After examining the aforesaid and also going through the case diary, the Special Court (POCSO Court) has issued non-bailable warrant against the petitioner, who is an accused of Crime No. 0136 of 2022, under Sections 323, 376, 504, 506 I.P.C. and Section 3/4 of the Protection of Children from Sexual Offences Act, 2012, Police Station Phaphamau, District Allahabad. Thus, we are of the considered view that the Special Court (POCSO Act), Allahabad has rightly exercised his power in issuing non-bailable warrant against the petitioner.

8. The judgment of the Apex Court in **State through CBI Vs. Dawood Ibrahim Kaskar and others (supra)** relied by the petitioner is distinguishable from the facts

and circumstances of the case, as in **Dawood Ibrahim Kaskar (Supra)**, the investigation was completed and charge-sheet was submitted, whereas in the instant case, the investigation is still continuing and the accused/petitioner is evading arrest and not appearing before the police for getting his statement recorded and not co-operating with the investigation.

9. At this juncture, it would be apposite to reproduce Section 73 of the Code of Criminal Procedure, which reads as under :-

"73. Warrant may be directed any person. (1)The Chief Judicial Magistrate or a Magistrate of the first class may direct a warrant to any person within his local jurisdiction for the arrest of any escaped convict, proclaimed offender or of any person who is accused of a non- bailable, offence and is evading arrest.

(2)Such person shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued, is in, or enters on, any land or other property under his charge.

(3)When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest police officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken under section 71."

10. Perusal of the aforesaid provision, it is apparent that if during invesigation, the Investigating Officer intends to arrest the person accused of the offence, he has to seek for and obtain a warrant of arrest from the Magistrate. The Magistrate is fully competent to issue non-bailable warrant to apprehend recalcitrant person who is accused of non-bailable offence and is evading arrest.

11. In the instant case, the Special Judge (POCSO Court), Allahabad has exercised its judicial discretion considering the gravity of the offence as well as taking into account the fact that the petitioner is not co-operating with the investigation as succssively the police had raided his premises so that he may be questioned in details regarding various facets of commission of crime. Hence, it was necessary to curtail his freedom in order to enable the Investigating Officer to proceed without any hindrance.

12. Ordinarily, arrest is a part of process of investigation. As the statement of the victim has been recorded showing the involvement of the petitioner in commission of crime, in the opinion of the Investigating Officer, it was necessary to effectuate his arrest and in doing so, he has committed no fault in moving before the Court to obtain non-bailable warrant. Furthermore, a plain reading of the FIR discloses the age of the victim to be less than 18 years.

13. So far as the plea of the petitioner that a compromise entered into between the informant and petitioner is concerned, we find that the statement of the prosecutrix under Section 164 Cr.P.C. has been recorded, supporting the prosecution case, at this stage, it cannot be said that no offence prima facie is committed by the petitioner. Therefore, the plea of the petitioner in regard to the compromise does not in any way help him because the said compromise has been entered between the petitioner and the informant and not with the prosecutrix.

14. For the aforesaid reasons, the impugned order issuing non-bailable warrant against the petitioner by the Special Judge, POCSO Court, Allahabad of which quashment is sought, cannot be said to suffer from any illegality so as to persuade this Court to exercise its inherent jurisdiction under Section 226 of the Constitution of India.

15. The instant writ petition is, accordingly, **dismissed.**

(2023) 3 ILRA 1010
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.03.2023

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE KSHITIJ SHAILENDRA, J.

Crl. Misc. Writ Petition No. 7952 of 2022

Gaaurav Tripathi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sundeep Shukla, Sri Navin Kumar Sharma

Counsel for the Respondents:
G.A., Sri Bharat Singh

(A) Criminal Law - The Prevention of Corruption Act, 1988 - Section 7 - Offence relating to public servant being bribed - The Code of criminal procedure, 1973 - section 167(2) - Power of transferring investigation to other investigating agency must be exercised in rare and exceptional cases - where the Court finds it necessary in order to do justice between the parties to instil confidence in the public mind - or where investigation by the State Police lacks credibility - fair investigation as well as fair trial is fundamental right of the accused - An accused person does not have a choice in regard to the mode or manner in which the investigation should be carried out or in regard to the investigating agency. (Para -11,12,20,)

Matter related to transfer of investigation from Gorakhpur Sector to Lucknow Sector of Vigilance Department - based upon letters of Ministers and representation of accused - non disclosure of any cogent or valid reason for transferring investigation - orders passed after considering representation moved by respondent No. 10 - Political interference and representation of respondent No. 10 are only reasons for transfer - case not of exceptional or rare nature.**(Para -23,24)**

HELD:-Order impugned dated 17.05.2022 and the consequential order dated 02.06.2022 cannot be sustained due to political interference. No speaking reason or ground to justify the transfer of investigation from one agency to the other. Order transferring investigation quashed. **(Para - 24,25,26)**

Petition allowed. (E-7)

List of Cases cited:

1. Arnab Ranjan Goswami Vs U.O.I. & ors. , (2020) 14 SCC 12

2. Bimal Gurung & ors. Vs U.O.I. (UOI) & ors. , (2018) 15 SCC 480

3. Omveer Vs St. of U.P. & ors. , 2008 (5) ADJ 698 (DB)

4. Kumari Aayasha Vs St. of U.P. & ors. , 2018(1) ADJ 85 (DB)

5. Smt. Vandana Srivastava Vs St. of U.P. & ors. , 2014 (7) ADJ 679 (DB)

6. Mohan Lal Vs St. of Punj. , AIR 2018 SC 3853

7. A.V. Bellarmin Vs Mr. V. Santhakumaran Nair , Crl. O.P. (MD) No.12212 of 2013 & M.P. (MD) Nos.1 & 2 of 2013

8. Nirmal Singh Kahlon Vs St. of Punj. & ors. , (2009) 1 SCC 441

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Sri Sandeep Shukla, learned counsel for the petitioner, Sri Bharat Singh, learned counsel appearing for the respondent no. 10 and Sri G.P. Singh, learned A.G.A. appearing for the State.

2. Pursuant to the orders of this Court dated 17.1.2023 and 30.1.2023 learned A.G.A. has produced before this Court attested copy of the order dated 17.5.2022 alongwith other documents, which are taken on record.

3. This petition has been filed inter alia claiming following reliefs:-

"a. Issue a writ, order or direction in the nature of mandamus calling for the record of order dated 17.05.2022 passed by respondent number 3, being number वी.आई.पी.-15/ 39-4-2022-50 ,e (01)/2021 and further to issue a writ of certiorari quashing impugned order dated 17.05.2022 and consequential order dated 02.06.2022 passed by respondent number 7 directing transfer of investigation of Case Crime Number 5 of 2021 from Gorakhpur Sector of Uttar Pradesh (Vigilance Establishment) to Lucknow Sector (Vigilance Establishment).

b. Issue a writ, order or direction in the nature of mandamus commanding upon the respondent number 4 to pass appropriate order under section 19 of The Prevention of Corruption Act, 1988 on the police report submitted in First Information Report dated 16.09.2021 bearing Case Crime Number 5 of 2021, under section 7 The Prevention of Corruption Act, 1988 Police Station Gorakhpur Sector (Vigilance Establishment), District Gorakhpur."

4. The necessary facts giving rise to the present writ petition are that the petitioner was working as Assistant Teacher at Primary School, Barhauwa, Vikas Khand Saltauva, Gopalpur and on 26.08.2021, petitioner was suffering from cold, cough, fever etc. problem and for medical treatment he went to District T.B. Hospital, Basti having O.P.D. registration number 6034; on account of aforesaid medical problem, petitioner took leave on 26.08.2021, the said information was duly communicated to the Principal of school and it was duly noted in the school register; the online portal for sanction of leave was nonfunctional (due to technical error) in the entire Uttar Pradesh from 21.08.2021 to 27.08.2021, that is why petitioner applied offline for the leave and the information was given to respondent no.10; the respondent no.10 visited the school on 26.08.2021 and created a chaos there. He has also made overwriting in the attendance register and marked petitioner absent; as soon as the petitioner got the abovementioned information from school staff after he came back on 28.08.2021, he went to meet private respondent after school hours; the petitioner was asked to meet at 06:00 pm in front of Boons restaurant at District Basti and there an illegal demand of Rs. 10,000/- (finally settled for Rs. 7,000/-) was raised by respondent no.10 from petitioner; on the said illegal demand being raised by respondent no. 10, a complaint dated 06.09.2021 was made before Superintendent of Police, Vigilance Department, Gorakhpur raising his grievances; acting on the said complaint dated 06.09.2021, inquiry was done, averments of complaint were found genuine and it came into the knowledge that respondent no.10 is a corrupt officer; later on after following due process, trap

was organized on 15.09.2021 and respondent number 10 was caught red handed by the trap team taking bribe of Rs. 7,000/-; for the offence committed by respondent no.10, first information report dated 16.09.2021 was registered at Police Station Gorakhpur Sector (Vigilance Establishment) under Section 7 of the Prevention of Corruption Act, 1988 against respondent no.10; once respondent no.10 was arrested and sent to judicial custody, vide order dated 24.09.2021 he was suspended; bail application was moved by the respondent no.10 before Additional District and Sessions Judge (P.C. Act), Court Number 5, Gorakhpur being Bail Application Number 4445 of 2021 and the same was rejected vide order dated 28.09.2021; being aggrieved by bail rejection order dated 28.09.2021, Bail Application Number 43678 of 2021 (Manoj Kumar Singh Vs. State of U.P.) was filed before this Court; since charge sheet was not submitted within prescribed period, therefore an application under section 167(2) Cr.P.C. was moved by the respondent no.10 before the court below with a prayer to release on bail; Investigating Officer and Special Public Prosecutor submitted report before the court below that entire documents were sent to the Government but prosecution sanction had not been given; the learned Additional District and Session Judge (P.C. Act), Court Number 5, Gorakhpur granted bail to respondent n.10 vide order dated 16.11.2021; once bail application of respondent no.10 was allowed by the court below, bail application filed before this Court was dismissed as infructuous vide order dated 09.12.2021.

5. This Court while entertaining the writ petition at the initial stage passed order dated 08.07.2022, relevant portion whereof is extracted herein-below:

"Learned counsel for the petitioner submits that the petitioner was working as Assistant Teacher at Primary School, Barhauwa, Vikas Khand Saltauva, Gopalganj, District Gorakhpur. On 26.8.2021 he was suffering from fever and cold/cough and due to illness, he took leave on 26.8.2021. Shri Monoj Kumar Singh, Block Education Officer/respondent no.10 visited the school on the said date and marked the petitioner as 'absent'. On some illegal demand made by the respondent no.10, the petitioner made a complaint before the Superintendent of Police, Vigilance Department, Gorakhpur on 06.9.2021 against him. Thereafter, the respondent no.10 was caught red handed by the trap team while taking bribe of Rs.7000/- and consequently, the first information report was lodged against him on 16.9.2021 at Police Station Gorakhpur Sector (Vigilance Establishment) under Section 7 of the Prevention of Corruption Act, 1988 against him. He was arrested on 24.9.2021 and sent to judicial custody. It is also alleged that the respondent no.10 is an influential person and has been reinstated in service. The competent authority is sitting tight in the matters relating to prosecution sanction. A bare perusal of the order impugned dated 02.6.2022, it is crystal clear that the impugned order dated 17.5.2022 is passed on the recommendation of the political persons and even their names are also mentioned. As per business rules, they have no authority to intervene in the proceeding. By the impugned order dated 02.06.2022, respondent no. 7 has directed for transfer of the investigation of Case Crime Number 05 of 2021 from Gorakhpur Sector of Uttar Pradesh (Vigilance Establishment) to Lucknow Sector (Vigilance Establishment), that too on the pretext of the accused person, which clearly shows that the impugned orders are

passed just to provide benefit to respondent no. 10. In support of his submission, he has placed reliance on paragraph no. 39 of the judgment passed by Hon'ble Apex Court in Writ Petition (Crl) No. 130 of 2020 (Arnab Ranjan Goswami vs. Union of India & Ors).

Before proceeding further in the matter, let learned A.G.A. seek instructions in the matter and file an affidavit of the respondent no.3, Additional Chief Secretary, Home and Vigilance Establishment Government of U.P., Lucknow and respondent no. 4, Additional Director Education (Basic) Prayagraj, on or before the next date fixed in the matter.

Put up this case again as fresh on 13.07.2022."

6. This Court, by its subsequent order dated 30.01.2023, directed the learned AGA to produce the order dated 17.05.2022 passed by the Additional Chief Secretary, which has been impugned in the present petition, inasmuch as the contention of the petitioner is specific to the effect that the said order was not made available to him.

7. Today, learned AGA has produced the order dated 17.05.2022, which reads as follows:-

" आर०पी0 सिंहए गोपनीय

विशेष सचिव । अर्द्धशा०प०सं०.वीआईपी.15/39-4-2022

50एम (01)/2021

उत्तर प्रदेश शासन

सतर्कता अनुभाग.4

लखनऊ: दिनांक : 17 मई, 2022

प्रिय महोदय,

कृपया श्री मनोज कुमार सिंह, खण्ड शिक्षा अधिकारी, शिक्षा क्षेत्र सल्टौआ, जनपद बस्ती के ट्रैप आख्या विषयक विशेष निदेशक, उ०प्र० सतर्कता अधिष्ठान के अ0शा0प0सं0-स0अ0/अनु-2.ट्रैप-225/2021 दिनांक 16.03.2022 एवं अपर मुख्य सचिव, गृह एवं सतर्कता विभाग को सम्बोधित श्री जय प्रताप सिंह, पूर्व मंत्रीए उ०प्र० सरकार के पत्र दिनांक 18.04.2022 ;मूलप्रति संलग्न), श्री अजय सिंह, मा० सदस्य, विधान सभा, हर्रैया, बस्ती के पत्र दिनांक 20.04.2022 ;मूलप्रति संलग्न) एवं श्री जयवीर सिंह, मंत्री, पर्यटन एवं संस्कृति, उत्तर प्रदेश के पत्र दिनांक 27.04.2022 ;मूलप्रति संलग्न) का सन्दर्भ ग्रहण करने का कष्ट करें ।

2. इस सम्बन्ध में मुझसे यह कहने की अपेक्षा की गयी है कि शासन द्वारा सम्यक् विचारोपरान्त प्रश्नगत ट्रैप के सम्बन्ध में श्री मनोज कुमार सिंह, खण्ड शिक्षा अधिकारी, शिक्षा क्षेत्र सल्टौआ, जनपद बस्ती द्वारा प्रत्यावेदन में उल्लिखित तथ्यों एवं संलग्न किये गये 20 साक्ष्यों के परिप्रेक्ष्य में प्रकरण की निष्पक्ष जॉच / विवेचना गोरखपुर सेक्टर के स्थान पर उ०प्र० सतर्कता अधिष्ठान के लखनऊ सेक्टर से कराये जाने का निर्णय लिया गया है।

3. अत: अनुरोध है कि कृपया उल्लिखित आरोपों एवं साक्ष्यों को विवेचना में सम्मिलित करते हुए प्रकरण की जॉच उ०प्र० सतर्कता अधिष्ठान के लखनऊ सेक्टर से कराने एवं जॉच आख्या 15 दिन में शासन को उपलब्ध कराने का कष्ट करें।

संलग्नक. यथोक्त। (मूलरूप में वापसी अपेक्षित)

भवदीय

S/d

आर०पी० सिंह)"

8. Pursuant to the order dated 08.07.2022, personal affidavit of Shri Awanish Kumar Awasthi, posted as Additional Chief Secretary (Home /Vigilance), Government of Uttar Pradesh, Lucknow was filed. Paragraph Nos. 5 to 7 of the affidavit are quoted herein-below:

"5. That the impugned order dated 02.06.2022, consequential to the order dated 17.05.2022, was passed after carefully considering the representation moved by Shri Manoj Kumar Singh.

6. That the representation moved by the delinquent Manoj Kumar Singh, comprised 20 issues on which he prayed for objective, fair and impartial investigation.
7. That it is noteworthy, that various pieces of evidence were annexed to the representation moved by Manoj Kumar Singh, in support of the prayer for fair investigation on the 20 issues raised by the accused. The fact of the annexures in support of his prayer, finds mentioned in both the impugned orders dated 17.05.2022 and 02.06.2022."

9. It is contended by the learned counsel for the petitioner that the respondent no.10, after having been released from jail, is threatening the petitioner to get the matter compromised. Learned counsel for the petitioner submits that thereafter the order impugned dated 17.05.2022 and consequential order dated 02.06.2022 has been passed and the investigation in relation to Case Crime No.5 of 2021 has been transferred from Gorakhpur Sector to Lucknow Sector at the behest of the accused person, namely, the respondent no.10. He further submits that the order impugned dated 17.05.2022 has been passed on the recommendation of political persons to accord benefit to the respondent no.10. While referring to Annexure No.6 to the writ petition, it has been submitted that the investigating officer, by letter dated 12.11.2021 brought to the notice of Special Judge (Prevention of Corruption Act), Gorakhpur that the entire proceedings of investigation have already been completed and the necessary documents have been forwarded to the State Government but, till date, requisite sanction has not been accorded at the State Level due to which it was not possible to submit charge sheet. The letter further indicates the stand of the investigating officer that after obtaining sanction from the State Government, further proceedings will be held.

10. The sheet anchor of the argument of the learned counsel for the petitioner is that the investigation could not have been transferred at the behest of accused person and that in this case there was neither any justification nor any occasion for the authorities to transfer investigation once it was clearly opined that the entire proceedings of investigation were already over.

11. The contention of the learned counsel for the petitioner to the effect that the impugned transfer order has been passed at the behest of the accused persons stands substantiated from paragraph 2 of the order dated 17.05.2022 (afore-quoted) which speaks that in relation to the concerned trap, **taking into consideration the stand taken by Manoj Kumar Singh (respondent no.10),** the decision to transfer investigation from Gorakhpur Sector to Lucknow Sector has been taken. In support of the contention to the effect that investigation cannot be transferred from one investigating agency to the other at the behest of accused persons, learned counsel for the petitioner has placed reliance upon a decision of the Apex Court in case of ***Arnab Ranjan Goswami Vs. Union of India & others: (2020) 14 SCC 12***. The Apex Court in paragraphs 47 and 48 of aforesaid judgment has observed as follows:-

"47. As we have observed earlier, the petitioner requested for and consented to the transfer of the investigation of the FIR from the Police Station Sadar, District Nagpur City to the N.M. Joshi Marg Police Station in Mumbai. He did so because an earlier FIR lodged by him at that police

station was under investigation. The petitioner now seeks to pre-empt an investigation by the Mumbai Police. The basis on which the petitioner seeks to achieve this is untenable. ***An accused person does not have a choice in regard to the mode or manner in which the investigation should be carried out or in regard to the investigating agency. The line of interrogation either of the petitioner or of the CFO cannot be controlled or dictated by the persons under investigation/interrogation****. In P Chidambaram v Directorate of Enforcement (2019) 9 SCC 24, R Banumathi, J. speaking for a two judge Bench of this Court held that:*

"66...there is a well-defined and demarcated function in the field of investigation and its subsequent adjudication. It is not the function of the court to monitor the investigation process so long as the investigation does not violate any provision of law. ***It must be left to the discretion of the investigating agency to decide the course of investigation. If the court is to interfere in each and every stage of the investigation and the interrogation of the accused, it would affect the normal course of investigation.*** *It must be left to the investigating agency to proceed in its own manner in interrogation of the accused, nature of questions put to him and the manner of interrogation of the accused."*

(Emphasis supplied)

This Court held that so long as the investigation does not violate any provision of law, the investigation agency is vested with the discretion in directing the course of investigation, which includes determining the nature of the questions and the manner of interrogation. In adopting this view, this Court relied upon its earlier decisions in State of Bihar v P P Sharma and Dukhishyam Benupani, v Arun Kumar Bajoria in which it was held that the investigating agency is entitled to decide "the venue, the timings and the questions and the manner of putting such questions" during the course of the investigation.

48. In CBI v Niyamavedi: (1995) 3 SC 601, Sujata V Manohar, J. speaking for a three judge Bench of this Court held that the High Court should have:

"4...refrained from making any comments on the manner in which investigation was being conducted by the CBI, looking to the fact that the investigation was far from complete."

This Court observed that:

"4...Any observations which may amount to interference in the investigation, should not be made. Ordinarily the Court should refrain from interfering at a premature stage of the investigation as that may derail the investigation and demoralise the investigation. Of late, the tendency to interfere in the investigation is on the increase and courts should be wary of its possible consequences."

This Court adopted the position that courts must refrain from passing comments on an ongoing investigation to extend to the investigating agencies the requisite liberty and protection in conducting a fair, transparent and just investigation."

12. Learned counsel for the petitioner has further placed reliance upon a decision of the Apex Court in the case of ***Bimal Gurung and Ors. Vs. Union of India (UOI) and Ors.: (2018) 15 SCC 480,*** in paragraphs 29 and 53 of the said judgment, the Apex Court has observed as follows:-

29. The law is thus well settled that power of transferring investigation to other investigating agency must be exercised in rare and exceptional cases

where the Court finds it necessary in order to do justice between the parties to instil confidence in the public mind, or where investigation by the State Police lacks credibility. *Such power has to be exercised in rare and exceptional cases. In K.V. Rajendran vs. Superintendent of Police, (2013) 12 SCC 480, this Court has noted few circumstances where the Court could exercise its constitutional power to transfer of investigation from State Police to CBI such as: (i) where high officials of State authorities are involved, or (ii) where the accusation itself is against the top officials of the investigating agency thereby allowing them to influence the investigation, or (iii) where investigation prima facie is found to be tainted/biased.*

53. Most of the cases which were cited before us by the parties are the cases where this Court exercised jurisdiction under Article 32 in transferring the investigation at the instance of the victims. For a victim the investigation in a case is of much significance. In the event, a proper investigation is not carried out and relevant evidence which would have been collected by due care and caution, is not collected, the victim is sure not to get justice on such faulty investigation. In case of faulty investigation, where an accused has been wrongly roped in, he has the right to seek all remedies before the Court of Law for further investigation and a Court of Law is able to marshall all evidence and capable of discerning truth from evidence on record. Although as a principle, there is no fetter on an accused to move a Court of Law for transfer of investigation, but on the facts of this case as noted above, we do not think it to be a fit case where this Court may exercise jurisdiction under Article 32 to transfer the cases enmasse to an independent agency. The present case cannot be said to be a case of individual's persecution by the State authority."

13. Learned counsel for the petitioner has also placed reliance upon a decision of of this Court in the case of ***Omveer Vs. State of U.P. and others: 2008 (5) ADJ 698 (DB)***, paragraphs 13 and 15 of the said judgment read as follows:-

"13. The perusal of the application filed by the wife of Charan Singh accused does not indicate any cogent reasons on the basis of which further investigation was required. His application mentioned only earlier incident and the enmity. How and on what reasons the State Government came to the conclusion that further investigation is required is not born out from the impugned order. No reasons has been assigned by the State Government to give a latitude to the wife of the charge-sheeted absconding accused of a murder charge to have say in a matter of investigation. In our opinion, the impugned order seems to have been passed because of extraneous consideration and under political pressure. ***Learned AGA has also failed to point out any reason as to why investigation by SIS or any other agency was an indispensable necessity.*** *The State Government, was not excepted to give a long rope to the accused of a murder charge to remain absconding and make him subject to the jurisdiction of the Court. Since the charge sheet has already been submitted and the accused never participated in the investigation and brought their version before the I.O. we fail to understand the reason why the State Government has allowed them to have a say in the matter when those absconding accused have got a scanty respect for the law.*

15. In such a view, we are of the opinion that the impugned order has been passed because of extraneous consideration by the State Government and follow up order by the S.S.P. and therefore, we quash the impugned order dated 27.3.2008 passed by SSP Gautam Budh Nagar in case crime No. 302 of 2007, under Sections 302, 307 IPC and also order by State Government dated 26.3.2008. We direct the court concerned to proceed with the case forthwith after securing the presence of the accused persons. The accused persons would have full right to raise their grievance in the trial at the proper stage of framing of charge."

14. Learned counsel for the petitioner has also placed reliance upon a decision of this Court in the case of ***Kumari Aayasha Vs. State of U.P. and Ors: 2018(1) ADJ 85 (DB)***, paragraph 10 of the said judgment reads as as follows:-

"10. Upon consideration of the judgement of the Hon'ble Supreme Court referred to above we find that the order dated 18.5.2016 passed by the Secretary, Department of Home, Government of U.P., Lucknow, has been passed at the behest of the wife of one of the accused namely Waqil Ahmad. The only ground discernible from the order dated 18.5.2016 for transferring the case to C.B.C.I.D. appears to be the plea of alibi raised by the applicant Smt. Safia in respect of some of the accused persons. ***The order dated 18.5.2016 does not record a satisfaction regarding fulfilment of any of the conditions necessary for transfer of investigation from local police to C.B.C.I.D****. as provided, vide G.O. dated 05.09.1995. Furthermore, the report dated 30.03.2016 submitted by the Senior Superintendent of Police, Muzaffar Nagar does not recommend for transfer of the above mentioned case crime number to the C.B.C.I.D. Thus, the learned counsel for the petitioner is right in contending before us that the impugned order dated 18.05.2016 passed by the respondent No. 1 is violative of the G.O. dated 22.10.2014 and contrary to the report dated 30.03.2016 submitted by the Senior Superintendent of Police, Muzaffar Nagar."*

15. The learned counsel for the petitioner has also placed reliance upon a decision of this Court passed in ***Smt. Vandana Srivastava Vs. State of U.P. and 4 others: 2014 (7) ADJ 679 (DB)***. Relevant portion of the aforesaid judgment reads follows:-

"We may only record that despite specific query being made to the learned Government Advocate and the battery of the learned AGAs, who are present in the Court, none could inform the Court as to what Government orders apply in matter of exercise of power of transfer. What has been referred to, to this Court is only a letter of the Additional Director General of Police (Apraadh Evam Kanoon Vyawastha, U.P.) dated 12th December 2012. We fail to understand as to how a letter of the Additional Director General of Police can control the discretion of the State Government, being a subordinate officer.

But what we find is that under the said circular, guidelines have been laid down in the matter of transfer of investigation and it has specifically been provided various clauses that in normal circumstances no order for transfer should be made on an application of an accused. Every attempt should be made to get the investigation completed on merits in a fair and diligent manner. ***It has again been repeated that normally no transfer could be affected on***

the asking of the accused. In paragraph 5 of the circular it has been mentioned that if it is necessary to transfer the investigation in special circumstances, then the conditions existing for such transfer should specifically be mentioned in the order itself and an intimation be given to the higher authorities/State etc.

We are of the opinion that what applies in the matter of transfer of the investigation by the higher police officers applies with full force in the matter of exercise of discretion for transfer by the State Government. In as much as, it is the case of the State itself that the power to transfer the investigation both in favour of the State Government as well as in favour of the higher police authorities flows from Section 36 of the Code of Criminal Procedure read with section 3 of the Police Act, 1961.

We are very sorry to record that the State will not follow any guideline in the matter of exercise of discretion qua transfer of investigation and would continue to act arbitrarily. This Court is facing petitions every day where orders of transfer of investigation are being challenged not only on merit but also on the ground that they contain no reasons.

The practice must be put to an end. Such kinds of orders of transfer of investigation have the affect of loss of confidence of common public in the criminal justice system of this State.

The higher the authorities the higher the responsibility for exercise of power of transfer on cogent grounds and sparingly. Power of transfer of investigation cannot be made a tool in the hands of accused or other involved in the matter to prolong the investigation on some pretext or the other.

We deem it fit and proper to issue following directions in the matter of transfer of investigation by the higher police authorities or by the State Government:

(a) normally there should be no any order of transfer of investigation on an application made by an accused.

(b) Every attempt should be made by the higher police authorities/State on receipt of an application for transfer of investigation to first ensure that the investigation is done by the concerned Police Station/concerned police authority in a fair and diligent manner.

(c) Before passing any order on an application for transfer of investigation, the minimum expected from the State Government or from the higher police officers is to obtain a report from the Investigating Officer qua the status of the investigation and the order of the High Court, if any, in respect of the case crime number.

d. If it is absolutely necessary to pass an order of transfer of investigation on the application of an accused, then the minimum required would be that the order must be supported by cogent reasons with reference to the material available with the authority transferring the investigation.

(e) If necessary and permissible, an opportunity should also be afforded to the informant/complainant before making any such order of transfer."

16. ***Per contra,*** the contention of the learned counsel for the respondent no.10 is that he was selected on the post of Block Education Officer on 24.03.2021 and was posted at Block Saltauwa on 29.06.2021 and at the time when inspection of the school was done on 26.08.2021, the petitioner was absent and when the school was inspected again on 01.09.2021, the petitioner was absent on that date too. It is further contended that the matter was referred to B.S.A. on 08.09.2021 and on the

date of trap, no matter was pending before the respondent no.10. Learned counsel for the respondent no.10 has relied upon the judgment of the Apex Court in the case of ***Mohan Lal Vs. State of Punjab: AIR 2018 SC 3853*** with specific reference to paragraphs 11 and 12. For ready reference, paragraphs 11 and 12 of the said judgment are being quoted below:-

"11. A fair trial to an accused, a constitutional guarantee under Article 21 of the Constitution, would be a hollow promise if the investigation in a NDPS case were not to be fair or raises serious questions about its fairness apparent on the face of the investigation. In the nature of the reverse burden of proof, the onus will lie on the prosecution to demonstrate on the face of it that the investigation was fair, judicious with no circumstances that may raise doubts about its veracity. The obligation of proof beyond reasonable doubt will take within its ambit a fair investigation, in absence of which there can be no fair trial. If the investigation itself is unfair, to require the accused to demonstrate prejudice will be fraught with danger vesting arbitrary powers in the police which may well lead to false implication also. Investigation in such a case would then become an empty formality and a farce. Such an interpretation therefore naturally has to be avoided.

12. That investigation in a criminal offence must be free from objectionable features or infirmities which may legitimately lead to a grievance on part of the accused was noticed in Babubhai vs. State of Gujarat, (2010) 12 SCC 254: as follows:

"32. The investigation into a criminal offence must be free from objectionable features or infirmities which may legitimately lead to a grievance on the part of the accused that investigation was unfair and carried out with an ulterior motive. It is also the duty of the investigating officer to conduct the investigation avoiding any kind of mischief and harassment to any of the accused. The investigating officer should be fair and conscious so as to rule out any possibility of fabrication of evidence and his impartial conduct must dispel any suspicion as to its genuineness. The investigating officer "is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring out the real unvarnished truth".

33. In State of Bihar v. P.P. Sharma (AIR 1991 SC 1261) this Court has held as under:

"57. ... Investigation is a delicate painstaking and dextrous process. Ethical conduct is absolutely essential for investigative professionalism. ... Therefore, before countenancing such allegations of mala fides or bias it is salutary and an onerous duty and responsibility of the court, not only to insist upon making specific and definite allegations of personal animosity against the investigating officer at the start of the investigation but also must insist to establish and prove them from the facts and circumstances to the satisfaction of the court.

** * **

59. Malice in law could be inferred from doing of wrongful act intentionally without any just cause or excuse or without there being reasonable relation to the purpose of the exercise of statutory power. ...

61. An investigating officer who is not sensitive to the constitutional mandates, may be prone to trample upon the personal liberty of a person when he is actuated by mala fides."

17. Learned counsel for the respondent no.10 has further placed reliance upon a decision of Madras High Court in the case of ***A.V. Bellarmin Vs. Mr. V. Santhakumaran Nair passed in Criminal O.P. (MD) No.12212 of 2013 and M.P. (MD) Nos.1 and 2 of 2013, decided on 13.08.2015.*** Paragraph no. 14 of the aforesaid judgment reads as follows:-

"14. Instrumentality of a State and its officials must conform to the Rule of Law leading to fairness in action. It has been well established that fairness is a facet of Article 21 of the Constitution of India. Such a fairness in action is also mandatorily to be followed in a criminal investigation. A right to a fair investigation is not only a constitutional right but a natural right as well. In Sathyavani Ponrani v. Samuel Raj, 2010 (4) CTC 833, while dealing with fair investigation, this Court has held that the same is mandatory under Articles 14, 21 and 39 of the Constitution of India. The following paragraphs would be apposite:

6.Free and Fair Investigation and Trial is enshrined in Article 14, 21 and 39-A of the Constitution of India. It is the duty of the state to ensure that every citizen of the country should have the free and fair investigation and trial. The preamble and the constitution are compulsive and not facultative, in that free access to the form of justice is integral to the core right to equality, regarded as a basic feature of our Constitution. Therefore such a right is a constitutional right as well as a fundamental right. Such a right cannot be confined only to the accused but also to the victim depending upon the facts of the case. Therefore such a right is not only a constitutional right but also a human right. Any procedure which comes in a way of a party in getting a fair trial would in violation of Article 14 of the Constitution.

67.The Hon'ble Apex Court in ZAHIRA HABIBULLA H. SHEIKH v. STATE OF GUJARAT [(2004) 4 SCC 158] has observed as follows:

"36. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all-comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial."

18. Learned counsel for the respondent no.10 has further relied upon a decision of the Apex Court in the case of

Nirmal Singh Kahlon Vs. State of Punjab and others: (2009) 1 SCC 441. Paragraph 28 of the aforesaid judgment reads as follows:-

"An accused is entitled to a fair investigation. Fair investigation and fair trial are concomitant to preservation of fundamental right of an accused under Article 21 of the Constitution of India. But the State has a larger obligation i.e. to maintain law and order, public order and preservation of peace and harmony in the society. A victim of a crime, thus, is equally entitled to a fair investigation. When serious allegations were made against a former Minister of the State, save and except the cases of political revenge amounting to malice, it is for the State to entrust one or the other agency for the purpose of investigating into the matter."

19. Learned counsel for the respondent no.10 has further relied upon same authorities that have been relied upon by the petitioner side viz. Vandana Srivastava (supra), Km Aayasha (supra), Omveer (supra), Bimal Gurung (supra).

20. In sum and substance the contention of the learned counsel for the respondent no.10 is that fair investigation as well as fair trial is fundamental right of the accused and, therefore, it is the duty of the investigating agency as well as the courts of law to ensure that investigation is conducted in fair and impartial manner.

21. Learned AGA, on the other hand, submits that investigation was already on its conclusion when the present writ petition was filed and on account of interim order passed by this Court on 04.01.2023, no further proceedings, either way, could be held. He has also placed for perusal of court Parcha No.14 dated 04.01.2023 being part of the record of investigation, which recites that most of the evidences and statements have already been collected/recorded during the course of investigation.

22. During the course of arguments, a dispute arose with respect to the aspect of sanction. Whereas the contention of the learned counsel for the petitioner is to the effect that papers for obtaining requisite sanction under the Statute have already been sent to the State Government as stands reflected from Annexure No.6 to the writ petition, the learned counsel for the respondent no.10 on the other hand submits that no such record is available with the State Government and, therefore, the contention advanced with regard to sanction is fallacious.

23. Having heard the learned counsel for the parties, having perused the record and having carefully examined the ratio laid down in the authorities cited at the Bar, we find that the impugned order dated 17.05.2022 transferring investigation from Gorakhpur Sector to Lucknow Sector of the Vigilance Department is based upon letters of Ministers on the one hand and representation of the accused (respondent no.10) on the other. The order impugned does not disclose any other cogent or valid reason for transferring the investigation. Even from perusal of affidavit of Shri Awanish Kumar Awasthi, this Court finds that it is admitted to the State-Authorities that the orders impugned dated 17.05.2022 and 02.06.2022 have been passed after considering the representation moved by respondent No. 10 (Shri Manoj Kumar Singh). Further stand taken in the affidavit of Shri Awasthi that the reasons for transfer are mentioned in both the said impugned

orders, does not stand reflected from the orders impugned as no reason other than political interference and representation of respondent No. 10 has been mentioned in both the said orders.

24. Therefore, we find substance in the arguments of the learned counsel for the petitioner that the law laid down by the Supreme Court as well as this Court to the effect that investigation normally cannot be transferred at the behest of accused person has been violated in the present case and, even otherwise, political interference in the matter of transfer of investigation from one agency to the other is apparent even from bare perusal of the order impugned dated 17.05.2022. This Court does not find any speaking reason or ground which could justify transfer of investigation except the reasons disclosed in the order impugned dated 17.05.2022. Further the case is not of exceptional or rare nature in which transfer of investigation could be said to be justified.

25. Keeping in view all the aforesaid facts and circumstances of the case, we find that the order impugned dated 17.05.2022 being based on political interference and having been passed at the behest of accused (respondent no.10) and being bereft of any valid or cogent reasoning, cannot be sustained and is liable to be set aside. Similarly the consequential order dated 02.06.2022 also cannot be sustained and is liable to be set aside.

26. Accordingly, the writ petition is **allowed.** The order impugned dated 17.05.2022 as well as consequential order dated 02.06.2022 transferring investigation of Case Crime No.5 of 2022 from Gorakhpur Sector of U.P. (Vigilance Establishment) to Lucknow Sector (Vigilance Establishment) are hereby quashed by issuing a writ of certiorari.

27. At this stage, learned counsel for the petitioner presses prayer no.(b), which is with regard to issuing a direction to the respondent no.4 to pass appropriate orders under Section 19 of the Prevention of Corruption Act, 1988, regarding sanction of prosecution. We find that at this stage the prayer (b), as claimed, cannot be granted, inasmuch as, once the orders impugned dated 17.05.2022 and 02.06.2022 are set aside, further consequences would certainly follow in accordance with law and hence with regard to prayer made in relation to Section 19 of the Prevention of Corruption Act, it is for the competent authority to take final call in this regard within a period of **three months** from the date a certified copy of this order is produced before the said authority.

(2023) 3 ILRA 1022
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2022

BEFORE

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

Crl. Misc. Writ Petition No. 15459 of 2022

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

Counsel for the Petitioner:
In Person

Counsel for the Respondents:
G.A.

(A) Criminal Law - The Constitution Of India - Article 19 - Right to Freedom - Liberty of free expression is not to be

confounded or confused with license to make unfounded allegations against any institution, much less the Judiciary - freedom is never absolute because the makers of the Constitution have imposed certain restrictions upon it - Particularly when such Freedom of Speech is sought to be abused and it has the effect of scandalising the institution as a whole and the persons who are part of the said institution and cannot defend themselves publicly, the same cannot be permitted in law - Lawyers and litigants cannot be permitted to 'terrorise' or 'intimidate' Judges with a view to 'secure' orders which they want. (Para - 18,19,20)

Petitioner used all sorts of canards and unfounded insinuations against Presiding Officer - seeking direction to institute an inquiry against concerned judicial officer - vague and bald - absolutely no material to substantiate - apprehensions made petitioner - such kind of ultra sensitiveness cannot constitute any legitimate ground - nothing on record to establish any nexus between concern presiding officer and the informant, petitioner's opponent. **(Para - 17,25)**

HELD:-Not a fit case to exercise its extraordinary jurisdiction under Article 226 of the Constitution of India. Petition filed leveling unsubstantiated allegations against presiding officer based on unfounded apprehensions, and the petitioner wasted precious time of the Court by filing frivolous litigation.(Para - 26)

Petition dismissed with cost. (E-7)

List of Cases cited:

1. Province of Bombay Vs Khushaldas , AIR 1950 SC 222

2. T.C. Basappa Vs T. Nagappa , AIR 1954 SC 440

3. Hari Vishnu Kamath Vs Ahmad Ishaque , AIR 1955 SC 233

4. Asian Resurfacing of Road Agency Pvt. Ltd. & Other. Vs C.B.I. , Crl. Appeal No.1375-1376 of 2010

5. Suo Motu Contempt Petition (Crl.) No.1 OF 2020 IN RE : Prashant Bhushan & anr.

6. Court on its own Motion Vs Coram" (Himanchal High Court , 24th August, 2018)

7. Vishram Singh Raghubanshi Vs St. of U. P. , (2011) 7 SCC 776

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

1. Heard Shri Ravi Kumar, the petitioner, appearing in person before us to plead his own case; learned AGA for the State of UP and perused the pleadings of aforesaid writ petition and the prayer sought by the petitioner.

2. At the outset we were shocked and stunned to see the array of the respondent parties, whereby, Smt. Mahima Jain, a serving judicial officer, presently posted as Civil Judge (J.D.)/F.T.C.-2, Gautam Budh Nagar is arrayed as respondent no.2 and Smt. Kusumlata Daksh, Bench Secretary (Peshkar) attached to the Court of Civil Judge (J.D.)/F.T.C.-2, Gautam Budh Nagar as respondent no.3. This Court records its strongest exception to such type of loose and irresponsible drafting of the petition; whereby every man on road (the petitioner) assumes a right to use any number of castic innuendos and pungent remarks upon judicial officer's integrity. Though, this issue would be dealt at the later part of the judgment in more befitting way, but, at this juncture we record our grave concern to such type of pratices.

3. Now coming to next issue, whereby Mr. Ravi Kumar, the petitioner himself has drafted the petition in Hindi and sought following prayers. At this stage we may clarify that we have got no hesitation in admitting and entertaining the writ petition

drafted in Hindi but it must carry some substance in it. The prayers sought by the petitioner are :

"अ . उपर्युक्त याचिका में उत्प्रेषणात्मक प्रकृति का आदेश या निर्देश जारी करते विपक्षी सं० 2 व 3 के विरूद्ध मुकदमा चलाने की अनुमति प्रदान करने की कृपा करें।

ब. उपर्युक्त याचिका में उत्प्रेषणात्मक प्रकृति का आदेश या निर्देश जारी करते हुए विपक्षी सं० 2 व 3 के विरूद्ध विभागीय जाँच के आदेश पारित करने की कृपा करें।

स. उपर्युक्त याचिका में तथ्यों एवं परिस्थितियों के आधार पर माननीय न्यायालय उपर्युक्त प्रकृति का आदेश या निर्देश जारी करने की कृपा करें।

द. उपर्युक्त याचिका में याची के हक में सव्यय आदेश या निर्देश जारी करने की कृपा करें। "

4. Thus, from above it is clear that the petitioner sought "उत्प्रेषणात्मक प्रकृति का आदेश" which, if translated in English means "Writ of Certiorari" was sought from us to initiate prosecution against respondent nos.2 and 3 and second (ii) Writ of certiorari is sought to initiate the departmental inquiry agianst respondent nos.2 and 3.

5. Without appreciating the nature and scope of writ of certiorari, the aforesaid two prayers were sought by Mr. Ravi Kumar, the petitioner, in person. Writ of Certiorari could be issued in cases, "Whenever any body of persons having legal authority to determine questions affecting rights of subjects and having the duty to act judicially but have acted in excess of their legal authority." The essential features and conditions under which "writ of certiorari' could be issued have been pointed out by Hon'ble Apex Court in ***Province of Bombay vs Khushaldas (AIR 1950 SC 222); T.C. Basappa vs T. Nagappa (AIR 1954 SC 440) and Hari Vishnu Kamath vs. ahmad Ishaque (AIR 1955 SC 233)*** and other most of the cases. Assessing the guidelines laid down in above judgments and the prayer sought by Mr. Ravi Kumar, the petitioner, we are afraid that we can not grant the prayer i.e. to initiate the prosecution against the respondent nos.2 and 3, nor we can grant relief to initiate the disciplinary/ departmental proceeding against them.

FACTS & CIRCUMSTANCES OF INSTANT CASE:-

6. Mr. Ravi Kumar, the petitioner is a chargesheeted accused of Case No.191 of 2018, arising out of Case Crime No.130 of 2016, u/s 498A, 323, 506, 342, 354 I.P.C. & ¾ of D.P.Act, P.S. Mahila Thana, District Gautam Budh Nagar, pending in the Court of Civil Judge (S.D.)/F.T.C., Gautam Budh Nagar. The aforesaid petitioner, through his counsel, has filed an Application u/s 482 Cr.P.C. No.13544 of 2018 (Smt. Satveeri and 4 others vs State of U.P.) assailing the legality and validity of the charge sheet as well as summoning order dated 12.3.2018. A Bench of this Court on 20.4.2018 referred the matter before Allahabad High Court Mediation & Conciliation Centre to enable the parties to settle down their differences and discord with the aid and help of Mediator. While passing the order, the Bench without entering into the merit of the case, keeping in vie the nature of accusation made thought it proper to refer the matter for mediation, directing the Mediation Centre to conclude the mediation process within two months and furnish its report. The Court had also stayed the proceedings of the Case No.191 of 2018 for the period of two months or till next date of listing. Relevant excerpts of the order dated 20.4.2018 are quoted below for the easy reference :-

"Without going into the merits of the applicants' case at this stage, since the matter is a matrimonial dispute between

applicant no. 5 and opposite party no.2, who are husband and wife, it is desirable that the parties be required to attempt a re-conciliation of their differences with the assistance of Allahabad High Court Mediation and Conciliation Centre.

Learned counsel for the applicants is in agreement with the aforesaid course of action.

It is directed that petitioners shall deposit a sum of Rs. 15,000/- within three weeks from today with the Mediation Centre of which Rs. 12,000/- would be paid to the opposite party no. 2 for appearance before the Mediation Centre.

Upon deposit aforesaid being made good, the Mediation Centre will issue notice to both the parties fixing an early date for appearance and further proceedings before the Centre.

The Mediation Centre will submit their report within two months from the date parties are required to first appear before the Centre. Thereafter the case shall be listed before appropriate Bench.

Till the next date of listing, the further proceedings in Case No. 191 of 2018, arising out of case crime no. 130 of 2016, under Sections 498A, 323, 506, 342, 354 IPC and 3/4 of D.P. Act, P.S. Mahila Thana, District Gautam Buddh Nagar, pending in the court of learned Civil Judge (S.D.)/F.T.C., Gautam Budh Nagar shall remain stayed."

Its the own admission by Mr. Ravi Kumar that the process of mediation got aborted and no result has come out of the same.

7. The Court has occasion to summon the parent records of aforesaid Application u/s 482 No.13544 of 2018. Curiously enough, the matter was referred to the mediation process way back on 20.4.2018 and as per information rendered by the petitioner Mr. Ravi Kumar, the mediation failed in the year 2018 itself but there is no report available to this effect on the record. This is the most disgusting feature of the case. It is now a normal practice that such type of lapses often occur, where the reports, pleadings are never placed on record within the reasonable time. The Registrar General, Allahabad High Court is hereby directed to hold an inquiry to its logical end and fix the responsibility of erring employees and thereafter suitable departmental proceedings shall be initiated against them for not sending the report from Mediation Centre to the second concerned, so that the report may be placed on original records of the case at first opportunity.

8. Now coming back to the facts of the case, it is born out from the order-sheet of Application u/s 482 No.13544 of 2018 that during the period of last four years, since 20.4.2018 to till date, only on two occasions i.e. in the year 2022, following orders were passed :

(i) Order dated : 31.5.2022-
(On the application)
List in the week commencing 4.7.2022.
Interim order, if any, shall continue till next date of listing.
(ii) Order dated : 4.7.2022-
List after one month.
Interim order, if any, is extended till next date of listing."

9. Except the aforesaid two orders of 31.5.2022 and 4.7.2022 there were no orders of extending the interim order during last four years. As mentioned above, while referring the matter to A.H.C.M.C.C., in order to facilitate the contesting parties, the Court in its own wisdom while passing the parent interim order has put a cap of

two months only. From October, 2018 till 31.5.2022 there was no orders as to extending the stay order.

10. Learned A.G.A. has drawn attention of the Court to the judgment of Hon'ble Apex Court, In re : ***Asian Resurfacing of Road Agency Pvt. Ltd. and other Vs. Central Bureau of Investigation,*** Crl. Appeal No.1375-1376 of 2010 decided on 28.03.2018, wherein the Hon'ble Apex Court has opined:-

"Situation of proceedings remaining pending for long on account of stay needs to be remedied. Remedy was required not only for corruption cases but for all civil and criminal cases where on account of stay, civil and criminal proceedings were held up. At times, proceedings were adjourned sine die on account of stay. Even after stay was vacated, intimation was not received and proceedings were not taken up. It was directed that in all pending cases where stay against proceedings of civil or criminal trial was operating, the same would come to end on expiry of six months from today unless in exceptional case by speaking order such stay was extended. In cases where stay was granted in future, same would end on expiry of six months from date of such order unless similar extension was granted by speaking order."

11. Thus, it is contended by the learned A.G.A. that the interim order dated 20.4.2018 was effective only up to six months. The petitioner never bothered to get the interim order extended during this period and he wants to enjoy the interim order for unlimited period on certain unfounded presumption and taking legal advice.

12. On the other hand, before the Magistrate, an application was moved on 7.11.2020/20.4.2022 along with the computer generated status report of the case, requesting the court to issue summons in the light of intervening developments.

13. Attention was also drawn to Annexure-5 of the writ petition, which is incomplete order-sheet starting from 01.12.2021 to 14.7.2022. From the perusal of this incomplete order-sheet it is evident that on 19.3.2021, N.B.W. was issued by the court to ensure his personal presence and on 20.9.2021, time was sought by the counsel for the petitioner to furnish relevant documents on the record. But it seems that no reference of those documents were ever furnished, which were supposed to be furnished by the applicant/now the petitioner herein. When the accused appeared in the Court and apprised that the aforesaid proceeding is still pending before this Court by means of 482 proceeding.

14. Now coming to the real crux of issue, relying over which the petitioner has used all sorts of canards and unfounded insinuations against the Presiding Officer.

15. Orders of two dates are relevant i.e. 11.8.2021 and 20.9.2021. We have keenly perused both these orders. On 11.8.2021, it has been mentioned that P.O. is on leave, accused were absent, let N.B.W. be issued fixing 24.9.2021. However, later on, on the same date in the presence of advocate of the accused he was directed to file certified copy of the order-sheet of Hon'ble High Court by 20.9.2021 (though later it was 24.9.2021), with the additional rider that accused shall remain present in the court. It was clarified, if there is no stay order from this Court, the accused have to appear on 20.9.2021 and apply for bail. On the next date fixed i.e.

20.9.2021 the P.O. was on leave, however, those documents were taken on record.

16. The petitioner Ravi Kumar has taken a strong exception of preponing of the date from 24.9.2021 to 20.9.2021 which was in the presence and knowledge of his counsel and despite of our repeated warnings not to use harsh expression against the Presiding officer, he keep on using those uncalled for expressions against the learned Presding Officer. Not only this in his pleadings in the writ petition, he states that :-

"8- यह की परिवाद संख्या 191/2018 शिवानी बनाम रवि कुमार आदि में दिनांक 11/08/2021 को अग्रिम नियत दिनांक 24/9/2021 नियत की गयी और बिना पक्षकारों को सूचित किये बिना उचित क़ानूनी प्रक्रिया अपनाए बिना विपक्षी संख्या 02 व 03 की मिलीभगत (षड़यंत्र) के चलते परिवाद संख्या 191/2018 शिवानी बनाम रवि कुमार आदि की ऑर्डरशीट में जालसाजी करके दी० 24/09/21 की जगह दी0 01/09/2021 नियत कर दिया गयी. जो कि कानून का स्पष्ट रूप से उल्लंघन किया गया है जिससे प्रार्थी व अन्य के विरुद्ध धोखे से 82, 83 की कार्यवाही की जा सके. और जिससे याचिकर्ता पर नाजायज दबाव बनाकर जमानत करने के लिए विवश किया जा सके और याचिकर्ता की 482 संख्या 13544/18 महत्वहीन की जा सके."

17. This is nothing but a deliberate and intentional attempt on the part of Ravi Kumar, the petitioner to browbeat a judicial officer and kneel down him by casting absolute canard and venom vomiting against him. There is nothing on record to establish any nexus between the concern presiding officer and the informant, petitioner's opponent. This is nothing but a stinking attempt on the part of petitioner to put a question mark on the integrity of the Presiding Judge, which has to be handled with iron hands by the superior courts. All these developments as culled out from the order sheet, was in front of petitioner's counsel. The court has unable to gather any conspiracy theory between the Presiding officer and petitioner's opponents, as alleged in para 8 of the writ petition. At the cost of repetition, we have tried to persuade the petitioner Mr. Ravi Kumar not to do so but stubborn petitioner keep on hammering his arguments and wasting the time of the Court. The allegations made are scandalous and are capable of shaking the very edifice of the judicial administration and also shaking the faith of common man in the administration of justice.

LEGAL DISCUSSION :

18. In this regard, at this juncture it is imperative to spell out the view taken by the Hon'ble Supreme Cout in **Suo Motu Contempt Petition (Crl.) No.1 OF 2020 IN RE : Prashant Bhushan and another**, whereby the Hon'ble Apex Court categorically expressed its concern and observed thus :

"34. Though there is a Freedom of Speech, freedom is never absolute because the makers of the Constitution have imposed certain restrictions upon it. Particularly when such Freedom of Speech is sought to be abused and it has the effect of scandalising the institution as a whole and the persons who are part of the said institution and cannot defend themselves publicly, the same cannot be permitted in law. Though a fair criticism of judgment is permissible in law, a person cannot exceed the right under Article 19(1)(a) of the Constitution to scandalize the institution.

35. It is apparent that the contemnor is involved in making allegations against the retired and sitting Judges. On one hand, our attention was attracted by Shri Dushyant Dave, learned senior counsel,

towards the norms of judicial conduct which also provide that Judges cannot express an opinion in the public. The Judges have to express their opinion by their judgments, and they cannot enter into public debate or go to press. It is very easy to make any allegation against the Judges in the newspaper and media. Judges have to be the silent sufferer of such allegations, and they cannot counter such allegations publicly by going on public platforms, newspapers or media. Nor can they write anything about the correctness of the various wild allegations made, except when they are dealing with the matter. Retired Judges do have the prestige that they have earned by dint of hard work and dedication to this institution. They are also not supposed to be answering each and every allegation made and enter into public debate. Thus, it is necessary that when they cannot speak out, they cannot be made to suffer the loss of their reputation and prestige, which is essential part of the right to live with dignity. The Bar is supposed to be the spokesperson for the protection of the judicial system. They are an integral part of the system. The Bar and Bench are part of the same system i.e. the judicial system, and enjoy equal reputation. If a scathing attack is made on the judges, it would become difficult for them to work fearlessly and with the objectivity of approach to the issues. The judgment can be criticized. However, motives to the Judges need not be attributed, as it brings the administration of justice into disrepute. In ***Halsbury's Laws of England, Fourth Edition, Volume 9,*** *in para 27, it is observed that the punishment is inflicted, not for the purpose of protecting either the Court as a whole or the individual Judges of the Court from repetition of the attack but for protecting the public and especially those who either voluntarily or by compulsion are subject to the jurisdiction of the Court, from the mischief they will incur if the authority of the Tribunal is undermined or impaired. Hostile criticism of the judges or judiciary is definitely an act of scandalizing the Court. Defamatory publication concerning the Judge or institution brings impediment to justice."*

19. At this juncture it would be useful to refer the decision of The Himanchal High Court in "***Court on its own Motion vs Coram"*** decided on 24th August, 2018, whereby the Himanchal High Court while thrashing the several judgment has held that :

"17. It has to be remembered that the subordinate judiciary forms the very backbone of the administration of justice and the higher court would come down with a heavy hand for preventing the judges of the subordinate judiciary from being subjected to scurrilous and indecent attacks, which scandalize or have the tendency to scandalize, or lower or have the tendency to lower the authority of any court as also all such actions which interfere or tend to interfere with the due course of any judicial proceedings or obstruct or tend to obstruct the administration of justice in any other manner.

18. No affront to the majesty of law can be permitted. The fountain of justice cannot be allowed to be polluted by disgruntled litigants or lawyers. The protection is necessary for the courts to enable them to discharge their judicial functions without fear. (Ajay Kumar Pandey, Advocate, (1998) 7 SCC 248).

19. It is well settled that litigant or for that matter even a lawyer cannot be permitted to browbeat the court or terrorize or intimidate the Judges as held by the

Hon'ble Supreme Court in Chetak Construction Ltd. v. Om Prakash (1998) 4 SCC 577:

"16. Indeed, no lawyer or litigant can be permitted to browbeat the court or malign the presiding officer with a view to get a favourable order. Judges shall not be able to perform their duties freely and fairly if such activities were permitted and in the result administration of justice would become a casualty and the rule of law would receive a setback. The Judges are obliged to decide cases impartially and without any fear or favour. Lawyers and litigants cannot be permitted to 'terrorise' or 'intimidate' Judges with a view to 'secure' orders which they want. This is basic and fundamental and no civilized system of administration of justice can permit it."

20. These observations were subsequently, reiterated in Radha Mohan Lal v. Rajasthan High Court (2003) 3 SCC 427.

21. Reverting back to the facts, it would be noticed that the genesis of the entire episode appears to be the application filed by respondent/contemnor for release of the vehicle. In case the respondent/contemnor felt that the same was not being decided expeditiously or the decision rendered by the Magistrate was in any way wrong or erroneous, he could have resorted to lawful remedies butcould not have resorted to Judge bashing and using derogatory and contemptuous language against Judges.

22. No Judge is infallible and the order passed by him/her may or may not be correct, but that would not give a litigant much less a lawyer to indulge in Judge bashing. The Hon'ble Supreme Court inHaridas Das vs. Usha Rani Banik (Smt.) and others APU Banik(2007) 14 SCC 1 has rightly observed as under:

"1. "Judge bashing" and using derogatory and contemptuous language against Judges has become a favourite pastime of some people. These statements tend to scandalize and lower the authority of the Courts and can not be permitted because, for functioning of democracy, an independent judiciary to dispense justice without fear and favour is paramount. Its strength is the faith and confidence of the people in that institution. That cannot be permitted to be undermined because that will be against the public interest.

2. Judiciary should not be reduced to the position of flies in the hands of wanton boys. Judge bashing is not and cannot be a substitute for constructive criticism.

xx xxxx xxxx

12. There is guarantee of the Constitution of India that there will be freedom of speech and writing, but reasonable restriction can be imposed. It will be of relevance to compare the various suggestions as prevalent in America and India. It is worthwhile to note that all utterances against a Judge or concerning a pending case do not in America amount to contempt of Court. InArticle 19the expression "reasonable restrictions" is used which is almost at par with the American phraseology "inherenttendency" or "reasonable tendency". The Supreme Court of America in Bridges v California (1911) 86 Law Ed. 192 said:

"What finally emerges from the clear and present danger cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely serious and the degree of imminence extremely high before utterances can be punished."

20. The Hon'ble Supreme Court in ***Vishram Singh Raghubanshi Vs. State of Uttar Pradesh (2011) 7 SCC 776***, has

noted the dangerous trend of making false allegations against judicial officers and observed as under:

"18. The dangerous trend of making false allegations against judicial officers and humiliating them requires to be curbed with heavy hands, otherwise the judicial system itself would collapse. The Bench and the Bar have to avoid unwarranted situations on trivial issues that hamper the cause of justice and are in the interest of none. "Liberty of free expression is not to be confounded or confused with license to make unfounded allegations against any institution, much less the Judiciary". A lawyer cannot associate himself with his client maligning the reputation of judicial officers merely because his client failed to secure the desired order from the said officer. A deliberate attempt to scandalise the court which would shake the confidence of the litigating public in the system, would cause a very serious damage to the Institution of judiciary. An Advocate in a profession should be diligent and his conduct should also be diligent and conform to the requirements of the law by which an Advocate plays a vital role in the preservation of society and justice system. Any violation of the principles of professional ethics by an Advocate is unfortunate and unacceptable. (Vide: O.P. Sharma & Ors. v. High Court of Punjab & Haryana, (2011) 5 SCALE 518)."

21. We are now-a-days living in a democracy in its ugliest form; where nobody has got any regard for any institution. This is unholy and dangerous sign that all and sundry are making unfounded and unsubstantiated allegations against judiciary in an irresponsible manner. Making irresponsible insinuations upon the judiciary or its officers has now become a fashion. This unholy practice has to be whole-heartedly discouraged and deplored by every responsible person of the society. Judiciary is one of the strongest pillars of any healthy democracy. This fact receives more significance when recently we have celebrated our 75th Independence Day. In order to strengthen the foremost pillars of democracy, there should be mutual regard. The subjects of that democracy too are expected to not become liberal and irresponsible in their expression. The Superior Courts are bound to protect their subordinate courts.

22. This Court records its strongest anguish and concern that the people at large are now making unwarranted and unsubstantiated and canards against the judicial officers relying upon their whims and capricious and making irresponsible allegations of dishonesty. The higher courts are duty bound to save the dignity and honour of the system in general and the individual judicial officer as well that no person is permitted to make a sweeping and wild allegations regarding the integrity and character of any judicial officer.

23. The apprehension of the petitioner solely springs from the uncalled for preponing the date as has been described hereinbefore, which according to the petitioner is tantamount to a conspiracy of the judge and his predilection towards prosecution side. The unsubstantiated paranoia of an ultra-conscious litigant and his illegitimate apprehensions cannot make us to believe on them and also cannot constitute a legitimate ground to allow the prayer sough in the petition. The Judges are also the parts of the society just as everybody else is and they do not live in ivory towers. The upsurge of particular type of social crimes causes concern of the

judges also who in an important way have also to deal with such crimes in their judicial capacity, therefore, if at some stage some judge ventilates his exasperation at commission of certain crimes which may sometimes appear to be revolting against the collective consents of humanity of which the judge himself is an integral part. Such expressions must not be mistaken to be any abdication of judicious independent thinking. Nor should it be interpreted as an indication that such presiding officer shall not adhere to the shorn duties as a Judge.

24. If there is some such order passed by the trial court with which the petitioner feels aggrieved, the right course is to challenge the same in judicial capacity in the higher courts. The propriety or correctness of any step or order taken or adopted by any judicial officer is amenable to jurisdiction of the superior court. So far as the allegation that the presiding officer is hand in glove with the opposite party is concerned, our judicial institutions are robust enough not to be swayed by any such parochial considerations. It is very easy to make insinuation against the presiding officer like this. We do not find any substantial record on the basis of which it may hold that either presiding officer has been approached or the petitioner has been nurtured holds water. The allegation as has been fastened by the petitioner against the presiding officer is too vague and conjectural and perhaps even irrelevant and simply cannot persuade us.

25. Submission as has been raised by the petitioner in order to seek direction to institute an inquiry against the concerned judicial officer is very vague and bald. There is absolutely no material to substantiate the same. It is very difficult to accept such kind of unsubstantiated insinuations to become a legitimate ground to initiate any inquiry. The apprehensions as have been made by the petitioner seems to be wholly unfounded and such kind of ultra sensitiveness cannot constitute any legitimate ground to allow the prayer sought in the petition.

26. We conclude that this is not a fit case where this court should exercise its extraordinary jurisdiction under Article 226 of the Constitution of India and as we have noted that the present petition is filed levelling unsubstantiated allegations against the presiding officer based on unfounded apprehensions and petitioner has wasted precious time of the Court by filing frivolous litigation, under circumstances, the present writ petition stands dismissed with costs of Rs.50,000/- to be paid to the State Exchequer.

27. The petitioner shall deposit the cost of Rs.50,000/- with the Registrar General of this Court within a period of five months from today. On deposit of such cost, it shall be transmitted to the account of Allahabad High Court Mediation & Conciliation Centre. If the petitioner fails to deposit the cost of Rs.50,000/- (Rs. Fifty thousand), the Registrar General of this Court shall inform the District Magistrate/Collector, Gautam Budh Nagar for recovery of the said amount as arrears of land revenue, who shall after recovering the same amount from the petitioner, transmit it to the Registrar General of this Court for depositing in the account of Allahabad High Court Mediation & Conciliation Centre within a further period of three months.

28. Let a copy of this judgment be communicated to the learned District & Sessions Judge, Gautam Budh Nagar as

well as to Ms. Mahima Jain, Judicial Officer/Civil Judge (J.D.)/F.T.C.-2, Gautam Budh Nagar by the Registrar (Compliance) of this Court forthwith.

29. Let the copy of this order be circulated to every sessions division by Registrar General of this Court.

(2023) 3 ILRA 1032
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2023

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Habeas Corpus Writ Petition No. 328 of 2022

Viraj Bhati & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rajiv Kumar Singh

Counsel for the Respondents:
G.A., Sri Om Prakash Rai, Sri Ashish Rai

Civil Law - Constitution of India.1950 - Article 226, - Criminal Procedure Code,1973 - Section - 491 - Indian Penal Code, 1860 - Sections 307, 323, 498(A), 504 & 506 - Hindu Minority & Guardianship Act, 1956 - Sections 6 & 6(A) - Dowry Prohibition Act,1961 - Sections 3 & 4 - Writ of Habeas Corpus - against illegal custody of minor child – after death of father of corpus, he was in custody of his grandmother and uncle - court finds that, the instant habeas corpus petition filed by the natural guardian mother on behalf of the corpus as well as on her own behalf – Whether petition is maintainable – Held, A mother is always mother whether earning sufficiently or not and it cannot be presumed that after termination of her employment in *Ferns Petals*, she will not be able to nourish or take care of needs of the child - Mother has superior right of custody over her son - she cannot be denied the custody of her child being her natural guardian under law and privacy over custody of child has been claimed by her rightly above any other person in absence of his father – Petition allowed - directions issued accordingly.
(Para - 12, 13, 14)

Writ Petition Allowed. (E-11)

List of Cases cited:

1. Master Advait Sharma Vs St. of U.P. & ors., 2021 (0) Supreme (All) 216,

2. Perry Kansagra Vs Smriti Madan Kansagra, (2019) 20 SCC 753,

3. Ashish Ranjan Vs Anupma Tandon & anr., (2010) 14 SCC 274,

4. Githa Hariharan Vs Reserve Bank of India, AIR 1999 SC 1149,

5. Rosy Jacob Vs Jacob Chakramakkal, AIR 1973 SC 2090,

6. Tejaswini Gaud & ors. v. Shekhar Jagdish Prasad Tewari & ors., (2019) 7 SCC 42.

(Delivered by Hon'ble Ram Manohar Narayan Mishra, J.)

1. Hear Sri Rajeev Kumar Singh, learned counsel for the petitioners, Sri O.P. Rai and Ashish Rai, learned counsel for the respondent no. 3 and learned A.G.A. for the state and perused the material on record.

2. Instant habeas corpus petition has been filed by the petitioner no. 2 Smt. Anu Kumari on behalf of the corpus Viraj Bhati (minor) as well as on her own behalf and has sought following relief in the petition:-

"(i) issue a writ of habeas corpus, directing the respondent no. 3 to produce the corpus/petitioner no. 1/minor boy/son of petitioner no. 2 before this Hon'ble

Court who is illegally detained by his grandmother/respondent no. 3 in the parental house of his late father situated at B-16, C-2, Everest Apartment, Shalimar Garden, Extension II, Sahibabad and District-Ghaziabad against the wish by the petitioner no. 1 to petitioner no. 2 on video call happened on 22.4.2022.

(ii) Issue any other suitable order or direction as this Hon'ble Court may deem fit and proper in the circumstances of the case for producing the corpus.

(iii) Award the cost of the habeas corpus petition to the petitioners."

3. Learned counsel for the petitioners based his submissions on averments made in writ petition and submitted that petitioner no. 1 is minor son of petitioner no. 2, born out of wedlock of petitioner no. 2 and her husband Vivek Bhati. Their marriage was solemnized on 7.3.2014 with the consent of parties as well as with consent of their family members in accordance with Hindu rites and rituals. Petitioner no. 2 resided with her husband in a rented house at Krishna Nagar East, Delhi. Petitioner no. 2 is presently residing in District Bulandshahar along with her father. Birthday of the corpus was celebrated by petitioner no. 2 and respondent no. 3, however, the child is presently detained by respondent no. 3 in parental house of corpus. Father-in-law of the petitioner no. 2 namely Satpal Bhati was a leading Advocate at District Ghaziabad and husband of petitioner no. 2 Vivek Bhati and his younger brother Mr. Varun Bhati were also Advocates, however, father-in-law of petitioner no. 2 died untimely, thus entire family became shocked. Husband of petitioner no. 2 started consuming liquor frequently and this was opposed by petitioner no. 2. He also used to physically assault her and used to make demand of dowry as such she lodged an F.I.R. on 30.3.2021 against her husband and his family members under Sections 498A, 323, 504, 506, 307 IPC and ¾ D.P. Act, which is registered as case crime no. 242 of 2021 at P.S. Kotwali Shahar, District Bulandshahar. Unfortunately husband of petitioner no. 2 died in a road accident on 9.4.2021. Petitioner no. 2 became widow due to death of her husband. She is graduate in commerce and started working as Sales Executive in a Company named as Ferns Petals to meet out household expenses and for the welfare of her small child. For enhancing her monthly income, petitioner no. 2 also started online sale of household goods by taking assistance of her retired father, who was in Army. Petitioner no. 2 is apprehending threat to her life from her mother-in-law. She also apprehends threat to life of her minor son, who is co-sharer of landed property of respondent no. 3 and her son Varun Bhati, who is an Advocate. Respondent no. 3 is infirm and old aged lady in whose custody corpus is presently lying due to death of her father-in-law and husband, and family outcome of her in-laws has deteriorated. It is further submitted that petitioner no. 2 is concerned about future and education of her minor son, who is illegally detained by respondent no. 3 and her son Varun Bhati as her son Varun bhati is an Advocate in Ghaziabad. She is fearful of approaching local Court for custody of minor child due to attitude of local lawyers in favour of her brother-in-law and son of respondent no. 3, therefore it is prayed that child may be directed to be produced before the Court and necessary order may be passed regarding transfer of custody of corpus in favour of petitioner no. 2, who is her natural guardian.

4. Per contra, learned A.G.A. as well as learned counsel for the private respondents objected the prayer made by the petitioner no. 2 in writ petition. It is further argued that actual date of birth of

petitioner no. 1 is 15.3.2015 and not 15.3.2016 as stated in writ petition. This fact can be verified from birth certificate issued from Nagar Nigam Ghaziabad and Ambey Hospital, a copy of birth certificate has been filed as Annexure CA-2 with counter affidavit. Custody of child was initially with his late father and after his death, it passes on respondent no. 3 (grandmother of corpus) and his uncle Varun Bhati. Petitioner no. 2 did not come to take forward the custody of corpus at the time of death of her husband and at that time respondent no. 3 and her son were only person who looked after petitioner no. 1. In fact she was never interested in custody of her child for a period of almost two years and the child is lying along with his grandmother and uncle. As the child is lying in custody of his grandmother and uncle, he cannot be said to be lying in illegal custody and present habeas corpus is not maintainable as such and appropriate remedy is available to the petitioner no. 2 to approach the statutory forum available under law seeking custody of the child. The petitioner no. 2 is presently not employed in Company named as Ferns Petals as she was terminated on 30.8.2021 and a certificate has been issued in this regard by Sri Gaurav Jain, partner of said firm, which is filed along with counter affidavit. The child is being imparted quality education by respondent no. 3 and his uncle Varun Bhati and is obtaining outstanding colour in his studies. Uncle of child Varun Bhati earns sufficiently and he is an Income-tax payee and is able to meet out academic and other expenses of child. Petitioner no. 1 is not willing to reside with his mother and is happily residing with his grandmother and uncle. He is aged around 7 years and is deeply attached with his grandmother and uncle.

5. Learned counsel for the petitioner placed reliance on a case decided by this Court in ***Master Advait Sharma Vs. State of U.P. and five others, 2021 0 Supreme (All) 216***, wherein matter of custody of minor child between his parents was occupied the centre stage of controversy. The child's misfortune, circumstanced as he is, is the fallout of an estrangement of his parents, who did not seem to have got along in matrimony. Both were highly educated and employed in a reputed companies. Both sides levelled a number of allegations against each other in their pleadings which were impleaded with virtues claimed for themselves and demonizing the other party including in-laws on both sides. This Court considered the provisions of Section 6-a of the Hindu Minority and Guardianship Act, 1956, wherein it is provided that natural guardian of a Hindu, minor, in respect of minor's persons as well as in respect of minor's property (excluding his or her undivided interest in combined family property), are- (a) in the case of a boy or an unmarried girl- the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. This Court observed in paragraph nos. 44, 49, 51 as under:-

44. The provision lays down the Rule that notwithstanding the father being the natural guardian, the custody of a minor, who has not completed the age of five years, ought ordinarily be with the mother. This rule echoes experience of mankind that mothers are best suited to take care of very young children. Since, however, welfare of a child is of paramount consideration, the proviso to Section 6(a) of the Act of 1956, makes a remarkable prescription by employing the word ''ordinarily' to qualify the rule. The word ''ordinarily' gives full play to the Court's assessment in a given case to find out

where the welfare of the minor would be best secured. It must be remarked here before moving ahead that even the natural guardianship of a minor under Section 6(a) of the Act of 1956 is now no longer preferentially held by the father. The mother and the father are at par as natural guardians of the minor, in view of the holding of the Supreme Court in Githa Hariharan (Ms) and another vs. Reserve Bank of India and another, (1999) 2 SCC 228. The dispute here is about custody and not about guardianship, which is hardly disputed for both parents.

49. In the opinion of this Court, there is a strong presumption about a child's welfare to be better secured in the mother's hand, which can be dispelled only by cogent and glaring evidence about the mother's lack of fitness to discharge her maternal obligations, as already remarked. There is no such circumstance or evidence brought to this Court's notice that may render Preeti unfit to take care of her minor son. This Court is fortified in the view that we take by the decision of the Supreme Court in Roxann Sharma vs. Arun Sharma, (2015) 8 SCC 318, where it has been held:

"13. The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the likelihood of the welfare and interest of the child being undermined or jeopardised if the custody is retained by the mother. Section 6(a) of the HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old. It carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this section or for that matter any other provision including those contained in the G and W Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years."

51. I had occasion to consider the question about the right of a mother to the custody of her young child, particularly, in the context of Section 6(a) of the Act of 1956 in Master Atharva (Minor) and another vs. State of Uttar Pradesh and 7 others, 2020 (143) ALR 332, where it was held:

"9. A reading of the terms of the proviso to Section shows that quite apart from the question of natural guardianship, the custody of a minor, who has not completed the age of five years, is to be ordinarily with the mother. The only niche, therefore, so far as the statue goes, is the word "ordinary". The word "ordinary" signifies that as a matter of rule, children up to the age of five years are to be left with their mothers, but there could be exceptions as well. Those exceptions could be where the mother is demonstrably leading an immoral life or may have remarried, where in her new home, the child from her earlier alliance has no place, or where the mother is convicted of a heinous offence etc. In the present case, no such circumstance has been indicated, much less pleaded and proved so as to place the mother in that exceptional category where she may be deprived of the custody of her young child, who is still well below the age of five years.

10. It must also be remarked that even after the child turns five, it is not that the mother becomes disentitled. She still would be the best person to tender a child and groom him into an adult. In this connection, reference may be made to the decision of the Supreme Court in Roxann

Sharma v. Arun Sharma, (2015) 8 SCC 318, where it has been held:

"13. The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the likelihood of the welfare and interest of the child being undermined or jeopardised if the custody is retained by the mother. Section 6(a) of the HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old. It carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this section or for that matter any other provision including those contained in the G and W Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years."

6. In Master Advait (supra), this Court ordered that Master Advait Sharma shall be delivered by his father into custody of his mother within a week of pronouncement of this judgment, failing which C.J.M., Ghaziabad shall cause the minor to be delivered into custody of his mother, Smt. Preeti Rai at Ghaziabad through agency of the police. However the father will have visitation rights of the child being one of his natural guardian and corresponding obligations will lie upon the mother to facilitate the visitation.

7. Hon'ble Apex Court in the case of ***Perry Kansagra Vs. Smriti Madan Kansagra, (2019) 20 SCC 753 and Ashish Ranjan Vs. Anupma Tandon and Anr., (2010) 14 SCC 274*** held that in case of custody of child paramount consideration remains welfare and interest of the child.

8. In the present case, the dispute regarding custody of minor is lying between his mother on one hand and his grand mother and uncle on the other hand. The child is lying in custody of his grandmother and the petition has been approached by his uncle Varun Bhati. Father of corpus died on 8.4.2021. This is a case of respondent no. 3 that after death of her person Vivek Bhati, custody of petitioner no. 1 passage on her being his grandmother and also to his uncle Varun Bhati and they are well equipped to take care of all essential needs of the child whereas petitioner no. 2 claims custody of child being his mother. From perusal of record, it appears that her private job was for stipulated period and presently she is not in the employment of G.H. Enterprises (Ferns Petals). She has stated that she earns sufficiently by engaging herself in other part time jobs. The corpus (minor) is aged about six to seven years as per his date of birth recorded as 15.3.2015. Section 6 of the Hindu Minority and Guardianship Act provides that natural guardian of a Hindu minor, in respect of minor's person as well as in respect of minor's property are-

(a) in the case of a boy or unmarried girl and father, and after him, mother: provided that the custody of a minor, who has not completed age of five years, was ordinarily be with the mother.

(b)...

(c)...

Explanation:- In this Section the expression "father" and "mother" do not include a step-father and step-mother.

9. Hon'ble Apex Court in ***Githa Hariharan v. Reserve Bank of India, AIR 1999 SC 1149,*** observed that in the phrase "

the father" and after him, " the mother", the word' after need not necessarily mean after the lifetime of father. In the context in which it appears in Section 6(a) it means "in the absence of', the word "absence' therein referring to the father's absence from the care of minor's property or person for any reason whatsoever. If the father is wholly indifferent to the matters of minor or if by virtue of mutual understanding between the parents, the mother is put exclusively in charge of the minor or if the father is physically unable to take care of minor for any reason whatsoever, the father can be considered to be absent and mother being a recognized natural guardian can act validly on behalf of the minor as the guardian.

10. In the case of ***Rosy Jacob v. Jacob Chakramakkal, AIR 1973 SC 2090,*** Hon'ble Apex Court held that controlling consideration governing the custody of children is the welfare of children and not the right of the parents.

11. Learned counsel for the petitioners placed reliance on judgement of Hon'ble Apex Court in ***Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others reported in (2019) 7 SCC 42***, wherein, also matter of custody of minor child between the father of minor girl and his sister-in-law (sister of his deceased wife) was involved; High Court of Bombay held that respondent no. 1 father only surviving parent of child, is entitled to the custody of child and the child needs love, care and affection of father, taking into account that respondent no. 1 was hospitalized for serious ailment and in those circumstances, the appellant, his brother and sister-in-law have looked after child and in the interest of justice it is just and proper that custody of child is handed over back to the first respondent (father of the child). However, the High Court observed that efforts put in hands of the appellant, in taking care of child has to be recognized and so High Court granted appellant no. 2 and 3 access to the child. The above order of the High court was challenged before the Apex Court by private respondent in whose custody child was lying but same was disposed by the Apex Court and impugned judgement of High Court was affirmed subject to certain conditions and observations. However, Hon'ble Apex Court had observed in paragraph Nos. 13, 14, 18, 19, 20, 22, 25, 52, which are as under:-

"13. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal 3 Gohar Begum v. Suggi @ Nazma Begam and others AIR 1960 SC 93 4 Smt. Manju Malini Sheshachalam D/o Mr. R. Sheshachalam v. Vijay Thirugnanam S/o Thivugnanam & Others 2018 SCC Online Kar 621 law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

14. In Gohar Begum3 where the mother had, under the personal law, the legal right to the custody of her illegitimate minor child, the writ was issued. In Gohar Begum3, the Supreme Court dealt with a petition for habeas corpus for recovery of

an illegitimate female child. Gohar alleged that Kaniz Begum, Gohar's mother's sister was allegedly detaining Gohar's infant female child illegally. The Supreme Court took note of the position under the Mohammedan Law that the mother of an illegitimate female child is entitled to its custody and refusal to restore the custody of the child to the mother would result in illegal custody of the child. The Supreme Court held that Kaniz having no legal right to the custody of the child and her refusal to make over the child to the mother resulted in an illegal detention of the child within the meaning of Section 491 Cr.P.C. of the old Code. The Supreme Court held that the fact that Gohar had a right under the Guardians and Wards Act is no justification for denying her right under Section 491 Cr.P.C. The Supreme Court observed that Gohar Begum, being the natural guardian, is entitled to maintain the writ petition and held as under:-

"7. On these undisputed facts the position in law is perfectly clear. Under the Mohammedan law which applies to this case, the appellant is entitled to the custody of Anjum who is her illegitimate daughter, no matter who the father of Anjum is. The respondent has no legal right whatsoever to the custody of the child. Her refusal to make over the child to the appellant therefore resulted in an illegal detention of the child within the meaning of Section 491. This position is clearly recognised in the English cases concerning writs of habeas corpus for the production of infants. In Queen v. Clarke (1857) 7 EL & BL 186: 119, ER 1217 Lord Campbell, C.J., said at p. 193:

"But with respect to a child under guardianship for nurture, the child is supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian; and when delivered to him, the child is supposed to be set at liberty." The courts in our country have consistently taken the same view. For this purpose the Indian cases hereinafter cited may be referred to. The terms of Section 491 would clearly be applicable to the case and the appellant entitled to the order she asked.

8. We therefore think that the learned Judges of the High Court were clearly wrong in their view that the child Anjum was not being illegally or improperly detained. The learned Judges have not given any reason in support of their view and we are clear in our mind that view is unsustainable in law. .....

10. We further see no reason why the appellant should have been asked to proceed under the Guardian and Wards Act for recovering the custody of the child. She had of course the right to do so. But she had also a clear right to an order for the custody of the child under Section 491 of the Code. The fact that she had a right under the Guardians and Wards Act is no justification for denying her the right under Section 491. That is well established as will appear from the cases hereinafter cited." (Underlining added)

18. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by

the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

19. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.

20. In the present case, the appellants are the sisters and brother of the mother Zelam who do not have any authority of law to have the custody of the minor child. Whereas as per Section 6 of the Hindu Minority and Guardianship Act, the first respondent- father is a natural guardian of the minor child and is having the legal right to claim the custody of the child. The entitlement of father to the custody of child is not disputed and the child being a minor aged 1½ years cannot express its intelligent preferences. Hence, in our considered view, in the facts and circumstances of this case, the father, being the natural guardian, was justified in invoking the extraordinary remedy seeking custody of the child under Article 226 of the Constitution of India.

22. After referring to various judgments and considering the principles for issuance of writ of habeas corpus concerning the minor child brought to India in violation of the order of the foreign court, in Nithya Anand7, it was held as under:-

6 Ruchi Majoo v. Sanjeev Majoo (2011) 6 SCC 479 7 Nithya Anand Raghavan v. State (NCT of Delhi) (2017) 8 SCC 454 "46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised."

25. Welfare of the minor child is the paramount consideration:- The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.

52. In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor."

12. On the basis of observations of Hon'ble Apex Court, which has binding force and facts and circumstances of the case, I am of the considered opinion that above judgment of Hon'ble Apex Court may act as a guiding force for this Court in present case and no pedantic approach can be taken by the court while deciding the custody of the child. In present case petitioner no. 2, who is mother of child, has neither abandoned nor deprived him of his right to maternal love and affection. She is natural guardian of the child due to death of his father. Respondent no. 3 and her surviving son Varun Bhati undoubtedly have taken care of the child since death of his father and fact of their care and concerned of the child cannot be lost side.

13. However, only due to this fact that the mother, who is petitioner no. 2, cannot be denied the custody of her child being her natural guardian under law and privacy over custody of child has been claimed by her rightly above any other person in absence of his father. A mother is always mother whether earning sufficiently or not and it cannot be presumed that after termination of her employment in Ferns Petals, she will not be able to nourish and take care of needs of the child. She has superior right of custody over her son than his grandmother and uncle in absence of anything adverse on the part of the mother except the fact that she is not employed in any regular job. However, till the child, who is stated to be between six to seven years of age at present, gets acquainted with everything and will be in company of his mother i.e. petitioner no. 2, respondent no. 3 and her son Varun Bhati shall have access to him in the form of visitation rights for a period of one year of this order.

14. Keeping in view the fact that petitioner no. 2 is resident of Bulandshahar and the respondent no. 3 and her son are settled in Ghaziabad, it is directed that respondent no. 3 and her surviving son (uncle of the child), will have visitation rights to the corpus Viraj Bhati (petitioner no. 1) for a period of one year at the place of petitioner no. 2, twice in a month on a Sunday between 11:00 am to 5:00 pm, subject to prior arrangement made with petitioner no. 2 telephonically. Petitioner no. 2 will facilitate the meeting between the child and his grandmother and uncle accordingly and will not create any impediment therein. Accordingly this Habeas Corpus Writ Petition is **allowed.**

15. Therefore, it is directed that respondent no. 3 shall handover custody of petitioner no. 1 to petitioner no. 2 (mother of the corpus) within 30 days from the date of production of a certified copy of this order, at the residence of petitioner no. 2. Keeping in view the interest of child, both the parties shall cooperate with each other to ensure direction of this Court.

16. It is further directed that in case respondent no. 3 or her family members adopt any procrastinating approach in handing over custody of child to petitioner no. 2 (mother) or refused to transfer the custody of child, matter would be reported by petitioner no. 2 to S.S.P., Ghaziabad and C.J.M., Ghaziabad, who shall ensure compliance of this order and shall ensure the custody of child to petitioner no. 2 on production of a copy of this order before them.

(2023) 3 ILRA 1041
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2023

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Second Appeal No. 947 of 1995

Babu Khan & Ors. ...Appellants
Versus
Rajendra Pratap ...Respondent

Counsel for the Appellants:
Sri S.N. Srivastava, Sri Naresh Chandra Tipathi

Counsel for the Respondent:
Sri J.H. Khan, Sri W.H. Khan, Sri Gulrez Khan

Civil Law – Civil Procedure Code, 1908 - Section 100, - U.P. Zamindari Abolition and Land Reforms Act, 1950 – Sections 189(C), 193, 209, 210, 229-B & 341 – Guardianship and Wards Act, 1890 – Sections 4(2), 4(3) & 30 – Limitation Act, 1963 – Sections 6 & 7, Entry - 65 of Schedule - 1 - Second Appeal arising out of a Suit - suit property - owner of suit property in question died - leaving behind his widow and his five sons - widow also died - eldest of sibling took care of the interests of his brothers who were all minors at that time executed a sale deed of suit property in year 1977 being de-facto guardian on behalf of all the minor also in favour of plaintiff/respondent - name of plaintiff-respondent was duly mutated in year 1982 in the revenue records and no objections against same were filed by defendant-appellants first set, even after attaining majority - On becoming major, defendant-appellant No. 1 and 2 filed a suit under Section 229-B of UP Act, 1950, challenging sale deed dated - during pendency of said suit, defendant-appellant first set executed another sale deed in year 1988, for sale of their share in property in question, in favour of second set of defendant-appellants - being non-prosecution, Suit u/s 229-B was dismissed - plaintiff/respondent's suit was decreed - first Appeal dismissed - court finds that, First Appellate Court have given a categorical finding that plaintiff-purchaser-respondent been in possession of property in dispute and ex-parte injunction granted plaintiff initially by order continued throughout suit – Plaintiff/respondents-purchaser were throughout

in possession of property in dispute since sale deed and defendant appellants first set after becoming major never initiated proceedings for possession of property in dispute - Limitation for initiating proceedings for recovery of possession, at best, expired in year 1994 on expiry of 12 years - as per joint reading of section 189©, 193, 209 and 210 of UP Act, 1950 rights of defendants-respondents first set from the property in dispute stand extinguished and the plaintiffs-respondents have become Bhumidhar - both set of appellants have lost their rights even presuming they had any either under the Mohammedan Law or by virtue of sale deed of 1988 - no relief in the present second appeal can be granted, hence dismissed. (Para –16, 17, 19, 20)

Second Appeal Dismissed. (E-11)

List of Cases cited:

1. Madhegowda (D) by L.Rs. Vs Ankegowda (D) by L.Rs. & ors., 2001 (45) ALR 820,

2. Mushamat Anto Vs Reoti Kaur, AIR 1936 Allahabad 837,

3. Meethiyan Sidhiqu Vs Muhammed Kunju Pareeth Kutty & ors., AIR 1996 SC 1003,

4. Mohd. Amin & ors. Vs Vakil Ahmad & ors., AIR 1952 SC 358

5. Prem Singh & ors. Vs Birbal & ors., (2006) 5 SCC 353,

6. Utha Moidu Haji Vs Kuningarath Kunhabdullah & Ors., (2007) 14 SCC 792,

7. Mashkoor Alam Vs Kumari Amir Bano & Ors., 2014 (125) RD 352,

8. Murugan & Ors. Vs Kesava Gounder (dead) & Ors., AIR 2019 SC 2696,

9. Bailochan Karan Vs Basant Kumari Naik & Anr., (1999) 2 SCC 310,

10. Lalloo & Ors. Vs Board of Revenue & ors., 2019 (12) ADJ 33,

11. Ram Sunder Vs Board of Revenue, 1984 AWC 696,

12. Ram Chander Dubey and Ors. Vs The Deputy Director of Consolidation, & ors., AIR 1978 All 157,

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. By the present second appeal, appellants are challenging the judgment and order dated 24.04.1995 passed by the learned Additional District Judge, Karvi in Civil Appeal No. 5 of 1990 (Babu Khan and others vs. Atul Prakash) and judgment and order dated 30.04.1990 passed by learned Munsif-Magistrate, Karvi, Banda in Original Suit No. 79 of 1988 (Atul Prakash vs. Babu Khan and others).

2. The suit was filed by the plaintiff-respondent Atul Prakash for cancellation of sale deed dated 28.04.1988 executed by defendant-appellant nos. 1 to 3 in favour of defendant-appellant nos. 4 to 8 and for permanent injunction restraining the defendants-appellants from raising any construction or interfering in possession of the plaintiff over the property in dispute. The Trial Court at the very initial stage, on 16.05.1988, granted an injunction order restraining the defendants-appellants from creating any hindrances. The suit was decreed and the appeal against the same was dismissed.

3. Brief facts of the case are that Rustam Khan was the owner of the property in question. He, unfortunately, died in the year 1964 leaving behind his widow and five sons, namely, Ramzan Khan (eldest), Nazir Khan, Babu Khan, Chand Khan and Nasim Khan. The widow of Rustam Khan also died sometime later, after which Ramzan Khan the eldest of the siblings took care of the interests of the

brothers, who were all minors at that time. Ramzan Khan and Nazir Khan executed sale deed dated 28.07.1977 of the property in dispute on their behalf as well as in their capacity as de-facto guardian on behalf of remaining three minor brothers (first set of defendant-appellant) in favour of plaintiff-respondent. By entry dated 13.10.1982, name of the plaintiff-respondent was duly mutated in the revenue records and no objections against the same were filed by defendant-appellants first set, even after attaining majority. In 1987, on becoming major, defendant-appellant No. 1 and 2 filed a suit under Section 229B of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 19501 challenging the sale deed dated 28.07.1977. Written statements were also filed. However, during the pendency of the said suit, defendant-appellant first set executed a sale deed dated 28.04.1988, for the sale of their share in the property in question, in favour of the second set of defendant-appellants (some of them have been substituted by their legal representatives in the proceedings). They also permitted the proceedings initiated under Section 229-B to be dismissed for non-prosecution. Respondent herein filed the present Original Suit No. 79 of 1988 against both sets of appellants praying for cancellation of the said sale deed dated 28.04.1988 and for relief of permanent prohibitory injunction restraining defendants-appellants from interfering in his peaceful possession over the property in question. The suit was filed on the ground that the demised property was already sold by defendant-appellant first set in favour of plaintiff-respondent by sale deed dated 28.07.1977. The suit was decreed in favour of the plaintiff-respondent. Aggrieved by the judgment and decree dated 30.04.1990, defendants-appellants filed a first appeal, which was also dismissed on 24.04.1995. Thus, they preferred present second appeal.

4. Learned counsel for the appellants assails the judgment of both Courts on the ground, that, Ramzan Khan being a brother was not legal or de-jure guardian of defendant-appellant first set under the Mohammedan law, therefore, the sale deed dated 28.07.1977 executed by him for the sale of shares of his minor brothers is void. Since the sale deed dated 28.07.1977 is void to the extent of the shares of the defendant-appellant first set, therefore ignoring its consequences, defendant-appellant first set could legally execute the sale deed dated 28.04.1988 in favour of defendant-appellants second set for sale of their shares in the property. In such circumstances, plaintiff-respondent never had any legal claim to the 3/5th of the property, sold vide sale deed dated 28.07.1977, and thus suit was liable to be dismissed to the said extent.

5. Learned counsel for the defendants-appellants further submits that both the courts have also wrongly applied provisions of the U.P. Z.A. & L.R. Act. As the first set of defendants-appellants are adherents of Islam, therefore, the aforesaid statute has no applicability in this case. In support of his arguments, learned counsel for the defendant-appellants has relied upon the following judgments:

(i) Madhegowda (D) by L.Rs. vs. Ankegowda (D) by L.Rs. and others2

(ii) Mushamat Anto vs. Reoti Kaur3

(iii) Meethiyan Sidhiqu vs. Muhammed Kunju Pareeth Kutty and others4

(iv) Mohd. Amin and others vs. Vakil Ahmad and others5

(v) Prem Singh and others vs. Birbal and others6

6. Learned counsel for the plaintiff-respondent supports the judgments of both the Trial Court and the First Appellate Court. He submits that the land in dispute being agricultural land has to be governed by the provisions of the Guardianship and Wards Act, 18907 and U.P. Z.A. & L.R. Act and Mohammedan law has no applicability in the present dispute. He further submits that it was necessary for the first set of appellants to get the sale deed dated 28.07.1977 cancelled. He supports the finding of the Court regarding estoppel by relying on Sections 4(2), 4(3) and 30 of the Guadianship and Wards Act, 1890 and Article 60 of the Schedule to the Limitation Act, 1963. He argues that even the youngest of the three brothers attained majority in the year 1982 and, therefore, they should have filed a suit for getting the sale deed dated 28.07.1977 cancelled, no later than the year 1985. But the suit under Section 229-B of U.P. Z.A. & L.R. Act was only filed in 1987 and that too was not contested properly, thus dismissed for default and never restored. Thus, now they are estopped from challenging the sale deed. In support of his arguments, learned counsel for the plaintiff-respondents has placed reliance upon the following judgments:

(i) Utha Moidu Haji vs. Kuningarath Kunhabdullah & Ors.8

(ii) Mashkoor Alam vs. Kumari Amir Bano & Ors.9

(iii) Murugan & Ors. vs. Kesava Gounder (dead) & Ors.10

(iv) Bailochan Karan vs. Basant Kumari Naik & Anr.11

(v) Lalloo & Ors. vs. Board of Revenue & Ors.12

7. Learned counsel for the appellants presses for the following substantial questions of law:

(i)Whether in the facts and circumstances of the case elder brother was competent to alienate the interests of the defendant-appellant first set, who were minor brothers?

(ii)Whether Muslim minors, whose property is sold by a de-facto but not de-jure guardian by executing a sale deed on their behalf during their minority, need to get the sale deed cancelled by filing a civil suit on attaining majority or is the sale deed void, non-est in law, and therefore the minor need not even repudiate it?

(iii)Whether the First Appellate Court erred in applying the U.P. Z.A. & L.R. Act and law on adverse possession vis-a-vis the Muslim Personal law in the facts and circumstances of the present case, where the first set of appellants are adherent of Islam?

8. Heard counsels for the parties and perused the record with their assistance.

9. Since both the substantial question of law number one and two deal with similar issues therefore they are being decided together. The learned Trial Court has framed issue no. 2 and 3 with regard to the eligibility of Ramzan Khan for transferring the shares of his minor brothers vide sale deed dated 28.07.1977. Trial Court has held that since the mother of the defendant-appellant first set died, therefore, Ramzan Khan aged about 21 years at that time, as the eldest brother, assumed the role of de-facto guardian under Mohammedan law and was also competent to sell the properties of his minor brothers. The same was affirmed by the First Appellate Court. the First Appellate Court has applied the

law settled by this Court in ***Ram Sunder vs. Board of Revenue***13 and held that if a minor fails to challenge the sale deed on attaining majority the sale deed was binding on the minor. It has further held that even if the sale deed dated 28.07.1977 was void to the extent of the shares of the defendant-appellant first set, they required a declaration to that effect from Court. In ***Ram Sunder (Supra)*** facts were that a hindu mother acting as a guardian sold her minor child's property without describing herself as a guardian. On attaining majority, the son failed to challenge the sale deed and it was held that the sale is now binding on him. Both the Trial Court and the First Appellate Court have held that since the mutation proceedings were over by 13.10.1982, and Babu Khan, one of the defendant-appellant from the first set, had become major by then and did not object to the mutation of names of plaintiff-respondent in the revenue records, therefore it must be understood that defendant-appellants first set have ratified the sale deed dated 28.07.1977.

10. So far as the judgment relied upon by Trial Court and Appellate Court is concerned, ***Ram Sunder (supra)*** is a case arising out of Hindu Law and has no applicability to the present facts where parties are governed by Mohammadan Law. With regard to other case laws relied upon by counsel for plaintiff-respondent in the case of ***Utha Moidu Haji (supra)***, in paragraph 14 it is clearly stated that no issue was ever framed with regard to the status of the guardianship and eligibility of the acting guardian. Therefore, it is also distinguishable from the facts of the present case and of no help to the plaintiff-respondent. The judgment in the case of ***Murugan (supra)*** is also distinguishable from the facts of the present case as in the said case the issue was with regard to limitation in case a minor dies before attaining majority and also in the said case the parties were governed by the Hindu Minority and Guardianship Act, 1956. The plaintiff-respondent also can not claim any benefit from ***Bailochan Karan (supra)*** and ***Lalloo (supra)***, as both these cases pertain to parties belonging to non-Muslim faith.

11. Under Muslim personal law, interests of minor is well protected. Muslim Law distinguishes between the status of a de facto guardian and a legal/de jure guardian. Any decision with regard to the devolution of the property of a Muslim minor can be only by a legal guardian and that too only on limited grounds. The law in this regard is well settled and suffice would to refer to the paragraph 5 of the ***Meethiyan Sidhiqu (supra)***, where the Supreme Court held:

"5. Mulla's "principle of the Mohammadan Law" [Nineteenth Edition] by Justice M. Hidayatullah, former Chief Justice of this Court and Arshad Hidayatullah, deals with legal property guardians of a muslim minor in Section 359. In the order, only father, executor appointed by the father's will, father's father and the executor appointed by the will of the father's father, are legal guardians of property. No other relation is entitled to be the guardian of the property of a minor as of right; not even the mother, brother or uncle but the father or the paternal grand-father of the minor may appoint the mother, brother of uncle or any other person as his executor or executrix of his will in which case they become legal guardian and have all the powers of the legal guardian as defined in Sections 362 and 366 of the above Principles. The Court may also appoint any one of them as

guardian of the property of the minor in which case they will have all the powers of a guardian appointed by the court, as stated in Sections 363 to 367."

In light of the law settled both the First Appellate Court and the Trial Court are wrong in holding that being a de facto guardian of the Muslim minors, their brother Ramzan Khan could execute a valid sale deed on their behalf. Admittedly there is no appointment of guardian of minors under the Guardianship and Wards Act.

12. It has long been settled by a Full Bench of this Court in ***Mushamat Anto (supra),*** that any transfer of property by a de facto guardian of a Muslim minor is void and non-est, it cannot be ratified by the minor upon his attainment of majority. Even when the transaction has been ratified by the minor after he has attained majority, it can subsequently be challenged by him or by his transferees. The relevant paragraph of the Mushamat Anto (supra) reads;

"Two questions have been referred to this Full Bench by the Bench before which the case came up for disposal. They are as follows:

(1) Can a transaction amounting to an alienation of an immovably property belonging to a Muhammadan minor by the de facto guardian of the minor be ratified by the latter upon his attainment of majority?

.....

Dealing with the third proposition, their Lordships examined the text of the Hedayah and the Fatwa-i-Alamgiri and came to the conclusion that the Hanafi doctrine relating to a sale by an unauthorised person remaining dependent on the sanction of the owners refers to a case where such owner is sui juris possessed of the capacity to give the necessary sanction to make the transaction operative, and that they did not find any reference in these doctrines relating to fazuli sales, so far as they appear in the Hedayah or the Fatwa-i-Alamgiri, to dealings with the property of minors by persons who happen to have charge of the infants and their property, in other words, the de facto guardians. In their Lordships' opinion the doctrine about fazuli sales appears clearly to be based on the analogy of an agent who acts in a particular matter without authority, but whose act is subsequently adopted or ratified by the principal which has the effect of validating it from its inception. The idea of agency in relation to an infant is as foreign, their Lordships conceived, to Mahomedan law as to every other system.

.....

Our answer to the first question referred to us is in the negative, as the transaction being void there is no question of ratification. The answer to the second question is that there can be no valid ratification and therefore there can be no estoppel on account of any such ratification."

13. In light of the law settled by the Full Bench of this Court, both the courts erred in holding that once the mutation proceedings are over with no objections from the defendant-apellants, they are estopped from questioning the validity of the sale deed dated 28.07.1977. Instead, as per the ***Mushamat Anto (supra),*** since there is no concept of subsequent ratification of an illegal/void act under Mohammedan law, it can be concluded that a Muslim minor can not ratify a void ab initio act after attaining majority, even if he wants to.

14. With regard to substantial question of law number three i.e.,

application of Muslim Law vis-a-vis U.P. Z.A. & L.R. Act, the learned First Appellate Court in its judgment has simply brushed off the issue by saying that *"I do not want to enter into the controversy as to whether Mohammedan personal law was involved or the U.P.Z.A. Act was involved.*". On the other hand, in its judgment the First Appellate Court has also dismissed the applicability of Full Bench judgment of this court in the case of ***Mushamat Anto (Supra)***, holding that the said case is from before the enactment of the U.P. Z.A. & L.R. Act, and is, therefore, not applicable. The First Appellate Court has also referred to the judgment of ***Ram Chander Dubey and Ors. vs. The Deputy Director of Consolidation, Deoria and Ors.***14 but did not state as to why the same would not apply. In ***Ram Chander Dubey (supra)*** this court in pargraphs 15 has held;

"15. Judged in the light of what has been said above, it will be found that U. P. Act I of 1951 does not crystallise or declare the existing law upon the land tenure system but deliberately departs from the old law in respect of various matters. It supersedes prior law and lays down the whole of the law of succession, transfer, bequest etc. Therefore, in cases governed by the Act reference to the previous rule of Hindu law or Mohammadan law cannot be made as it is not permissible, but the Hindu law can certainly be resorted to in respect of matters for which no provision is made in U. P. Act No. I of 1951. Matters saved from the operation of the Act, of course, continue to be governed by the personal law to the extent the same is applicable. The Act does not touch or affect the law of joint family, hence the Hindu law continues to operate in this matter."

15. Thus, personal law would apply even to land covered by the provisions of U.P. Z.A. & L.R. Act to the extent the same is not ousted by U.P. Z.A. & L.R. Act. There is no provision in U.P. Z.A. & L.R. Act, contrary to the Mohammadan Personal Law, that validates a sale deed by de facto guardian of a muslim minor, which is void ab initio and can not be ratified even on attaining majority by the minor under Mohammadan Law. Thus, the sale deed dated 28.07.1977 executed by the de facto guardian of minors is void to the extent of share of minors.

16. Had the matter been only with regard to the personal law of Mohammadan, it could be concluded with the aforesaid, but, the provosions of the U.P. Z.A. & L.R. Act are also applicable. In present case, bhumidhars were minor muslim boys whose agricultural land was sold by de-facto guardian. There is no dispute that the minors were ousted from the property in dispute by the sale deed dated 28.07.1977 executed in favour of plaintiff-respondent. Both the Trial Court and the First Appellate Court have given specific finding of fact that the plaintiff-respondent is in possession of the property in dispute since the date of sale deed. Section 189(c), Section 193, Section 209 and Section 210 of the U.P. Z.A. & L.R. Act deals with right of the bhumidhar who stands dispossessed from his land. The said sections reads:-

"189. Extinction of the interest of a bhumidhar with transferable rights.*--The interest of a bhumidhar with transferable rights in his holding or any part thereof shall be extinguished--*

..

(c) when he has been deprived of possession and his right to recover possession is barred by limitation."

Thus, when a bhumidhar with transferable rights is deprived of his possession and his right to recover possession is barred by limitation, his right in the holding is extinguish*ed. Section 193 provides with consequences of extinction of the interest. It reads:-*

*"**193. Rights and liabilities of a sirdar or asami on extinction of his interest.**--When the interest of a bhumidhar or asami is extinguished he shall vacate his holding, and he shall, except in cases where his interest has extinguished under or in accordance with the provisions of any law for the time being in force relating to the acquisition of land, have in respect of removals of standing crops and any construction existing on the holding the same right as he would have upon ejectment under the provisions of this Act."*

209. Ejectment of persons occupying land without title. - A person taking or retaining possession of land otherwise than in accordance with the provisions of the law for the time being in force; and-

(a) where the land forms part of the holding of a bhumidhar, [* * *] or asami without the consent of such bhumidhar, [* * *] or asami;

(b) where the land does not form part of the holding of a bhumidhar, [* *] or asami without consent of the [Gaon Sabha],*

shall be liable to ejectment on the suit in cases referred to in Clause (a) above of the bhumidhar, [* * *]** or asami concerned and in cases referred to in Clause (b) above of the [Gaon Sabha] [* * *]* ***and shall also be liable to pay damages.

[(2) To every suit relating to a land referred to in Clause (a) of sub-section (1) the State Government shall be impleaded as a necessary party.]"

"210. Consequence of failure to the suit under Section 209. - If a suit for eviction from any land under Section 209 is not instituted by a bhumidhar or asami, or a decree for eviction obtained in any such suit is not executed within the period of limitation provided for institution of such suit or the execution of such decree, as the case may be, the person taking or retaining possession shall-

(a) where the land forms pail of the holding of a bhumidhar with transferable rights, become a bhumidhar with a transferable rights of such land and the right, title and interest of an asami, if any, in such land shall be extinguished;

(b) where the land forms part of the holding of a bhumidhar with non-transferable rights, become a bhumidhar with non-transferable rights I and the right, title and interest of an asami, if any, in such land shall be I extinguished;

(c) where the land forms part of the holding of an asami on behalf of the Gaon Sabha, become an asami of the holding from year to year.

[Provided that the consequences mentioned in Clauses (a) to (c) shall not ensue in respect of any land held by a bhumidhar or asami belonging to a Scheduled Tribe.]"

17. Consequences under the civil law, in case a person fails to take possession of his property within the statutory period of limitation is, that, the other side gets rights as adverse possession. However, under the above provisions of U.P. Z.A. & L.R. Act, when a bhumidhar fails to file suit for possession, against a person holding possession of his bhumidhari land against law and without his consent, within period of limitation prescribed, rights of

bhumidhar from the land are extinguished and the person holding possession becomes bhumidhar. As per Section 341 of the U.P. Z.A. & L.R. Act, provisions of the Limitation Act are made applicable to proceedings under the U.P. Z.A. & L.R. Act, unless otherwise expressly provided. Limitation for filing a suit for possession is 12 years as per entry 65 of Schedule I of the Limitation Act. Since, it is admitted that property sold belonged to minors, thus, Section 6 and 7 of the Limitation Act would come into play and the starting date of period of limitation would be from the date they become major. In the suit, all the three minor brothers, namely, Chand Khan, Babu Khan and Nisar Khan were made defendants as major. None of them were made party through any guardian. In their written statement also it was not claimed that any of them was minor. Thus, admittedly in the year 1982, all three brothers were major. Thus the limitation for initiating proceedings for recovery of possession, at best, expired in the year 1994 on expiry of 12 years. Sole proceedings which were initiated under Section 229-B for declaration and/or possession by the said brothers were admittedly permitted by them to be dismissed for want of prosecution. In his oral statement Babu Khan admitted that they never filed any application for restoration. Till date, there is no claim that those proceedings under Sectio 229-B were restored or contested any further. Thus, no proceedings were initiated for possession by the brothers, as minors or on becoming major, and the earlier filed proceedings under Section 229 B of U.P. Z.A. & L.R. Act were also permitted to be dismissed for default. The Trial Court as well as the First Appellate Court have given a categorical finding that the plaintiff-purchaser-respondent has been in possession of the property in dispute on the basis of sale deed dated 28.07.1977. The ex-parte injunction granted in favour of plaintiff initially by order dated 16.05.1988 continued throughout the suit.

19. From the above, it is clear that the plaintiff respondents-purchaser were throughout in possession of the property in dispute since the sale deed dated 28.07.1977 and the defendant-appeallants first set after becoming major permitted the proceedings under Section 229-B to be dismissed and never initiated any other proceedings for possession of the property in dispute. Thus, as per joint reading of Section 189(c), Section 193, Section 209 and Section 210, rights of defendants-respondents first set from the property in dispute stand extinguished and the plaintiffs-respondents have become bhumidhar. Same is position with regard to defendant-appellants second set who purchased the property in dispute from the defendant-appellants first set. They also never took any proceedings for possession at any stage whatsoever. Thus, both sets of appellants have lost any right in their favour, even presuming they had any either under the Mohammedan law or by virtue of the sale deed dated 28.04.1988, due to the application of Section 189(c), Section 193, Section 209 and Section 210 of the U.P. Z.A. & L.R. Act.

20. In the aforesaid circumstances since appellants now do not have any right in the property in dispute, no relief in the present second appeal can be granted to them. The second appeal is ***dismissed.***

(2023) 3 ILRA 1050
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.02.2023

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ -C No. 31271 of 2022

Manish Shukla ...Petitioner
Versus
Board of Revenue & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ajay Kumar, Sri Chandrama Singh

Counsel for the Respondents:
C.S.C., Sri Dheeraj Kumar Dwivedi

CiviL Law - U.P. Revenue Code, 2006 - Section 144 - Declaratory suit - Declaratory suit dismissed without framing issue - Held - if no issue has been framed on a question which arises out of the pleading of the parties, the Court cannot proceed to record a finding on that point - judgment passed by the Trial Court cannot be maintained on merit (Para 10)

Civil Law -U.P. Revenue Code, 2006- Section 144 - Limitation - there is no limitation for filing suit for declaration under Section 229 B of U.P.Z.A. & L.R. Act (Para 12)

Constitution of India, 1950 -Article, 226 - Quashing of order - an order, which is illegal, cannot be quashed or set aside in writ jurisdiction, if quashing of it, results in bringing on record another illegal order- if as a result of quashing of an order, another wrong and illegal order would be restored, High Court under Article would refuse to interfere with the impugned order which appears to be quite proper equitable and just order (Para 13)

Dismissed. (E-5)

List of Cases cited:

1. Babu Vs Mahaveer 2020 RD (140) 186

2. Kaniz Fatima & anr. Vs Shah Naim Ashraf AIR 1983 Allahabad 450

3. Pan Kumari Vs Board of Revenue, U.P. at Allahabad & ors. 2005 (99) R.D. 529

4. Paras Nath Singh Vs Deputy Director of Consolidation & ors. 1985 R.D. 71

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

1. Counsel for the petitioner is permitted to implead Upziladhikari, Kanpur Nagar as respondent No.5 in the array of parties during the course of day.

2. Heard Mr. Ajay Kumar, Counsel for the petitioner, learned Standing Counsel for the State-respondents and Mr. Dheeraj Kumar Dwivedi for respondent No.4.

3. The instant petition has been filed against the order of Board of Revenue dated 26.4.2022, by which, the second appeal filed by respondent No.4 has been allowed setting aside the judgment of the Courts below and proceeding of the suit has been remitted back before the Trial Court to decide the suit afresh after impleadment of the Gaon Sabha.

4. Counsel for the petitioner submitted that the suit under Section 144 of the U.P. Revenue Code, 2006 filed by respondent No.4 has been dismissed by the Trial Court and the decree has been maintained in first appeal but Appellate Court has arbitrarily allowed the second appeal and remitted the matter back before the Trial Court for fresh trial. He further submitted that suit for declaration filed by respondent No.4 was rightly dismissed by Trial Court and First Appellate Court as no claim was raised during consolidation operation. He further submitted that Second

Appellate Court has exceeded his jurisdiction in allowing the second appeal, as such, the impugned judgment be set aside against the order of Trial Court.

5. In reply, Counsel for respondent No.4 submitted that suit under Section 144 of the U.P. Revenue Code, 2006, filed by respondent No.4 has been dismissed without framing issues and giving parties to lead the evidence according to the issues framed in the suit as such the same was wholly illegal. He further submitted that there is no limitation for filing the suit under Section 144 of the U.P. Revenue Code, 2006 but the plaintiff suit has been dismissed arbitrarily holding that it is barred by limitation. He further submitted that Second Appellate Court has allowed the second appeal and remitted the matter back for filing fresh suit under Section 144 of the U.P. Revenue Code, 2006.

6. Counsel for the respondent No. 4 placed reliance upon the judgment of this Court reported in ***2020 RD (140) 186 Babu vs. Mahaveer*** in which it has been held that unless the issues are framed in the suit for declaration under Section 144 of the U.P. Revenue Code, 2006, the judgment cannot be passed on merit. He further submitted that there is no limitation for filing suit under Section 144 of U.P. Revenue Code, 2006. He finally submitted that no interference is required against the order of Board of Revenue by which the matter has been remanded back to the Trial Court to decide the suit afresh on merits.

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

8. There is no dispute about the fact that the suit under Section 144 of U.P. Revenue Code, 2006 filed by respondent No.4 has been dismissed without framing issue in the suit.

9. There is also no dispute about the fact that the suit has been dismissed on the ground of limitation also and the judgment and decree of the Trial Court has been maintained in First Appeal but in Second Appeal, the judgments of Trial Court and First Appellate Court have been set aside and the matter has been remanded back to the Trial Court to decide the suit afresh on merit.

10. Since, the suit under Section 144 of U.P. Revenue Code, 2006 has been decided without framing issue, as such, in view of ratio of law laid down by this Court in ***Babu (Supra)***, judgment passed by the Trial Court cannot be maintained on merit. The paragraph Nos. 2, 3, 4, 5 & 6 of the judgment rendered in ***Babu (Supra)*** is relevant for perusal which are as under:-

"2. The manner in which the suit instituted by the respondent no.1 under Section 229-B of U.P. Z.A. & L.R.Act has been decided by the impugned order dated 28.01.2019 cannot be appreciated. The trial court has neither framed issues nor has provided any opportunity of leading evidence to the parties to prove their respective cases. The provisions contained in Code of Civil Procedure has been given a go bye.

3. As already observed above by the Court in its order dated 21.02.2019, the proceedings under Section 229-B of U.P.Z.A & L.R Act are regular proceedings where declaration of rights in a holding is decided on the basis of evidence.

4. Learned counsel for respondent no.1 has also not been able to defend the

impugned order; rather he appears to agree that the matter ought to have been remanded to the Sub-Divisional Officer concerned.

5. For the aforesaid reasons, this petition is allowed and the judgment and order dated 28.01.2019 passed by the Sub-Divisional Officer, Malihabad, Lucknow in Computerized Case No.T201810460101621; Mahavir vs Babu and others, under Section 229-B of U.P. Z.A & L.R.Act, as is contained in annexure no.1 to the writ petition, is hereby quashed.

6. The Sub-Divisional Officer is directed to decide the suit afresh in accordance with law and also by following the procedure as prescribed under the provision of the Code of Civil Procedure. The Sub-Divisional Officer shall expedite the proceedings of the suit and conclude the same within a period of six months from the date of production of a certified copy of this order."

11. This court in the case reported in ***AIR 1983 Allahabad 450 Smt. Kaniz Fatima and another Vs. Shah Naim Ashraf*** has held that if no issue has been framed on a question which arises out of the pleading of the parties, the Court cannot proceed to record a finding on that point. The paragraph nos. 19 & 20 of the judgement are relevant, which are as under:-

"19. There is no dispute with the proposition of law laid down in the aforesaid decision but the true scope of the said rule would be that where the parties have led their entire evidence on all the pleas raised by them, they cannot be permitted to urge at the conclusion of the proceedings or in appeal that they were taken by surprise by non-framing of an issue on that particular point on which they have already exhausted their evidence. In such a case it cannot be said that the parties are prejudiced in any manner whatsoever by non-framing of an issue. But the said rule cannot be construed to cover those cases as well where the evidence was led on issues on which the parties actually went, to trial because it is well settled that the evidence adduced on any particular issue by the parties cannot be made foundation for decision of any other and different plea on which no issue has been framed, because in the absence of an issue on the point they cannot be said to have an opportunity of adducing evidence in support of it or in rebuttal of it. It cannot be assumed that the parties have exhaustively led evidence on all the pleas raised in the pleadings. A party is supposed to lead evidence only on the issues framed in the suit. The other party can object and the Court can always refuse to record evidence which does not relate to the issues framed in the suit. Even if evidence has been led and brought on record, the court will not be justified to look into that evidence for deciding a point not covered by the issues. Thus, it cannot be said that it the parties had led evidence in the case it should be construed to cover all the pleas raised in the pleadings although no issue has been framed on that point.

20. The object of framing the issue is to direct that attention of the parties to lead evidence on that specific issue frame and if no evidence is led (one line obliterated. Ed.) drawn against the concerned parties for holding that it has no evidence to support or to rebut the plea covered by the issue in question. But in the absence of the proper issues covering all the pleas raised in pleadings it cannot be said that the parties have exhausted all

their evidence or all the pleas raised by them although the same are not covered by the issues framed. In the view of the matter, we find that in the present case since proper issues have not been framed, which arise out of the pleadings of the parties as well as in the statement of the case recorded under Order 10 Rule 2 of the Code, it cannot be said that the defendants have led all their evidence which they would have led in support of the pleas, which are not covered by the issued framed in the suit. The decision recorded by court below, therefore, cannot be sustained on the said ground urged by learned counsel of the plaintiff. The case, therefore, deserves to be remanded to the trial court for decision afresh after framing proper additional issues in the suit and giving full opportunity to the parties to lead their evidence which they may like to produce in support of their case. Learned court below will carefully scrutinize pleadings and frame necessary additional issues."

12. So far as the limitation question is concerned, the law is well settled that there is no limitation for filing suit for declaration under Section 229 B of U.P.Z.A. & L.R. Act. This Court in the case reported in ***2005 (99) R.D. 529, Pan Kumari Vs. Board of Revenue, U.P. at Allahabad & Others*** has held that there is no limitation for filing suit under Section 229 B of U.P.Z.A. & L.R. Act, the paragraph no.6 of the judgment is relevant, which is as follows:

"6. Sri. R.C. Singh submits that the suit under Section 229-B was barred by limitation. In support of this contention he relies upon Section 341 of the U.P. Zamindari Abolition and Land Reforms Act, which provides that the Limitation Act would be applicable to proceedings under the U.P. Zamindari Abolition and Land Reforms Act and limitation in a suit for declaration would be governed by Article 137 of Schedule 1 of the Limitation Act as there is no period prescribed for such a suit under the U.P.Z.A. & L.R. Act. Section 341 itself provides that the provisions of certain Acts including the Limitation Act shall apply to the proceedings under the U.P.Z.A. & L.R. Act unless otherwise provided in the U.P.Z.A. & L.R. Act. Rule 338 of the U.P.Z.A. and L.R. Rules provides that the suits, applications and other proceedings specified in Appendix III shall be instituted within the time specified therein for them respectively. Recourse to the provisions of the Limitation Act would be available only If there is no provision under Rules in respect of the period of limitation for the different classes of suits or proceedings mentioned therein. In Appendix III the period of limitation provided for different classes of suits has been given. As regards suits under Section 229-B column 4, which prescribes the period of limitation for different classes of suit says "none". It would therefore be treated that there is no limitation for filing a suit under Section 229-B. Section 9 of the Civil Procedure Code provides that all suits of civil nature shall be instituted in the civil Court except those, which have been excepted. A suit under Section 229-B falls within the excepted category and such suits even though they involve declaration are suits of a special character. Article 137 of the Limitation Act relied upon by Sri Singh in any case is applicable only to applications and not to suits and therefore has no play. When the rule making authority has provided different periods of limitation for different classes of suits it would be treated that

provisions prescribing period of limitation in the Limitation Act would not be applicable to suits under the U.P.Z.A. & L.R. Act. Section 189 U.P.Z.A. & L.R. Act sets out the circumstances in which the interest of a bhumidar is extinguished. Clauses (a), (aa) and (b) relate to cases where the bhumidar dies leaving no heir, or where he has let out his holding in contravention of the provisions of the Act or where the land is acquired. Sub-section (c) of Section 189 provides that where a bhumidar has lost-possession the bhumidari right would extinguish when the right to recover possession is lost. In Ram Naresh v. Board of Revenue 1985 Rev Dec. 444 relied upon by Sri R.C. Singh it was held that the provisions of Section 27 of the Limitation Act would be attracted to suits instituted under Section 229-B. Section 27 provides that on the determination of the period limited for instituting a suit for possession the right to such property shall be extinguished. The rule is an exception to the general rule that limitation bars the remedy but does not extinguish the right. If, however, a person is in possession his right can not be extinguished unless the case is covered by Clauses (a), (aa) and (b) of Section 189. He can therefore seek a declaration of his right at any point of time. If a person has been dispossessed he would have to institute a suit under Section 129 U.P.Z.A. & L.R. Act. Appendix III provides the period for limitation for filing a suit under Section 209. It would follow therefore that a suit under Section 229-B would be barred by limitation the bhumidar is out of possession and his right to file a suit under Section 209 is barred by limitation. The finding of fact recorded on the question of possession is that the plaintiffs have established their continuous possession over the disputed land. The finding is not shown to be vitiated by any error. As the rights of the plaintiff were never extinguished no question of limitation arises. For the reasons given above the writ petition lacks merit and is dismissed."

13. So far as exercise of jurisdiction of this Court under Article 226 of the Constitution of India against the impugned order of Board of Revenue is concerned, this Court in the case reported in ***1985 R.D. 71, Paras Nath Singh Vs. Deputy Director of Consolidation and Others*** has held that if as a result of quashing the impugned order another illegal order would be restored then Court would refuse to interfere with the impugned order. Paragraph No.21 of the judgment is as follows:

"21. It is, no doubt, correct to say that any order passed without jurisdiction is a nullity and deserves to be quashed. But if as a result of quashing that order another wrong and illegal order would be restored, this Court would refuse to interfere with the impugned order which appears to be quite proper equitable and just order. As mentioned above, the power under Article 226 of the Constitution is devised to advance justice and not to thwart it. To me it appears to be well settled that an order which is illegal cannot be quashed or set aside in writ jurisdiction if quasing of it results in bringing on record another illegal order."

14. Considering the entire facts and circumstances, of the case as well as ratio of law laid down by this Court there is no illegality or infirmity in the judgment of Board of Revenue by which the judgment and decree of the Trial Court and First Appellate Court have been set aside and the

matter has been remitted back to the Trial Court to decide the suit afresh on merit.

15. No interference is required against the impugned judgment.

16. Writ petition is devoid of merit and, is accordingly, ***dismissed.***

17. However, Trial Court - Upziladhikari, Kanpur Nagar is directed to decide the suit under Section 144 of U.P. Revenue Code, 2006 after framing issue and permitting authorities to lead evidence, in accordance with law. The suit will be decided, expeditiously, preferably within a period of one year from the date of production of certified copy of this order.

(2023) 3 ILRA 1055
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.02.2023

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Special Appeal No. 70 of 2023

Chandrashekhar Tiwari ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Siddharth Khare

Counsel for the Respondents:
C.S.C., Sri Hritudhwaj Pratap Sahi, Sri G.K. Singh (Sr. Advocate)

A. Special Law -Allahabad High Court Rules, 1952 –Ch. VII Rule 5-U.P. Intermediate Education Act, 1921-Section 16-D(4)-State Govt. superseded the Committee of Management in exercise of power under Section 16 D(4) of the Act-Opportunity of hearing was not afforded by State Govt. while superseding the Management-State Government under law is empowered to supersede the Committee of Management by an order 'for reasons to be recorded'-State Govt. was thus enjoined with the duty to consider the reply and give reasons for not accepting the reply, which has not been done-Thus, resulted in gross violation of principles of natural justice-Hence, no interference requires. (Para 1 to 20)

The appeal is dismissed. (E-6)

List of Cases cited:

Committee of Mgmt. Gautam Buddhha Inter College & anr.. Vs St. of U.P & ors.

(Delivered by Hon'ble Manoj Kumar Gupta, J. & Hon'ble Syed Qamar Hasan Rizvi, J.)

1. Heard Sri Siddharth Khare, counsel for the appellant, learned Standing Counsel for the State respondents and Sri G.K. Singh learned Senior Counsel assisted by Sri H.P. Sahi for respondent Nos. 5 and 6.

2. This intra-court appeal arises out of judgment and order dated 19.12.2022 passed by learned Single Judge in Writ-C No. 37460 of 2022 filed by respondent Nos. 5 and 6 (hereinafter referred to as 'the petitioners').

3. The petitioners in the Writ Petition were the Committee of Management of Goswami Tulsi Das Inter College, a recognized Institution under the U.P. Intermediate Education Act, 1921 (hereinafter referred to as 'the Act') and its Manager (respondents no.5 & 6 in the instant appeal). They had, in the writ petition, assailed the order dated 04.11.2022 passed by the State Government superseding the Committee of Management

in exercise of power under Section 16-D(4) of the Act. The writ petition has been allowed on the sole ground that opportunity of hearing was not afforded to the petitioners by the State Government while superseding the Management. The Writ Court has quashed the order impugned in the writ petition and has remitted the matter back to the State Government for passing a fresh order after affording opportunity of hearing to the writ petitioners.

4. The brief facts of the case are that the appellant herein (respondent No. 5 in the writ petition) had made complaint against the petitioners and on basis thereof, the Director of Education, on 27.05.2021, recommended to the State Government to supersede the Committee of Management and appoint an Authorized Controller in its place.

5. In pursuance thereof, it seems that the Special Secretary (Secondary Education) heard the parties on 24.06.2021 and 28.12.2021. The petitioners filed a detailed objection on 28.12.2021 to the charges levelled against the Committee of Management and the appellant also filed his reply on the same date. The State Government vide its letter dated 31.12.2021 forwarded the reply submitted by the Committee of Management and the appellant dated 28.12.2021 for factual examination and recommendation by the Director (Secondary) U.P. In pursuance thereof, the Director (Secondary) U.P. obtained reports from the Joint Director of Education, Gorakhpur and District Inspector of Schools, Kushinagar wherein they recommended for superseding the Committee of Management in exercise of power under Section 16-D (4) of the Act on three charges mentioned therein. It was followed by passing of the order impugned in the writ petition dated 4.11.2022 relying on the recommendation of the Director of Education, (Secondary), Uttar Pradesh dated 21.03.2022.

6. Learned counsel for the appellant vehemently contended that the impugned order of learned Single Judge proceeds on a wrong assumption of fact that opportunity of hearing was not given to the petitioners before superseding the Committee of Management. In support of his contention he has placed reliance on the recitals contained in the impugned order to the effect that the Special Secretary (Secondary Education), U.P. heard the parties on 24.06.2021 and 28.12.2021.

7. He has also invited the attention of the Court towards a notice dated 16.03.2022 issued by Deputy Secretary, U.P. Government addressed to Director of Education (Secondary) and District Inspector of Schools, Kushinagar with copy thereof endorsed to the Manager, Committee of Management of the Institution fixing 21.03.2022 as date for hearing in connection with the proceedings relating to appointment of Authorized Controller. It is submitted that the said communication further reveals that yet another opportunity of hearing was given to the parties on 21.03.2022 and thus it is submitted that learned Single Judge committed an error apparent on the face of record in remitting the matter back to the State Government for affording opportunity of hearing to the writ petitioners.

8. Sri G.K. Singh, learned Senior Counsel, appearing for the petitioners, submitted that the hearing which was afforded to the parties on 24.06.2021 and 28.12.2021, was not sufficient, inasmuch as the recommendation for superseding the

Committee of Management was made by the Director of Education subsequently, vide its letter dated 21.03.2022 and thereafter no opportunity of hearing was granted. He further submits that the petitioners were never served with any notice dated 16.03.2022 fixing 21.03.2022 as date of hearing, nor any hearing took place on that date.

9. Sri Siddharth Khare, learned counsel for the appellant submitted that the Director of Education initially made a recommendation for superseding the Committee of Management vide its letter dated 27.05.2021 and consequently the hearing held on 24.06.2021 and 28.12.2021 was sufficient and the writ petitioners cannot complain of breach of principles of natural justice. He submits that although Director of Education (Secondary) made another recommendation on 21.03.2022 for superseding the Committee of Management but it was based on same charges and, therefore, no fresh opportunity of hearing was required to be given to the writ petitioners.

10. Sri G.K. Singh, learned Senior Counsel appearing for the petitioners, in reply submitted that the procedure adopted by the State Government after the hearing took place on 28.12.2021 was in gross violation of principles of natural justice. It is submitted that the State Government called for a report from Director of Education (Secondary) in context of the reply submitted by the petitioners and the appellant and thereafter based on his recommendation contained in letter dated 21.03.2022, proceeded to pass the impugned order without supplying its copy to the petitioners.

11. In other words, the submission is that when there was a fresh recommendation by Director of Education by letter dated 21.03.2022, which alone had been made basis for passing the impugned order, it was incumbent upon the State Government to have afforded fresh opportunity of hearing to the petitioners. He further submits that even otherwise, the impugned order is bad in the eyes of law, inasmuch as it does not take into consideration the detailed reply submitted by the petitioner on 28.12.2021 denying each and every charge levelled against the Committee of Management of the Institution.

12. We have considered the rival submissions and perused the material on record.

13. The Writ Court while remitting the matter to the State Government has placed reliance on a judgment of learned Single Judge in **Committee of Management, Gautam Buddha Inter College and Another Vs. State of U.P. & 4 Others**1, wherein it has been held that although the statute provides for opportunity of hearing at the stage of enquiry by the Director but in case there is recommendation by the Director to supersede the Committee of Management, it is implicit in the provision that the State Government would accord hearing to the affected parties before it supersedes the Committee of Management. This is necessary, in view of the fact that the decision making authority is the State Government and it is enjoined with duty to record reasons for supersession of the Committee of Management. The relevant observations are extracted below:-

"10. In my opinion, it would be incumbent upon the State Government to issue notice to the aggrieved party to show cause before passing an order on the recommendation of the Director. The decision making authority is the State Government and not the Director. Aggrieved party would have every right to show cause before the State Government, contending that the recommendations made by the Director are either incorrect or per se perverse. It would, therefore, be incumbent upon the State Government to pass suitable order considering the objections. It is immaterial whether the Committee of Management has appeared before the Director pursuant to the show cause notice under sub-section (3). Principle of natural justice would have to be read into sub-section (4) to uphold the vires of the section.

.....

18. Notwithstanding, the fact that the sub-section (4) does not contain any express provision for the affected party being given an opportunity of being heard. Undoubtedly, action under the said sub section is a function which involves due application of mind to the facts as well as to the requirements of law. Therefore, it is plain that before acting upon the recommendation of the Director, State is bound to put the aggrieved party to notice. Civil consequence of superseding the Committee of Management follows the decision of the State Government and not of the Director."

14. Sri G.K. Singh, learned Senior Counsel for the petitioners has not disputed before us that the State Government heard the parties on 24.06.2021 and 28.12.2021. He also does not dispute that the hearing on the aforesaid dates was preceded by a recommendation dated 27.05.2021 by the Director of Education (Secondary), Uttar Pradesh for superseding the Committee of Management in exercise of power under Section 16-D(4) of the Act.

15. The purpose of affording hearing is to provide opportunity to the Committee of Management to place its defence in context of the recommendation made by the Director of Education. It would get opportunity to impress upon the State Government that on the basis of material available on record, the law does not warrant appointment of an Authorized Controller.

16. Albeit, in the instant case, there was a previous recommendation superseding the Committee of Management, followed by hearing, but thereafter, as is evident from the impugned order, the State Government instead of applying its own independent mind to the objection submitted by the petitioners and taking decision in the matter, called for a fresh report from the Director of Education (Secondary). He, in turn, called for the comments from the Joint Director of Education, Gorakhpur and District Inspector of Schools, Kushinagar and submitted a fresh recommendation on 21.03.2022. Based on the same, the State Government had proceeded to supersede the Committee of Management. The order does not indicate that the fresh recommendations and the reports called for, were made available to the petitioners, as specifically pleaded in paragraphs 48 and 49 of the writ petition and which fact is not disputed by counsel for the appellant and learned Standing Counsel.

17. Additionally, there is no indication in the impugned order that any

consideration was given to the detailed reply submitted by the petitioners denying each and every charge levelled against them. The State Government under law is empowered to supersede the Committee of Management by an order 'for reasons to be recorded'. The State Government was thus enjoined with the duty to consider the reply and give reasons for not accepting the reply, which has not been done.

18. A perusal of the impugned order reveals that the State Government has not even alluded to the reply submitted by the petitioners dated 28.12.2021 and merely, relying on the recommendation made by the Director of Education dated 21.03.2022 had superseded the Committee of Management. This, in our opinion, has also resulted in gross violation of the principles of natural justice.

19. For the reasons given in the order of learned Single Judge and for additional reasons recorded by us, we decline to interfere in the matter.

20. The appeal lacks merit and is accordingly dismissed.

21. No order as to costs.

(2023) 3 ILRA 1059
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.02.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Writ-A No. 5369 of 2022

Suryendra Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shantanu Khare, Sri Sidharth Khare, Sri Himanshu Singh, Ashok Khare(Sr. Advocate)

Counsel for the Respondents:
C.S.C.

A. Service Law - U.P. Lok Nirman Vibhag Avar Abhiyanta (Civil) (Group-C), Service Rules, 2014-Rule 5(2)-U.P. Lok Nirman Vibhag Avar Abhiyanta (Mechanical) (Group-C) Service Rules, 2014-Promotion-Petition sought promotion on post of Junior engineer (Mechanical) in PWD under 5% quota for promotion available to Group C employees-Petitioner possesses a diploma in mechanical engineering passed in year 1991-Case of petitioner has not been considered for promotion for reason that he is not covered under Rule 5, which permits consideration of an employee who has obtained diploma for promotion by department while in service, whereas petitioner had a diploma prior to date of his appointment-Plea not tenable-It cannot be said that petitioner is not having the requisite qualification or he is not eligible to be promoted, because he has not obtained the diploma with prior permission of the department-Plea of respondent of no vacancy under 5% quota also rejected-Direction issued to consider claim of petitioner for promotion afresh.(Para 1 to 29)

The writ petition is allowed. (E-6)

List of Cases cited:

1. U.O.I. Vs Vijay Kumari (1994) Supp(1) SCC 84
2. U.O.I. Vs Parul Devnath (2009) 14 SCC 173
3. Govind Chandra Tiriya Vs Sibaji Charan Panda (2020) 3 SCC 803

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

1. Heard Shri Sidharth Khare, learned counsel for the petitioner as well as Shri

Vikram Bahadur Singh, learned Standing Counsel for the State.

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

It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to issued:-

a writ, order or direction of a suitable nature commanding the respondent to forthwith grant of promotion to the petitioner as Junior Engineer (Mechanical) in Public Works Department of the State under 5% quota for promotion available to Group C employees of the department w.e.f. the date the first Group C employees junior than the petitioner was so granted promotion within a period to be specified by this Hon'ble court.

(ii) a writ, order or direction of a suitable nature commanding the respondent to permit the petitioner to function as Junior Engineer (Mechanical) under them and to pay the petitioner his regular monthly salary on the said post, regularly, every month including all arrears of salary w.e.f. the date from which the first Group 'C' employees junior than the petitioner have been so promoted.

(iii) a writ, order or direction in the nature of which this Hon'ble court may deem fit and proper under the circumstances of the case."

3. Pursuant to the advertisement dated 19.11.2007 issued by the Executive Engineer, Provincial Division, Mainpuri, the petitioner has applied for appointment against the post of Heavy Mechanic Machine Operator and work agent by way of direct recruitment for filling up unfilled vacancies of the reserved category post. The qualification advertised for the post of Heavy Machine Operator was intermediate certificate or equivalent. Possession of experience was specified as a provincial qualification.

4. It is submitted that the petitioner possesses a diploma in mechanical engineering passed in the year 1991 from the Board of Technical Education U.P. The advertisement as well as certificate of the diploma are contained in Annexure No. 1 and 2 to the petition. The petitioner belongs to a scheduled caste category and applied for the said category. The petitioner was selected and was granted appointment by the office order dated 06.12.2007 in the pay scale of Rs. 3050-4590. Thereafter the petitioner joined and is in continuous service and presently is posted in District Mainpuri. The work and conduct of the petitioner has been satisfactory. The post of the petitioner is categorized in Group-C. The pay scale of the petitioner was revised from time to time vide office orders dated 07.10.2003, 14.05.2012 and 03.10.2012.

5. In public works department there existed a post of Junior Engineer (Civil) and Junior Engineer (Mechanical). On 01.01.2015, The State Government U.P., notified U.P. Lok Nirman Vibhag Avar Abhiyanta (Civil) (Group-C), Service Rules 2014 and also U.P. Lok Nirman Vibhag Avar Abhiyanta (Mechanical) (Group-C) Service Rules 2014. Under both the rules there existed 5 percent quota of promotion to the post of Junior Engineer to be filled up by promotion from amongst the substantively appointed Group-C Employees of the department who have obtained the qualification specified in Group-C after obtaining the permission of the department and have completed 10 years of substantive service on the first day of the year of recruitment.

6. It has been further submitted that the petitioner is fully qualified and eligible to be considered for the promotion against the five percent quota of Junior Engineer.

7. It has been further submitted that the Chief Engineer (Establishment), Group-C category by communication dated 03.10.2016 sought information pertaining to Group 'C' Staff of the department eligible for consideration for promotion under 5 percent quota for the post of Junior Engineer. Responding to the said notification, the Executive Engineer, Provincial Division, Mainpuri, intimated that there was no such Group-C staff in this division. The aforesaid response dated 18.10.2016, however, specifies that the petitioner is possessing a diploma and was working in the Division, but, the diploma possessed by him had been obtained prior to the date of appointment in the department.

8. Again the Superintending Engineer, Mainpuri Circle, vide notification dated 22.12.2017 sought information regarding eligible candidates for consideration for promotion on the said post of Junior Engineer. The Executive Engineer, Provincial Division, Mainpuri vide letter dated 29.01.2018 replied in which it was specified that there did not exist any such staff in his division, however, in submitting the aforesaid communication, it was specifically stated that the petitioner was working as a heavy machine operator in the division and possessed a diploma prior to the date of his appointment.

9. The Superintendent Engineer again vide letter dated 07.01.2020 sought information from the Executive Engineer Mainpuri. Replying that, the Executive Engineer sent a communication dated 20.01.2020 in which again name of the petitioner was specified, but it was mentioned that he possesses a diploma prior to the date of appointment. The copy of the aforesaid notifications are on record as Annexure No. 8 to 11 to the writ petition.

10. Thereafter, the petitioner vide various representations prayed for according consideration for promotion under the quota for promotion.

11. On the representation of the petitioner, the Executive Engineer sent a letter dated 11.06.2018 to the Superintendent Engineer, who forwarded it to the Chief Engineer and the Chief Engineer in turn forwarded such information vide letter dated 27.06.2018 to the Chief Engineer (Establishment) Group-C Category, however, till date the case of the petitioner has not been considered for promotion for the sole reason that the petitioner is not covered strictly by the language utilized in Rule 5 of the 2014 Rules which permits consideration of an employee who has obtained diploma for the promotion by the department while in service, whereas the petitioner had a diploma prior to the date of his appointment.

12. In support of his contention, learned counsel for the petitioner has relied on the judgment of the Division Bench of this Court dated 04.01.2016 passed in Writ C No. 62726/2016 (Madhvendra Singh Vs. State of UP and others), wherein Rule 5 of 2014 Rules was challenged in so far as it excluded from consideration the candidate who possesses diploma prior to his appointment.

13. The petitioner of the aforesaid writ petition Madhavendra Singh

represented the authorities along with copy of the judgment dated 04.01.2015. Another judgment dated 22.11.2018 has been relied by the learned counsel passed in Writ petition No. 33558/2017 "Vinod Goel Vs. State of U.P. and others".

14. It has been submitted that as a consequence of the aforesaid judgment, the controversy stands settled for consideration under Rule 5 of 2014 Rules, upon such a group C post an incumbent who already possess the diploma at the time of entry in service is also eligible.

15. It is further submitted that the objection against the candidature of the petitioner is contrary to 2014 Rules as interpreted by the Division Bench of this Court.

16. Per contra, learned Standing Counsel has submitted that the petitioner is not eligible to be promoted only on the basis of seniority list. It has been submitted on behalf of the State that the recruitment to the post of Junior Engineer, Mechanical is made on the basis of seniority subject to rejection of the unfit in accordance with the Uttar Pradesh Promotion by Selection in Consultation with Public Service Commission (Procedure) Rules, 1970 as amended from time to time.

17. He also submits that 2014 Rules is effective from 01.01.2015 and according to the provision of the 2014 Rules, 95 percent of the vacancies of the Junior Engineer are to be filled by the direct recruitment and five percent post are filled by way of promotion in a selection year. He also submits that excess posts have already been filled up by way of promotion. In previous years due to wrong calculation based on the cadre strength, more posts have been fulfilled which was not in accordance with law, then some administrative orders were passed by the respondents authorities which were challenged by the aggrieved persons before the Court.

18. It has been further submitted that at present, there is no vacancy in the department which has to be filled by way of promotion. Hence, no requisition can be forwarded the U.P. Public Service Commission to fill the post by way of promotion.

19. It is also submitted that several petitions are pending before this Court where some interim orders are going on and the aggrieved persons are working in shelter of those interim orders. In such circumstances, no further process can be initiated to fulfill the post of promotion by sending the requisition to U.P. Public Service Commission.

20. It is also submitted that in Civil Misc. Writ Petition No. 3099 of 2022, the promotion orders of the petitioner has been cancelled by the respondent authorities and the same was stayed by this Court. Specific pleadings in this regard has been made in para 25 of the short counter affidavit.

21. It has been further submitted by the learned Standing Counsel that the respondent authorities have not violated any existing rules and has further submitted that the petitioner is not eligible to be promoted.

22. Learned counsel for the petitioner in rebuttal has submitted that after the controversy regarding interpretation of Rule 5 of 2014 Rules has been settled by the Division Bench of this Court in the judgment and order dated 04.01.2016

passed in Writ-C No. 62726/2015, Madhvendra Singh (supra), it is not open for the State to contend that the petitioner is not eligible for promotion.

23. It is further submitted that in case the excess posts have been filled up by the department, the petitioner cannot be deprived from being considered for promotion as the fault of filling excess posts is of the respondents authorities. In case there are no post left, the State may direct to create a supernumerary post for grant of effective relief to the petitioner. In support of his contention, he has relied on three judgments of the Apex Court i.e. ***1994 Supp (1) SCC 84 (para-10), Union of India Vs. Vijay Kumari", "2009 (14) SCC 173 (para 45), Union of India Vs. Parul Devnath" and "2020 (3) SCC 803 (para-22), Govind Chandra Tiriya Vs. Sibaji Charan Panda".***

24. A perusal of judgment passed in Writ C No. 62726/2015 dated 04.01.2016 shows that the Division Bench while deciding writ petition has held that ***"In our view, the requirement that a candidate should have fulfilled the required educational qualifications as prescribed by Rule 8 after obtaining the permission of the department covers those in service candidates who have acquired the qualifications during their employment with the State Government. This is intended to ensure that a candidate who is duly employed with the State obtains the educational qualifications only after seeking and obtaining the permission of the prescribed authority. Obviously, the object and purpose is not to exclude from consideration in service candidates who have already obtained educational qualifications prescribed prior to their date of entry in service. In other words, Rule 5 (2) is not intended to act as an exclusion of in service candidates who otherwise fulfill the requirement of holding the prescribed qualifications, where the qualifications had already been acquired prior to entry in service. If the Rule is construed in the manner it has been interpreted by the State Government, it would become manifestly arbitrary since it would operate to exclude in service candidates who fulfill all the required norms including the prescribed qualifications, only on the ground that the qualifications had been obtained prior to the date of entry in service. This is evidently not the object and purpose which is sought to be achieved by the Rule.***

Hence, as we have interpreted the Rule, it would not exclude the petitioner from being considered for promotion merely on the ground that he had not obtained the educational qualifications prescribed with the permission of the department. There was no occasion for the petitioner to obtain the permission of the department for the simple reason that he had acquired a three year diploma in 1988, much prior to his appointment in the clerical cadre of the PWD in 1999. We, consequently, hold that the petitioner shall not be excluded from the eligibility list for the reasons which had weighed with the authorities. We clarify that it would be open to the authorities to duly verify that the petitioner does fulfill the prescribed qualifications. Subject to this verification and the petitioner meeting the required norms as prescribed in Rule 5 (2), the name of the petitioner shall be included in the eligibility/select list in accordance with law. This exercise shall be completed within a period of one month from the date of receipt of a certified copy of this order. In the view which we have taken in interpreting Rule 5 (2), it has not been

necessary for the Court to strike down the provisions contained in the Rule."

25. The issue in the present case that in case the petitioner has got a diploma prior to the date of appointment and not with the permission of the department whether still his case shall be covered under Rule 5(2) of 2014 Rules. The above interpretation by the Division Bench of this Court clearly answers the issue. Rule 5(2) of 2014 Rules has been interpreted by the Division Bench to the effect that it is not intended to act as an exclusion in service candidates who otherwise fulfills the requirement of holding prescribed qualification where the qualification had already been acquired prior to entry in the service like the petitioner. Accordingly, it cannot be contended by the respondent authorities that the petitioner is not having the requisite qualification or he is not eligible to be promoted because he has not obtained the diploma with prior permission of the department.

26. So far as the argument of learned Standing Counsel that they did not have any vacancy for filling 5 percent post quota for promotion which can be filled up for grant of promotion to the petitioner is concerned, this Court has noticed the fact that in the counter affidavit, it has been acknowledged by the State that several illegal promotions have been made under the aforesaid quota which subsequently have been cancelled and persons directed to be reverted have been granted stay orders from the Court and are working on the strength of said stay orders. In view of the admitted position, the respondent cannot be permitted to perpetuate the the illegality on the pretext that they don't have any vacancy under five percent quota.

27. The Hon'ble Apex Court in the aforesaid judgment in the case of Union of India Vs. Vijay Kumar (supra), Union of India Vs. Parul Devnath (supra) and Govind Chandra Tiriya Vs. Sibaji Charan Panda (supra) has time and again issued directions for creation of supernumerary post for grant of effective relief to the concerned litigants, after it was found by the Court that they were wrongly denied their legal entitlements.

28. Accordingly, in order to balance the equities, a writ of mandamus is issued to the respondent authorities to consider the claim of the petitioner for promotion afresh after creating a supernumerary post under five percent quota which shall be adjusted in future, upon the occurrence of a vacant post, in the same quota. This exercise shall be conducted within a period of three months from the date of receipt of certified copy of this order.

29. The writ petition is allowed. No order as to cost.

(2023) 3 ILRA 1064
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.02.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ-A No. 42450 of 2011

Raj Pal Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Satya Prakash Pandey

Counsel for the Respondents:
C.S.C.

A. Service Law - Petitioner was retired from service after serving as Sub-inspector in Civil Police-a disciplinary proceeding was initiated and awarded major punishment withholding the salary for the period of his absence from duty-show cause notice issued and disciplinary authority without considering the reply of the petitioner and without recording any finding imposed the same punishment proposed by Enquiry officer-Enquiry Officer has no business to propose the punishment-After the death of the deceased employee no further or fresh enquiry may be initiated-It is well settled law that an administrative/quasi-judicial order must contain reason in support of the conclusion and in absence of the reason, the order become arbitrary.(Para 1 to 21)

The writ petition is allowed. (E-6)

List of cases cited:

1. St. of U.K. Vs Kharak Singh (2008) 8 SCC 236

2. Surendra Singh Vs St. of U.P.

3. Durgawate Dubey Vs St. of U.P & ors.

4. Raj Kishori Devi Widow (deceased) Vs. St. of U.P & ors.

5. A.K.S. Rathore (dead) thru LRS Vs U.O.I. & anr.

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

1. Heard learned counsel for the petitioner and learned standing counsel for State- respondents.

2. Present petition has been filed for quashing the impugned orders dated 04.11.2009, 05.11.2009, 14.10.2020 & 18.04.2011 and for payment of consequential dues.

3. Counter and rejoinder affidavits have been exchanged. With the consent of learned counsel for the parties, writ petition is being decided at the admission stage itself.

4. Learned counsel for the petitioner submitted that during pendency of writ petition, Raj Pal Singh (husband of petitioner) died and now petition is being contested by his wife after filing substitution application, which has been allowed.

5. He next submitted that husband of petitioner (Raj Pal Singh) was serving as Sub Inspector in Civil Police and after attaining the age of superannuation i.e. 60 years, he was retired from service on 31.05.2009. While, he was posted at Ramabai Nagar, a disciplinary proceeding was initiated against him to award major punishment and also withholding the salary for the period of his absence from duty. Pursuant to that, a charge sheet dated 24.10.2008 was served upon husband of petitioner and he has submitted his reply dated 13.11.2008 denying all charges. Ultimately, Enquiry Officer has submitted enquiry report dated 06.03.2009 against the husband of petitioner with recommendation of punishment for withholding salary for the period of absence and further reversion to minimum pay scale for one year.

6. Pursuant to enquiry report dated 06.03.2009, two show cause notices dated 27.05.2009 has been issued to husband of petitioner by Disciplinary Authority, upon which, he has submitted reply dated 30.05.2009. Disciplinary Authority without considering the reply of husband of petitioner and without recording any finding upon that, has passed impugned orders dated 04.11.2066 & 05.11.2009 imposing the punishment proposed by Enquiry Officer. Against the impugned orders, husband of petitioner has preferred

appeal before respondent no. 3, which was dismissed vide order dated 14.10.2010. After dismissal of appeal, husband of petitioner has preferred revision before respondent no. 2, which was also dismissed vide order dated 18.04.2011.

7. Learned counsel for the petitioner submitted that impugned orders are bad on two grounds.

8. First of all, Enquiry Officer has no business to propose the punishment and it is upon the Disciplinary Authority to take decision after considering the enquiry report and other material available on record. In support of his contention, he has placed reliance upon the judgment of Apex Court in the matter of ***State of Uttaranchal Vs. Kharak Singh; 2008 (8) SCC 236.***

9. Secondly, impugned orders are having no reason and no consideration of reply of husband of petitioner dated 30.05.2009 of show cause notice dated 27.05.2009. For this, he has taken specific plea in paragraph 11 of the affidavit filed along with petition and in the counter affidavit, there is a very vague denial not supported with any document. In support of his contention, he has placed reliance upon the judgment of this Court in the matter of ***Surendra Singh Vs. State of U.P.*** *(Writ A No. 23290 of 2017) decided on 24.05.2017.*

10. He next submitted that after death of deceased employee (in present case, husband of petitioner), no further or fresh enquiry may be initiated. In support of his contention, he has placed reliance upon the judgments of this Court in the matters of ***Durgawati Dubey Vs. State of U.P. and 3 others*** *(Writ A No. 40057 of 2013)* decided on 8.10.2018, ***Raj Kishori Devi Widow (deceased) Vs. State of U.P. and 4 others*** *(Writ A No. 47122 of 2016)* decided on 30.7.2019 and judgment of Apex Court in the matter of ***A.K.S. Rathore (dead) through LRS Vs. Union of India & another*** in Civil Appeal No. 7028 of 2022 (arising out of SLP (C) No. 22570 of 2016 decided on 28.9.2022.

11. Sri Govind Narayan Srivastava, learned standing counsel vehemently opposed the submissions raised by learned counsel for the petitioner, but could not dispute this fact that punishment so given is as proposed by the Enquiry Officer. He also could not dispute that impugned orders have been passed without considering the reply of petitioner dated 30.05.2009 having no finding upon that.

12. I have considered the rival submissions raised by learned counsel for the parties and perused the record. Last paragraph of the enquiry report dated 06.03.2009 provides proposed punishment i.e. withholding salary for the period of absence and further reversion to minimum pay scale for one year, which are awarded to the petitioner. Apex Court in the matter of ***Kharak Singh (supra)*** has considered this fact and opined that Enquiry Officer has no authority to make recommendation for punishment. Relevant paragraphs of the said judgment are quoted below;

"18. Another infirmity in the report of the enquiry officer is that he concluded the enquiry holding that all the charges have been proved and he recommended for dismissal of the delinquent from service. The last paragraph of his report dated 16-11-1985 reads as under:

"During the course of above inquiry, such facts have come into light from which it is proved that the employee who has doubtful character and does not obey the

order, does not have the right to continue in the government service and it is recommended to dismiss him from the service with immediate effect."

(emphasis supplied)

Though there is no specific bar in offering views by the enquiry officer, in the case on hand, the enquiry officer exceeded his limit by saying that the officer has no right to continue in the government service and he has to be dismissed from service with immediate effect.

19. As pointed out above, awarding appropriate punishment is the exclusive jurisdiction of the punishing/disciplinary authority and it depends upon the nature and gravity of the proved charge/charges and other attended circumstances. It is clear from the materials, the officer, who inspected and noted the shortfall of trees, himself conducted the enquiry, arrived at a conclusion holding the charges proved and also strongly recommended severe punishment of dismissal from service. The entire action and the course adopted by the enquiry officer cannot be accepted and is contrary to the well-known principles enunciated by this Court.

13. Apex Court has taken firm view that Enquiry Committee has no authority to recommend the punishment.

14. From the perusal of show cause notice dated 27.05.2009 and reply submitted by the husband of petitioner dated 30.05.2009, it is apparently clear that reply so given by the petitioner has not been considered and straightway impugned orders have been passed with a one line observation that reply of petitioner is not satisfactory. No finding is recorded in support of that as to why reply is not satisfactory. This issue has also been decided by this Court in the matter of Surendra Singh (Supra). Relevant paragraphs are being quoted below;

"By the impugned order, the petitioner has been found guilty and he has been awarded a censure entry in terms of Rule 4(1)(b)(iv) of the U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rule, 1991.

It is contended on behalf of the petitioner that the impugned order is arbitrary and illegal and it does not disclose any reason, hence, the order is liable to be set aside. He further submits that in response to the show cause notice, the petitioner has submitted detailed representation on 28.04.2016. The authority concerned without adverting to his reply has rejected it by single order that his reply was found "Asantoshjanak" (Unsatisfactory). He submits that no reason has been assigned in the matter, hence, the order is arbitrary.

I have heard the learned counsel for the parties.

It is well settled law that an administrative/quasi judicial order must contain reason in support of the conclusion and in absence of the reason, the order become arbitrary.

The Supreme Court in long line of decisions has settled the view that recording the reasons is an essential feature in administrative decision. Recording the reasons also checks the State functionaries to act fairly and restrain them from arbitrary exercise of their administrative or quasi judicial power. The reasons in support of decision must be cogent and clear, which can demonstrate that authority concerned has applied his mind. Reference may be made to the judgments of Supreme Court in the cases of Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing

Vs. Shukla and Brothers, (2010) 4 SCC 785; Kranti Associates Private Limited Vs. Masood Ahmed Khan, (2010) 9 SCC 496; Union of India Vs. Mohan Lal Capoor, AIR 1974 SC 87; S.N. Mukherjee Vs. Union of India, AIR 1990 SC 1984; Raj Kishore Jha Vs. State of Bihar, (2003) 11 SCC 519; Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota Vs. Shukla and Brothers (2010) 4 SCC 785.

In view of the said settled law, I find that the impugned order which is cryptic and skeletal, needs to be set aside. Accordingly, it is set aside.

The matter is remitted to the authority concerned to pass fresh order in accordance with law, expeditiously.

In view of the fact that from order itself, it is evident that no reason has been mention, no useful purpose would be served to grant time to learned Standing Counsel to file counter affidavit.

With the aforesaid observation, the writ petition is disposed of."

15. Court is of the firm view that recording of reason is an essential feature in Administrative decisions.

16. Now, coming to the last submission as to whether a fresh enquiry can be conducted or not? It is undisputed that as on date, original petitioner, (husband of present petitioner before substitution), is no more. This matter was before this Court in the matter of ***Durgawati Dubey (Supra).*** Relevant paragraphs are quoted below;

"After going through the judgments and facts of the case, this Court is of the view that against a dead person, neither disciplinary proceeding can be initiated nor any punishment order can be passed. In the present case, facts are not disputed that disciplinary proceeding was initiated against husband of petitioner after his death, which suffers from non application of mind as well as contrary to the law laid down by this Court as well as other High Courts, therefore, the impugned order dated 10.06.2013 is not sustainable and is hereby quashed.

The writ petition is allowed. No order as to costs."

17. Court is of the firm view that no disciplinary proceeding can be initiated against a dead person. This Court in the matter of Raj Kishori Devi Widow (supra) has again taken the similar view. Relevant paragraphs are being quoted below;

"Learned Single Judge of of this Court in Rajeshwari Devi Vs. State of U.P. and others, in the similar facts, held as follows:

"Holding of departmental enquiry and imposition of punishment contemplates a pre-requisite condition that the employee concerned, who is to be proceeded against and is to be punished, is continuing an employee, meaning thereby is alive. As soon as a person dies, he breaks all his connection with the worldly affairs. It cannot be said that the chain of employment would still continue to enable employer to pass an order, punitive in nature, against the dead employee..... all the punishments contemplated under the rules are such which can be imposed on a person who is still continuing to be an employee."

It follows that punishment provided under the Disciplinary Rules can be imposed upon the government servant and not on the family member of the government servant. As soon as an incumbent ceases to be a government servant upon death, no penalty under the rules could have been imposed upon him.

That being so, the question of passing an order, which may have the effect of punishing legal heirs of the deceased employee would not arise. In the facts of the instant case, disciplinary proceeding was initiated against the employee immediately before his retirement and before the disciplinary enquiry could conclude he died. The disciplinary enquiry, thereafter, could not have been proceeded under Section 351A of the Civil Service Regulations, accordingly, the competent authority dropped the enquiry. By the impugned order, recovery was sought to be made from the post retiral dues from the legal heir for the misdemeanour and misconduct of the delinquent employee, which was not permissible in view of Rule 54-B of the Fundamental Rules.

Learned standing counsel, in rebuttal, does not dispute the fact that the enquiry was dropped as the employee died and the enquiry could not be concluded before death of the employee. In the circumstances, no recovery could have been made from the post retiral dues without a finding being recorded against the deceased/employee under the Rules that he was responsible for having caused loss to the government.

The order dated 17 June 2016 passed by the second respondent-Finance Controller and Chief Accounts Officer, Foods and Civil Supplies, Lucknow, is unsustainable, accordingly, set aside and quashed.

The recovered sum of the post retiral dues shall be released to the petitioner by the second respondent--Finance Controller and Chief Accounts Officer, Foods and Civil Supplies, Lucknow, within two months from the date of filing of certified copy of this order along with interest @ 7% per annum on the sum from the date of recovery.

The writ petition stands allowed. No Cost."

18. Recently, in the matter of ***A.K.S. Rathore (supra),*** Apex Court has taken a very clear view that no disciplinary proceeding can be initiated or continued against a dead person. Relevant paragraphs are being quoted below;

"8. Today even if we dismiss the above appeal, no final order can be passed in the disciplinary proceedings, against a dead person. The disciplinary proceedings have actually abated. In other words the dismissal of the above appeal will have the same consequences as the appeal being allowed.

9. In view of the above, the above appeal is disposed of holding that the disciplinary proceedings initiated affinst the original appellant stand abated. As a consequence, the legal representatives of the original appellant will be entitled to all the benefits that the original appellant would have been entitled to, as per the rules. The respondents may pass orders in accordance with the rules, about the benefits law-fully admissible to the original appellant and disburse the same within a period of 12 weeks. There will be no order as to costs."

19. In the present case, Disciplinary Authority has given the same punishment, which was proposed by Enquiry Officer and further no finding has been recorded while passing the impugned orders, therefore, it is bad in law.

20. Under such facts and circumstances of the case as well as law discussed herein above, impugned orders dated 04.11.2009, 05.11.2009, 14.10.2020 & 18.04.2011 are bad and hereby quashed. Further, as on

date, husband of petitioner (employee) is no more, therefore, matter cannot be remitted back to the respondents for passing fresh order and petitioner shall be entitled for all consequential benefits permitted under the Rules.

21. Accordingly, petition is **allowed.**

22. No order as to cots.

23. Respondents are directed to pay all consequential benefits arising out of quashing of impugned orders to the petitioner i.e. wife of Raj Pal Singh within three months from the date of production of certified copy of this order.

(2023) 3 ILRA 1070
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.03.2023

BEFORE

THE HON'BLE SAMEER JAIN, J.

Application U/S 482 No. 2229 of 2022
With'
Application U/S 482 No. 4627 of 2022

Yogeshwar Sood ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Vineet Vikram, Sri Dhirendra Kumar Srivastava, Sri Hari Krishna Singh, Sri Imran Ullah

Counsel for the Opposite Parties:
G.A., Sri Bhanu Prakash Verma, Sri Shashi Kant Shukla, Sri Amarnath Shukla

Criminal Law - Indian Penal Code, 1860 - Sections 409 & 420 -for offence u/s 420 IPC- fraudulent or dishonest intention necessary- Applicant failed to keep their promise to make payment-no evidence for dishonest or fraudulent intention at the time of making promise-merely breach of promise will not attract section 420 IPC-sec. 409-Applicants neither public servant-nor banker or merchant or broker or attorney or agent-section 409 IPC not made out-no legal evidence of entrustment of gold chhatra to the Applicant-except verbal allegation-proceedings quashed.

Application allowed. (E-9)

List of Cases cited:

1. R.P. Kapur Vs St. of Pun. AIR 1960 SC 866

2. St. of Haryana & ors. Vs Bhajan Lal & ors. 1992 Supp (1) SCC 335

3. M/s Neeharika Infrastructure Pvt. Ltd. Vs St. of Mah. & ors. AIR (2021) SC 1918

4. Prabhatbhai Aahir @ Parbatbai Bhimsinhbhai Karmur & ors. Vs St. of Gujarat & anr. (2017) 9 SCC 641

5. Kapil Agarwal & ors. Vs Sanjay Sharma & ors. (2021) 5 SCC 524

6. Hridaya Ranjan Prasad Verma Vs St. of Bihar (2000) 4 SCC 168

7. Dalip Kaur Vs Jagnar Singh (2009) 14 SCC 696

8. Anwar Chand Sab Nanadikar Vs St. of Karn. (2003) 10 SCC 521

9. Vijay Kumar Ghai Vs St. of W. B. (2022) 7 SCC 124

10. Indian Oil Corporation Vs NEPC India Ltd. (2006) 6 SCC 736

(Delivered by Hon'ble Sameer Jain, J.)

1. Both the Applications U/S 482 Cr.P.C. No. 2229 of 2022 and 4627 of 2022 are connected matters and in both the

applications cognizance order dated 05.11.2020 as well as entire proceedings of Case No. 1327 of 2020 pending in the Court of ACJM, Court No.1, Mathura arising out of Case Crime No. 648 of 2019, under Section 409, 420 IPC, Police Station Kotwali, District Mathura have been challenged, therefore, both the applications are being decided by the common order.

2. Learned AGA does not propose to file any counter affidavit. However, pleadings between applicants and opposite party no.2 (informant) have been exchanged.

3. Heard Sri Dhirendra Kumar Srivastava and Sri Hari Krishna Singh, learned counsels for the applicants, Sri Amarnath Tripathi, Sri Bhanu Prakash Verma and Sri Shashi Kant Shukla, learned counsels for opposite party no.2 and Dr. S.B.Maurya, learned AGA-I, for the State.

4. The instant applications under Section 482 Cr.P.C. have been filed by the applicants with a prayer to quash the cognizance order dated 05.11.2022 as well as entire proceeding of Case No. 1327 of 2020 pending in the Court of ACJM, Court No.1, Mathura arising out of Case Crime No. 648 of 2019, under Sections 409, 420 IPC, Police Station Kotwali, District Mathura.

Factual Matrix

5. Opposite party no.2 lodged FIR against applicants under Sections 409, 420 IPC on 31.08.2019 at Case Crime No. 648 of 2019 at Police Station Kotwali, District Mathura and as per allegation made in the FIR, informant/opposite party no.2 made a Golden Chatra on the order of the applicants weighing about 3.352 Kilogram and 420 miligram valuing about 1,31,36,289/- and handed over the same to the applicants on 06.04.2018 and applicants promised him that within a week they will make the payment and on 09.05.2018 applicants donated the Golden Chatra at Badrinath Dham and when more than a month passed then informant demanded his money but applicants stated that within 2-4 months they will make the payment but they did not make the payment and thereafter they refused to make any payment. According to the FIR, applicants were having intention to cheat informant since beginning and thus they committed fraud.

6. After registration of the FIR, investigation was conducted and during investigation Investigating Officer recorded the statement of opposite party no.2, the informant and he reiterated the version of the FIR. During investigation, Investigating Officer also recorded the statements of some independent witnesses and they stated that applicants did some interior work of the house of the informant and estimate of the renovation was rupees 9.5 Crore but informant i.e. opposite party no.2 paid only Rs. 1.2 Crore and due to this reason some dispute arose between applicants and informant and applicants also filed a civil suit in this regard against informant before Civil Judge (Junior Division), Ludhiana vide Case No. 7461 of 2019 and only due to this reason informant lodged FIR of the present case against the applicants after cooking up false and fabricated story and in fact informant did not want to pay the remaining amount to the applicants. These independent witnesses also stated that after the alleged date of handing over the Golden Chatra to the applicants, informant deposited Rs. 10 Lakhs in the account of the firm of the applicants. After

investigation on 16.12.2019 Investigating Officer submitted final report in the present matter.

7. From the record, it reflects that during pendency of final report before the court concerned informant i.e. opposite party no.2 moved an application for further investigation before Inspector General of Police, Agra and on 06.01.2020, Inspector General of Police, Agra transferred the investigation from District Mathura to District Agra and directed the SSP, Agra to allot further investigation of the case to some competent police officer and on the direction issued by Inspector General, Agra further investigation of the case was commenced and during further investigation subsequent statement of informant i.e. opposite party no.2 was recorded and he reiterated his earlier version recorded by earlier Investigating Officer although in his subsequent statement he admitted the fact that applicants informed him that they are in the business of interior decoration and he gave them a contract to renovate his house. He further stated that applicants provided him estimate of Rs. 9.5 Crore for renovation. Informant i.e. opposite party no.2 also stated that on different dates he transferred number of amounts in the account of the firm of applicants and made a request to them to start the renovation work of his house and thereafter applicants sent some materials of about Rs. 8,48,000/- and in the meantime applicants stated to him that they wanted to donate a Golden Chatra at Badri Nath Dham and they placed the order in this regard to him and on their verbal order he prepared a Golden Chatra of about 3.352 Kilogram and 420 miligram and cost of the Chatra was Rs. 1,31,36,289/- and handed over the same to the applicants on 06.04.2018 but they did not make the payment. In his second statement opposite party no.2 further stated that as applicants were doing the renovation work of his house, therefore, he deposited Rs. 10 lakhs on 12.06.2018 in the account of the firm of the applicants i.e. after handing over the Golden Chatra to the applicants. Opposite party no.2 further stated that on 12.06.2019 applicants sent legal notice to him and also filed civil suit against him in the court of Civil Judge (Junior Division), Ludhiana and thereafter on 31.08.2019 he lodged FIR of the present case.

8. During further investigation, Investigating Officer also recorded the statement of Pundereep Goswami Ji Maharaj. He stated that Golden Chatra was made by the informant.

9. During further investigation, again investigation was transferred from District Agra to Mathura by the order of the Inspector General of Police, Agra on the application of the informant i.e. opposite party no.2 and thereafter on 14.10.2020 statement of Ashok Kumar Agrawal, the brother of the informant was recorded and he also stated that informant handed over the work of renovation of his house to the applicants and they provided estimate of about rupees 9.5 Crore and thereafter opposite party no.2 transferred 1.10 Crore in the account of the firm of the applicants and thereafter applicants sent materials of about Rs. 1,48,000/- but they did not start any work of renovation and thereafter they by playing fraud got manufactured Golden Chatra from the informant amounting to Rs. 1,31,36,289/- weighing about 3.352 Kilogram and 420 miligram and donated the same at Badri Nath Dham and did not make the payment of Golden Chatra. Ashok Kumar Agrawal, the brother of the informant also stated that on 12.06.2018

i.e. after alleged handing over the Golden Chatra to the applicants by the informant, Rs. 10 Lakhs were transferred by opposite party no.2 in the account of the firm of applicants.

10. From the record, it further reflects that during further investigation, Investigating Officer made query from Badri Nath Kedar Nath Samiti and on 07.02.2020 Samiti provided its reply and as per reply, applicants on 09.05.2018 donated a Golden Chatra at Badri Nath Dham weighing about 3.354 Kilogram and entry of the same was made on 24.10.2018 at the register of the temple. It appears from the record that after further investigation on 16.10.2020 charge-sheet was submitted against the applicants in the present matter and after submission of the charge-sheet cognizance was taken and summons were issued to the applicants on 05.11.2020.

11. Hence the present application.

Submission on behalf of the applicants

12. Learned counsel for the applicants submitted that entire allegations made against the applicants are totally false and baseless and in fact applicants never placed any order to the opposite party no.2 with regard to the Golden Chhatra. He submits, applicants are in the business of interior designing and informant engaged them for the purpose of renovation of his house and in this regard an estimate of Rs. 9.5 Crore was given by the applicants to him and thereafter work of renovation of the house of the informant (Opposite Party No. 2) was started and Opposite Party No. 2 transferred Rs. 1.2 crore in the account of the firm of the applicants but thereafter some dispute arose between the parties with regard to the remaining payment and in this regard firm of the applicants sent a legal notice to the Opposite Party No. 2 on 12.6.2019 through its counsel and demanded the remaining dues of Rs. 8.3 crore and Opposite Party No. 2 gave reply to the same through his advocate on 26.6.2019 and stated in his reply that in spite of advance payment of Rs. 1.2 crore applicants did not even start renovation work of his house and alleged that applicants committed fraud.

13. He further submits, in reply dated 26.6.2019 Opposite Party No. 2 did not state about the fact of Golden Chhatra and this fact clearly suggest that only due to the dispute arose between the parties with regard to the payment of renovation of the house of the informant the FIR of the present case was lodged against the applicants by setting up a false and concocted story.

14. He further submitted that firm of the applicants also replied on 19.9.2019 but in the meantime on 31.8.2019 Opposite Party No. 2 has lodged FIR of the present case against the applicants. He further submitted that there is no admissible evidence on record which can show that applicants placed any order for making of Golden Chhatra. He further submitted that the present dispute is purely civil dispute and even if applicants failed to keep promise to make payment of golden chhatra as alleged then also no criminal liability could be fastened against them.

15. He further submitted that from the subsequent statement of the Opposite Party No. 2 and his brother Ashok Kumar Agrawal recorded during further investigation, it is evident that the amount of Rs. 10 lac was transferred by Opposite

Party No. 2 in the account of the firm of the applicants after about two months from the date of alleged handing over the Golden Chhatra to the applicants and this fact clearly suggest that there was no dispute pending between the parties with regard to the Golden Chhatra rather the dispute was pending with regard to the renovation of the house of informant which was being done by the firm of the applicants.

16. He further submitted that as informant/ Opposite Party No. 2 failed to make the payment of the balance amount of Rs. 8.3 crore to the applicants, therefore, the firm of the applicant filed a civil suit for damages against Opposite Party No. 2 on 21.9.2019 which is still pending. He further submitted that except the verbal allegation there is also no evidence on record which can show that Opposite Party No. 2 handed over the Golden Chhatra to the applicants.

17. He further submitted that in fact the Golden Chhatra was not individually donated by the applicants at Badrinath Dham but it was handed over by the group of devotees at Badrinath Dham and this fact is evident from the letter of Maharshi Mukta Seva Mission which has been annexed as Annexure No. 19 to the affidavit filed in support of the present application. He further submitted that Uttarakhand Government in the year 2021 has constituted Uttarakhand Char Dham Management Board (in short Board) to look after the working of the temples in the State and abolished Badrinath Kedarnath Mandir Samiti which earlier looked the working of the temples in the State and Maharshi Mukta Seva Mission through its letter dated 15.4.2021 informed the newly constituted Uttarakhand Char Dham Management Board that on 09.05.2018 the Golden Chhatra was donated by groups of devotees and also apprised the Board about the wrong information furnished by the earlier Samiti to the Investigating Officer and also requested to issue correct information. He further submits, after that on 26.04.2021 the Board sent letter to Maharshi Mukta Sewa Mission and informed that Golden Chhatra was collectively donated by large numbers of devotees on 09.05.2018 and entry of the same has been made in the record of the temple. He further submits, therefore, it is evident that the Golden Chhatra was donated collectively by number of devotees and not by applicants individually.

18. He further submitted that even if the allegations are accepted then also no offence under Section 409, 420 IPC is made out against the applicants as there is no evidence on record which can show that applicants were having any intention to cheat the informant/Opposite Party No. 2 since beginning.

19 . He further submitted that admittedly applicants are neither public servant nor banker nor merchant nor broker nor attorney nor agent, therefore, offence under Section 409 IPC is not made out against them. He further submitted that without any application of mind in routine manner cognizance was taken by the Court concerned, therefore, cognizance order dated 5.11.2020 and proceedings pending against the applicants before the Court concerned are liable to quashed.

Submission made on behalf of the respondents

20. Learned counsels for the informant as well as learned AGA submitted that from the perusal of the record it appears that applicants committed offence under Section 409, 420 IPC and

they were having intention since beginning to deceit the informant and in spite of receaving the Golden Chhatra of about Rs. 1,31,36,289/- they did not pay the amount and donated the Chhatra at Badrinath Dham, thus committed offence of cheating and criminal breach of trust and it cannot be said that it was merely a breach of a promise.

21. Learned counsel for the informant further argued that from the perusal of the statement of the Opposite Party No. 2 and other witnesses it is apparant that on the order placed by applicants Golden Chhatra was made by the informant and he handed over the same to them but they failed to make the payment of the same and this fact shows that applicants were having intention to cheat the informant. He further submitted that from the letter of Badrinath Kedarnath Mandir Samiti which was sent by the Samiti to the Investigating Officer it reflects that applicants were the persons who donated the Golden Chhatra at Badrinath Dham and at this stage it cannot be said that the Golden Chhatra was donated collectively by the devotees rather there is evidence on record which can clearly shows that applicants were the persons who donated the same at Badrinath Dham.

22. He further submitted that as applicants being interior decorator were doing some work of renovation of the house of Opposite Party No. 2, therefore, in fiduciary relationship without any written agreement, on the verbal order placed by the applicants Opposite Party No. 2 made the Golden Chhatra and handed over it to them and as work of renovation of the house of the Opposite Party No. 2 was under way, therefore, Opposite Party No. 2 even after handing over the Golden Chhatra to the applicants transferred the amount of Rs. 10 lacs in the account of the firm of the applicants with regard to renovation work and from this fact it cannot be presumed that no dispute with regard to Golden Chhatra was pending between the parties.

23. He further submitted that as the dispute with regard to the payment of the renovation of the house of the informant and Golden Chhatra were two different disputes, therefore, in reply to the legal notice of the applicants, Opposite Party No. 2 did not disclose the fact about Golden Chhatra and therefore, it also cannot be presumed on the basis of the reply of the legal notice given by the Opposite Party No. 2 that no such dispute with the regard to the payment of the Golden Chhatra was existed.

24. He further submitted that applicants by playing fraud with deceitful intention duped amount of more than Rs. 1,31,00,000 of the informant. He further submitted that as there is prima facie sufficient evidence against the applicants on record, therefore, Court concerned rightly took the cognizance and issued the summons.

25. He further submitted that the previous investigation could not be properly conducted and with the connivance of the applicants, first Investigating Officer submitted final report in the present matter and after further investigation on the basis of evidence collected during further investigation charge-sheet was filed against applicants, therefore, the instant applications filed on behalf of the applicants are devoid of merits and are liable to be dismissed.

Analysis

26. I have given my thoughtful consideration on the rival submissions advanced by learned counsels for both the parties and perused the material placed on record.

27. The power of this Court with regard to its inherent jurisdiction has been discussed by Three Judges Bench of the Apex Court in case of **R.P. Kapur Vs. State of Punjab AIR 1960 SC 866** and Three Judges Bench of the Apex Court summarised the categories of cases where inherent power can or should be exercised to quash the proceedings:-

(i) Where it manifestly appears that there is a legal bar against the institution or continuance of proceedings for example want of sanction,

(ii) Where allegation in the first information report or complaint if taken at its face value and accepted in their entirety do not constitute the offence alleged,

(iii) Where the allegations constituted an offence but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charges.

28. The Apex Court in its celebrated judgement of **State of Haryana and others Vs. Bhajan Lal and other 1992 Supp (1) SCC 335** considered in detail the scope of this Court under Section 482 Cr.P.C. and/ or Articles of 226 of Constitution of India and identified the following categories in which proceedings can be quashed and observed in paragraph 102 as:-

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

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

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155 (2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a

police officer without an order of a Magistrate as contemplated under Section 155 (2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

29. Recently Three Judges Bench of the Supreme Court in the case of **M/s Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra and others AIR (2021) SC 1918** also occasioned to discuss the scope of Section 482 Cr.P.C. and Article 226 of Constitution of India and observed that if a case falls under the parameters of R.P. Kapur case (supra) and Bhajan Lal case (supra) then this Court is having jurisdiction to quash the proceedings by invoking its jurisdiction under Section 482 Cr.P.C.

30. The Three Judges Bench of the Apex Court in case of **Prabhatbhai Aahir alias Parbatbai Bhimsinhbhai Karmur and others Vs. State of Gujarat and another (2017) 9 SCC 641** observed that Section 482 Cr.P.C. is pre-faced with an overriding provision and this Court being a superior Court has the inherent power to make such order as necessary (i) to prevent an abuse of the process of any Court; or (ii) otherwise to secure the ends of justice.

31. Again apex Court in case of **Kapil Agarwal and others Vs. Sanjay Sharma and others (2021) 5 SCC 524** observed with regard to power of this Court under Section 482 Cr.P.C. as:-

"As observed and held by this Court in catena of decisions, inherent jurisdiction under Section 482 Cr.P.C. and/or under Article 226 of the Constitution is designed to achieve salutary purpose that criminal proceedings ought not to be permitted to degenerate into weapon of harassment. When the Court is satisfied that criminal proceedings amount to an abuse of process of law or that it amounts to bringing pressure upon accused, in exercise of inherent powers, such proceedings can be quashed."

32. The law with regard to the power of this Court under Section 482 Cr.P.C. is settled that this Court cannot scuttle a legitimate prosecution at its inception and the inherent power should be used sparingly with abundant caution but at the same time if it appears that even if entire allegations are accepted and even then no offence is made out or proceedings has been initiated with mala-fide intention only to harass the accused persons then in the interest of justice and to secure the ends of justice this Court should invoke its jurisdiction under Section 482 Cr.P.C. and may quash the proceedings.

33. In case at hand, proceedings pending against the applicants relates to Sections 409, 420 IPC and therefore, question before this Court is, whether the offences of cheating and criminal breach of trust have been made out from the face value of the allegations. Following the well settled principle of law, contents of the allegations would have to be taken as a whole to deduce as to whether the ingredients of the offence have been duly established.

34. In the present matter, the FIR was lodged on 31.8.2019 and according to the FIR applicants placed an order for Golden Chhatra and on the order of the applicants a Golden Chhatra was made by the informant and it was handed over to them and applicants promised that within a week they will make the payment but when more than one month was passed then informant demanded their dues but applicants did not make the payment, therefore, as per allegation made against the applicants, they failed to fulfil their promise. Therefore, question arises if allegations made against the applicants are accepted then offences under Section 420, 409 are made out or not.

35. The ingredients of the offence of cheating and dishonestly inducing delivering of property are spelt out in Section 420 of IPC it reads as follows:

420. Cheating and dishonestly inducing delivery of property.--*Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

36. Therefore, for offence under Section 420 IPC cheating and dishonest inducement to deliver the property is necessary.

37. In **Hridaya Ranjan Prasad Verma Vs. State of Bihar (2000) 4 SCC 168**, the Apex Court interpreted Section 415 and 420 of IPC and hold that fraudulent and dishonest intention is a pre-condition to constitute the offence of cheating the relevant extract from the judgment are as follows:-

"14. On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.

15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction,

that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed." (emphasis supplied)

38. In **Dalip Kaur Vs. Jagnar Singh (2009) 14 SCC 696,** Apex Court held that a dispute arising out of a breach of an agreement would not amount to an offence of cheating under Section 415 and 420 IPC and observed as:-

"9. The ingredients of Section 420 of the Penal Code are:

"(i) Deception of any persons;

(ii) Fraudulently or dishonestly inducing any person to deliver any property; or

(iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit."

10. The High Court, therefore, should have posed a question as to whether any act of inducement on the part of the appellant has been raised by the second respondent and whether the appellant had an intention to cheat him from the very inception. If the dispute between the parties was essentially a civil dispute resulting from a breach of contract on the part of the appellants by non-refunding the amount of advance the same would not constitute an offence of cheating. Similar is the legal position in respect of an (2009) 14 SCC 696 offence of criminal breach of trust having regard to its definition contained in Section 405 of the Penal Code. (See Ajay Mitra v. State of M.P. [(2003) 3 SCC 11 : 2003 SCC (Cri) 703])" (emphasis supplied)

39. Therefore, from the prenciple laid down by the Apex Court with regard to an offence under Section 420 IPC it appears that for offence under Section 420 IPC it is necessary that a person had fraudulent or dishonest intention at the time of making the promise and from his mere failure to keep up promise subsequently such a culpable intention right at the beginning that is when he made the promise cannot be presumed.

40. Applying the above principle in case at hand, I find no offence under Section 420 IPC is made out against the applicants as from the allegation it appears that applicants failed to keep their promise to make the payment of alleged Golden Chhatra and there is no evidence on record which can suggest that applicants were having dishonest and fradulent intention at the time of making the promise and from the allegation it appears that they merely breached the promise which does not attract Section 420 IPC.

41. Section 409 IPC deals with criminal breach of trust by public servant or by banker, merchant or agent and reads as follows:-

409. Criminal breach of trust by public servant, or by banker, merchant or agent.*--Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business*

as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with [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.

42. Therefore from the perusal of Section 409 IPC it appears that who ever being public servant or in way of his business as banker, merchant, factor, broker, attorney or agent commits offence of criminal breach of trust then he will be liable under Section 409 IPC.

43. In case at hand, applicants are neither public servants nor they are bankers nor they in way of their business as a merchant or broker or attorney or agent committed the alleged offence, therefore, offence under Section 409 IPC against the applicant is also not made out.

44. However, charge-sheet against the applicants has not been filed under Section 406 IPC but question also arises whether offence of criminal breach of trust stipulated under Section 405 IPC against the applicants is made out.

45. In Section 406 IPC punishment has been provided for offence of criminal breach of trust and offence of criminal breach of trust has been defined under Section 405 IPC which read as followes :-

***405. Criminal breach of trust**.--Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".*

Explanation 2[1].--A person, being an employer 3[of an establishment whether exempted under section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not] who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.]

[Explanation 2.--A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid."

46. The offence of criminal breach of trust contains two ingredients (a) entrusting

any person with property, or with any dominion over the property, and (b) the person entrusted dishonestly misappropriated or converts to his own use that property to the detriment of the person to entrusted it.

47. In **Anwar Chand Sab Nanadikar Vs. State of Karntaka (2003) 10 SCC 521,** the Apex Court observed as:-

"7. The basic requirement to bring home the accusations under Section 405 are the requirements to prove conjointly (1) entrustment, and (2) whether the accused was actuated by the dishonest intention or not misappropriated it or converted it to his own use to the detriment of the persons who entrusted it. As the question of intention is not a matter of direct proof, certain broad tests are envisaged which would generally afford useful guidance in deciding whether in a particular case the accused had mens rea for the crime."

48. In **Vijay Kumar Ghai Vs. State of West Bengal (2022) 7 SCC 124** held as followes:-

"28. "Entrustment" of property under Section 405 of the Penal Code, 1860 is pivotal to constitute an offence under this. The words used are, "in any manner entrusted with property". So, it extends to entrustments of all kinds whether to clerks, servants, business partners or other persons, provided they are holding a position of "trust". A person who dishonestly misappropriates property entrusted to them contrary to the terms of an obligation imposed is liable for a criminal breach of trust and is punished under Section 406 of the Penal Code."

49. Therefore, from the above principles laid down by the Apex Court, merely breach of contract does not attracts offence of criminal breach of trust and for offence under Section 405 IPC entrustment is necessary.

50. In case at hand, there is no legal evidence of the entrustment of Golden Chhatra to the applicants on record except the verbal allegation made by the informant. Further, there is also no legal evidence on reord, which can show that applicants placed an order to the informant for Golden Chhatra except the verbal allegation made by the imformant. It further appears that evidence adduced by prosecution is not sufficient to prove the charges against the applicants.

51. The three judges Bench in the case of R.P. Kapoor (supra) held that if there is no legal evidence available on record or evidence adduced fails to prove the charges, then proceedings can be quashed.

52. Thus, in view of the principle laid down in the case of R.P. Kapoor (supra) offence under Section 405 IPC is also not made out against the applicants.

53. Further, from the perusal of the material placed on record, it appears that applicants were in the business of interior decoration and informant engaged them for renovation of his house and applicants provided him an estimate of Rs. 9.5 crore for renovation and some dispute of amount arose between the parties and in this regard a legal notice was sent by the firm of the applicants to the informant in the month of May, 2019 and informant in the month of June, 2019 replied the same but in the reply it is no where stated about the dispute with

regard to Golden Chhatra and thereafter on 31.8.2019 FIR of the present case was lodged. This fact suggest that a dispute with regard to payment of renovation of the house of informant was pending between applicants and the informant and this fact also has been admitted by the informant and his brother in their statements recorded during further investigation, therefore, it appears that informant instituted the present proceeding with mala fide intention and ulterior motive for wrecking vengeance due to private and personal grudge. The Apex Court in case of Bhajan Lal (supra) held that if any proceeding has been initiated with mala fide intention due to personal grudge then it should be quashed.

54. Further, the dispute in hand appears to be primarily civil dispute and law is settled that a criminal prosecution should not be allowed to continue if it attracts civil liability. In case of **Indian Oil Corporation Vs. NEPC India Ltd. (2006) 6 SCC 736,** the Apex Court observed as:

13..... any effort to settle civil dispute and claim which do not involve any criminal offence by applying pressure through criminal prosecution should be deprecated and discouraged.

55. Therefore, from this point of view too, the proceeding pending against the applicants is liable to be scuttled at its inception.

56. Further, there is one more important aspect in the present case, the FIR of the present case was lodged on 31.8.2019 and from the statements of the informant and his brother recorded under Section 161 Cr.P.C. it reflects that informant after two months from the date of lodgement of the FIR of the present case transferred Rs. 10 lacs in the account of the firm of the applicants with regard to the dispute arose between them in respect of the payment of the renovation of his house and this fact again shows that the FIR of the present case appears to be lodged with mala fied intention as if after two months from the lodgement of the FIR informant transferred such a huge amount towards the applicants then it indicates that no dispute with regard to non-payment of the Golden Chhatra existed till then and this fact again strengthen the version of the defence that due to the dispute with regard to the payment of renovation of the house of the informant the FIR of the present case was lodged.

57. Further, as per allegation, on 06.04.2018 alleged Golden Chhatra was handed over by the informant to the applicants but FIR of the present case was lodged on 31.08.2019 i.e. after about more than a year. Therefore, it appears that when in May, 2019 a legal notice was given by applicants to the informant for non-payment of their dues with regard to the payment of renovation of the house of informant then FIR was lodged in August, 2019.

58. Further, it is hard to believe that an article of more than 1.25 Crores was made by informant on mere verbal order without any advance and it was even handed over to the applicants without any payment.

59. Therefore, from the discussion made above, in my considered view, proceedings pending against the applicants in the aforesaid case are liable to be quashed.

60. Accordingly, proeedings of the aforesaid case pending against the applicants are hereby **quashed.**

61. Accordingly, both the applications are **allowed.**

(2023) 3 ILRA 1083
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.02.2023

BEFORE

THE HON'BLE SHIV SHANKER PRASAD, J.

Application U/S 482 No. 4302 of 2023

Anup Kumar Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Bhiguram Ji, Sri Ashotosh Kumar Nishad, Sri Prabhat Kumar, Sri Sandip Kumar

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 482-Application filed for quashing the order rejecting anticipatory bail of the Applicant –on untenable grounds-as Applicant has not breached any condition of the anticipatory bail-proceedings u/s 82 Cr.P.C. initiated after issuance of summons/bailable-warrant/non-bailable warrant-two more application u/s 482 already filed-concealed.

Dismissed with cost. (E-9)

List of Cases cited:

1. Vinod Kumar, IAS Vs U.O.I. & ors. in Writ Petition (s) (Criminal) No(s). 255 of 2021 decided on 29th June, 2021

2. Dolat Ram & ors. Vs The St. of Har. reported in (1994) Spp. 6 S.C.R

3. St. of M. P. Vs Pradeep Sharma reported in (2014) 2 SCC 171

4. Shanker Prasad Vs St. of Bihar AIR OnLine 2021 SC 915

5. Anil Khadiwala Vs St. Govt. of NCT of Delhi reported in 2019 (17) SC 1002

6. Superintendent And Remembrancer Vs Mohan Singh & ors., AIR 1975 SC 1002

7. M/s. Tilokchand Motichand & ors. Vs H.B. Munshi & Anr.,AIR 1970 SC 898;

8. St. of Har. Vs Karnal Distillery,AIR 1977 SC 781;

9. Sabia Khan & ors. Vs St. of U.P. & ors. (1999) 1 SCC 271

10. Agriculture & Process Food Products Vs Oswal Agro Furane & ors.,AIR 1996 SC 1947

11. King Vs General Commissioner (1917) 1 KB 486

12. Abdul Rahman Vs Prasony Bai & anr., AIR 2003 SC 718;

13. S.J.S. Business Enterprises (P) Ltd. Vs St. of Bihar & ors., (2004) 7 SCC 166

14. K.D. Sharma Vs SAIL, (2008) 12 SCC 481

15. G. Jayashree Vs Bhagwandas S. Patel (2009) 3 SCC 141

16. Dhananjay Sharma Vs St. of Har. & ors., reported in AIR 1995 SC 1795

17. Dhananjay Sharma Vs St. of Har. & ors., AIR 1995 SC 1795

18. Sabia Khan & Ors. Vs St. of U.P. & ors., (1999) 1 SCC 271

19. Lavesh Vs St. of (NCT of Delhi (2012) 8 SCC 730

(Delivered by Hon'ble Shiv Shanker Prasad, J.)

1. This application under Section 482 Cr.P.C. has been preferred by the applicant for the following relief:

"PRAYER

It is, therefore, most respectfully prayed that this Hon'ble Court may kindly be pleased to allow this application and quash the impugned order dated 05/01/2023 passed by District and Session Judge Mirzapur and cancelled the Anticipatory bail Application No. 529/2022 Surendra Kumar V/S Anup Kumar Singh in case crime no. 30/2021 U/S 419, 420, 467, 471 I.P.C., P.S.- Kotwali Katra, District Mirzapur, against the applicant and It is also restore the Anticipatory bail, which has already been granted vide dated 15/09/2022 in case crime no. 30/2021 U/S 419, 420, 467, 471 I.P.C., P.S.- Kotwali Katra, District- Mirzapur till the disposal of the Trial.

It is also prayed that this Hon'ble Court may kindly pleased to stay the further proceedings in case crime no. 30/2021 U/S 419, 420, 467, 471 I.P.C., P.S.- Kotwali Katra, District- Mirzapur, otherwise applicant/petitioner suffer irreparable loss and injury, and/or pass such other and further order which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case."

2. This case is classic example of how a person, who is an accused wastes the precious time of the High Court by filing petition/application one after another; concealing the material fact as well as avoiding the process of Court like non-bailable warrant, proceedings initiated under Section 82 Cr.P.C.

3. I have heard the learned counsel for the applicant and Mr. Jitendra Kumar Jaiswal, learned A.G.A. for the State.

CASE OF THE APPLICANT

4. Earlier the applicant has lodged a First Information Report dated 6th March, 2020 against the opposite party no 2 which came to be registered as Case Crime No. 53 of 2020 under Sections 419, 420, 468 & 471 I.P.C. Police Station- Kotwali Katra, District- Mirzapur, a copy of which has been enclosed as Annexure No.1 to the affidavit accompanying the present application.

5. As a counter blast to the aforesaid FIR, opposite party no. 2 lodge the First Information Report on 21st February, 2021 against the applicant which was registered as case crime no. 30 of 2021 under Sections 419, 420, 468 and 471 I.P.C., Police Station-Kotwali Katra, District- Mirzapur, a copy of which has been enclosed as Annexure No.2 to this affidavit.

6. After lodgement of the aforesaid FIR against the applicant, he moved an Anticipatory Bail Application No.1225 of 2021 which was rejected by the Sessions Judge Mirzapur vide dated 19.10.2021 by observing that no apprehension has been established in the bail application. Not being satisfied with the aforesaid order, the applicant moved an Anticipatory bail application No.4527/2022 before this Court. The said bail application has been dismissed as not pressed by this Court vide order dated 28th July, 2022. For ready reference, order dated 28th July, 2022 reads as follows:

"Heard Sri Pavan Kishore, learned counsel for the applicant, learned AGA and Sri Shailesh Pandey, learned counsel for the complainant.

At the very outset learned counsel for the applicant has submitted that he does not want to press this application as the

applicant is willing to appear before the learned court below where the proceedings are pending consideration.

Accordingly, the present application is dismissed being not pressed.

Consigned to records."

7. After taking some time, the applicant filed second anticipatory bail application before court below on 2nd September, 2022, which was numbered as Anticipatory bail application No. 1558/2022. This second bail application was allowed by the court below vide order dated 15th September, 2022. After obtaining the said order, the applicant was following each and every condition as mentioned in the order of court below granting anticipatory bail to the applicant.

8. It is surprising that the informant/opposite party no.2 filed a bail cancellation application before court below on 8th November, 2022, which was not pressed by informant, whereafter again on 9th November, 2022, he filed second bail cancellation application Under Section 439 (2) Cr.P.C., which was registered as Bail Cancellation Application no.529 of 2022. The court below without going through the fact of the case and without following due procedure known to law has rejected the anticipatory bail application of the applicant vide order dated 5th January, 2023.

9. Learned counsel for the applicant submits that as per settled law, if an accused breaches any condition mentioned in the order granting anticipatory bail to him earlier, the court of law granting the same can reject the bail application under Section 439 Cr.P.C., while in the present case the applicant has not breached any of the conditions mentioned in the order dated 15th September, 2022 granted anticipatory bail to the applicant. In support of his case, learned counsel for the applicant has placed reliance upon the judgments of the Hon'ble Supreme Court in the cases of Daulat Ram and Others v. State of Haryana (1995) 1 SCC 349, State (Delhi Admn) v. Sanjay Gandhi (1978) 2 SCC 411, Kashmira Singh v. Duman Singh (1996) 4 SCC 693, CBI v. Subramani Gopalkrishnan (2011) 5 SCC 296, X v. State of Telangana. (2020) 16 SCC 511), wherein the Hon'ble Supreme Court has opined that very cogent and overwhelming circumstances are necessary for an order directing cancellation of bail. It has further been opined that bail granted cannot be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it in conducive to allow fair trial. Learned counsel for the applicant, therefore, submits that the court below without following provisions of law has cancelled the anticipatory bail of the applicant, which is liable to be quashed.

10. On the cumulative strength of the aforesaid, learned counsel for the applicant submits that this Court may allow this application and quash the impugned order dated 5th January, 2023 passed by District and Session Judge Mirzapur cancelling the anticipatory bail application of the applicant and restore the order dated 15th September, 2022 granting anticipatory bail to the applicant.

CONCEALMENT OF MATERIAL FACT

11. Mr. Jitendra Kumar Jaiswal, learned A.G.A. has raised preliminary objection to the maintainability of the

present application by submitting that this is the third applications filed by the applicant under Section 482 Cr.P.C. Earlier he has filed two applications under Section 482 Cr.P.C. being Application U/S Nos. 16846 of 2021 (Anoop Singh Vs. State) and 23322 of 2021 (Anoop Singh Vs. State of U.p. & Another) but he has concealed the said fact in the present application. In support of his plea, he has drawn attention of the Court to paragraph no.2 of the affidavit accompanying the present

"2. That this is a first Criminal Misc. Application (482) before this Hon'ble court and no any Cri. Writ Petition, Cri. Misc. application (482) is pending before this Hon'ble court or any other court or Lucknow Bench."

12. Learned A.G.A., therefore, submits that since the applicant has not approached this Court with clean hands by filing this third application under Section 482 Cr.P.C., it is liable to be dismissed with exemplary cost for concealment of material fact.

13. To the aforesaid submissions of the learned A.G.A., though the learned counsel for the applicant has placed the copies of the orders passed in the earlier two applications of the applicant before this Court, but on a pointed query made by this Court as to why he has concealed the material fact, he could not answer the same.

MAINTAINABILITY

14. Mr. Jitendra Kumar Jaiswal, learned A.G.A. has also raised preliminary objection to the maintainability of the present application by submitting that this is the third application filed by the applicant under Section 482 Cr.P.C. He, therefore, submits that successive applications under Section 482 Cr.P.C. cannot be entertained and this third application is liable to be rejected as not maintainable.

15. In reply, learned counsel for the applicant submits that it is no doubt true that this is the third application filed by the applicant under Section 482 Cr.P.C. but the same is not maintainable in view of the judgment and order of the Hon'ble Supreme Court in the case of Vinod Kumar, IAS vs. Union of India & Others in Writ Petition (s) (Criminal) No(s). 255 of 2021 decided on 29th June, 2021. The relevant portion of the said judgment has been referred by the learned counsel for the applicant, which is being quoted herein-below:

"The law on point as held by this Court in "Superintendent and Remembrancer of Legal Affairs, West Bengal Vs. Mohan Singh & Ors." reported in SCC (1975) 3 706 is clear that dismissal of an earlier 482 petition does not bar filing of subsequent petition under Section 482, in case the facts so justify."

WHETHER THE APPLICANT IS ENTITLED TO GRANT ANTICIPATORY BAIL WHEN AS A MATTER OF FACT NON-BAILABLE WARRANT AS WELL AS PROCEEDINGS UNDER SECTION 82 CR.P.C. HAVE BEEN INITIATED AGAINST HIM?

16. It is submitted by learned counsel for the applicant that the applicant is innocent and has no concern with the present matter. It is further submitted that although proceedings under Section 82 Cr.P.C. have been initiated against the applicant yet no prima facie case is made

out against the applicant. It is further submitted that mere issuance of non-baible warrant and initiation of proceedings under Section 82 Cr.P.C. can be the basis for cancelling the anticipatory bail earlier granted to the applicant. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of bail already granted. In support of his case learned counsel for the applicant has placed reliance upon the judgment of the Hon'ble Supreme Court in the case of Dolat Ram & Ors. Vs. The State of Haryana reported in (1994) Spp. 6 S.C.R. It is also submitted that he has fully cooperated with the investigating agency. He was not arrested during investigation. It is further submitted that if applicant is allowed on anticipatory bail, he will cooperate with the Trial Court. There is no chance of him fleeing away from the Courts of law. There is no criminal history of the applicant. Applicant undertakes that he will not misuse the liberty and will cooperate. Applicant has apprehension of his arrest by the police any time.

17. On the other hand, learned A.G.A. opposed the prayer and argued that proceedings under Section 82 Cr.P.C. have been initiated against the applicant, as he did not appear before the court concerned despite service of summon/notice/bailable and non-bailable warrants is continuing till today. Applicant is not cooperating to the Court concerned. In support of his submissions, learned A.G.A relied upon the law laid down by the Hon'ble Supreme Court in the case of State of Madhya Pradesh Vs. Pradeep Sharma reported in (2014) 2 SCC 171 and in the case of Prem Shanker Prasad Vs. State of Bihar reported in AIR OnLine 2021 SC 915 and further argued that applicant is not entitled to be released on anticipatory bail. A prima facie case is made out against him.

MERIT OF THE IMPUGNED ORDER CANCELLING THE ANTICIPATORY BAIL APPLICATION OF THE APPLICANT

18. Learned counsel for the applicant submits that since the order impugned passed by the court below in a mechanical manner, the same cannot be legally sustained and is hereby set aside and the order granting anticipatory bail to the applicant be restored.

19. Per contra, learned A.G.A. submits that while passing the impugned order the court below has recorded categorical finding fact, as such there is no illegality or infirmity in the same.

20. I have considered the submissions made by the learned counsel for the parties and have gone through the records of the present application including the order impugned.

21. Now this Court comes on the issue of maintainability of this application under Section 482 Cr.P.C. It is no doubt true that this is the third application under Section 482 Cr.P.C. which has been filed by the applicant but from the perusal of the orders of this Court dated 21st September, 2021 and dated 5th May, 2022 passed in the first and second applications under Section 482 Cr.P.C. filed by the applicant bearing Nos. Application U/S 482 Cr.P.C. No. 16846 of 2021 (Anoop Singh Vs. State of U.P. & Another) and Application U/S 482 Cr.P.C. No. 23322 of 2022 (Anoop SinghVs. State of U.P. & Another), copies of which have been placed before this Court today.

22. Perusal of the order dated 21st September, 2021 passed in first application being Application U/S 482 Cr.P.C. No. 16846 of 2021 (Anoop Singh Vs. State of U.P. & Another) indicates that applicant has challenged the order dated 26th October, 2021 issuing non-bailable warrant against the applicant passed in the aforesaid criminal case, whereas from the order dated 5th May, 2022 it is clear that the applicant has challenged the charge sheet dated 15.03.2021 as well as entire proceedings of Case No. 1085 of 2021, arising out of Case Crime No. 30 of 2021, under Section 419, 420, 468, 471 of I.P.C., P.S. Kotwali Katra, District Mirzapur, pending in the court of Chief Judicial Magistrate, Mirzapur with a further prayer to stay further proceeding in the aforesaid case. In the present applicant i.e. third application, the applicant has challenged the order dated 5th January, 2023 cancelling the anticipatory bail earlier granted to the applicant.

23. It would be worthwhile to reproduce orders 21st September, 2021 and dated 5th May, 2022 passed by this Court in the first and second application under Section 482 Cr.P.C. by the applicant, which read as follows:

Order dated 21st September, 2021:

"Heard learned counsel for the applicant, learned A.G.A. for the State and perused the record.

This application under Section 482 Cr.P.C. has been filed with a prayer to quash the charge sheet dated 15.03.2021 as well as entire proceedings of Case No. 1085 of 2021, arising out of Case Crime No. 30 of 2021, under Section 419, 420, 468, 471 of I.P.C., P.S. Kotwali Katra, District Mirzapur, pending in the court of Chief Judicial Magistrate, Mirzapur with a further prayer to stay further proceeding in the aforesaid case.

Learned counsel for the applicant submitted that the First Information Report was lodged at the instance of the private respondent against the applicant, is wholly illegal, concocted and has been lodged with false and baseless averments. The opposite party no. 2 is a person of criminal intent and a large number of criminal cases are pending against him and he had initiated the present malicious proceedings against the applicant as a counter blast to the criminal case lodged by applicant on 06.03.2020 against him which has been registered at Crime No. 53 of 2020, under Section 419, 420, 468, 471 I.P.C., P.S. Kotwali Katra, District Mirzapur. No offence is made out against the applicant and private respondent no. 2 has no locus-standi to lodge the F.I.R. The applicant has no criminal antecedents, hence, this application.

Per contra, learned A.G.A. vehemently opposed the above submission.

Perusal of the record reveals that an F.I.R. was lodged by Surendra Kumar Singh on 21.02.2021 at P.S. Kotwali Katra, District Mirzapur, under Section 419, 420, 468, 471 of I.P.C. After investigation, the police submitted the charge sheet against the applicant and found offences under Section 419, 420, 468, 471 of I.P.C. proved. In the charge sheet, it has been stated that the applicant Anoop Kumar has mentioned different dates of birth at different places. At one place his date of year mentioned as 1969 and at other place, it is mentioned as 1975. He obtained two Arm Licenses. It has also been stated that

there is contradiction with regard to date of birth in the affidavit and application.

In M/s Neeharika Infrastructure Pvt. Ltd. v. State of Maharastra and others, 2020 SCC Online SC 850, the Hon'ble Apex Court has held as under:

"iv) The power of quashing should be exercised sparingly with circumspection, as it has been observed, in the rarest of rare case (not to be confused with the formation in the context of death penalty).

v) While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint;

vi) Criminal proceedings ought not to be scuttled at the initial stage;

vii) Quashing of a complaint/FIR should be an exception rather than an ordinary rule."

Following other authorities can be cited on the aforesaid point: R. P. Kapur vs. The State Of Punjab, AIR 1960 SC 866, State of Haryana and others Vs. Ch. Bhajan Lal and others, AIR 1992 SC 604, State of Bihar and Anr. Vs. P.P. Sharma, AIR 1991 SC 1260 lastly Zandu Pharmaceutical Works Ltd. and Ors. Vs. Md. Sharaful Haque and Ors., AIR 2005 SC 9.

All the submissions made at the Bar relate to the disputed questions of fact, which cannot be adjudicated upon by this Court in proceedings u/s 482 Cr.P.C. This Court cannot embark upon the factual enquiry as to the truthfulness of statement of witnesses in proceedings under Section 482 Cr.P.C.

Learned counsel for the applicant relied upon the judgment passed by Hon'ble Apex Court in Mohammed Ibrahim and others v. State of Bihar and another, (2009) 3 SCC (Cri) 929.

have gone through the aforesaid citation, the facts of this case are totally different from the aforesaid case, hence, the relief cannot be granted in view of the aforesaid authority.

In view of the above, I am of the considered opinion that the Application U/s 482 Cr.P.C. is not maintainable in the present case.

Accordingly, the prayer for quashing the proceedings is refused.

This application U/s 482 Cr.P.C. is hereby, dismissed."

Order dated 5th May, 2022:

"आवेदक की ओर से धारा 482 दं0प्र0सं0 के अन्तर्गत यह आवेदन पत्र, वाद सं0 1085 सन 2021, अन्तर्गत धारा 419, 420, 468, 471 भा0दं0वि0, थाना कोतवाली कटरा, जिला मिर्जापुर में सी0जे0एम0, मिर्जापुर द्वारा पारित एन0बी0डलू0 आदेश दि0 26–10–2021 के विरूद्ध दायर किया गया है।

आवेदक के विद्वान अधिवक्ता, विपक्षी सं0 2 के विद्वान अधिवक्ता एवं विद्वान अपर शासकीय अधिवक्ता को सुना तथा पत्रावली का परिशीलन किया।

आवेदक के विद्वान अधिवक्ता का कथन है कि नियत तिथि पर आवेदक के अवर न्यायालय में अनुपस्थित हो जाने के कारण उनके विरूद्ध एन0बी0डब्लू0 जारी कर दिया गया है, अब आवेदक

अवर न्यायालय में नियत तिथि पर उपस्थित होने को तत्पर है।

आवेदक के विद्वान अधिवक्ता के अनुरोध के दृष्टिगत यह आवेदन पत्र स्वीकार किया जाता है तथा वाद सं0 1085 सन 2021, अन्तर्गत धारा 419, 420, 468, 471 भा0दं0वि0, थाना कोतवाली कटरा, जिला मिर्जापुर में सी0जे0एम0, मिर्जापुर द्वारा पारित एन0बी0डलू0 आदेश दि0 26–10–2021 का क्रियान्वयन आज से 15 दिन के लिए स्थगित किया जाता है। यदि आवेदक द्वारा 15 दिन के अन्दर आदेश का अनुपालन सुनिश्चित नहीं किया जाता तो संबंधित अवर न्यायालय नियमानुसार आवश्यक कार्यवाही करने को स्वतंत्र है।"""""""""

24. From perusal of the aforesaid three prayer made in all the three applications filed by the applicant under Section 482 Cr.P.C., it is apparently clear that all the three applications have been filed for different cause of action and on different facts.

25. The Hon'ble Supreme Court of India in the case of **Anil Khadiwala Vs. State Govt. of NCT of Delhi reported in 2019 (17) SC 1002,** relying upon the earlier judgment of the Hon'ble Surpeme Court in the case of **Superintendent And Remembrancer Vs. Mohan Singh And Ors.** reported in AIR 1975 SC 1002 has opined that successive application under Section 482 Cr.P.C. under the changed circumstances is maintainable. Relevant portion whereof is being quoted herein-below:

"8. In Mohan Singh (supra), it was held that a successive application under Section 482 . under changed circumstances was maintainable and the dismissal of the

"2. ..... Here, the situation is wholly different. The earlier application which was rejected by the High Court was an application under Section 561-A of the CrPC to quash the proceeding and the High Court rejected it on the ground that the evidence was yet to be led and it was not desirable to interfere with the proceeding at that stage. But, thereafter, the criminal case dragged on for a period of about one and half years without any progress at all and it was in these circumstances that respondents Nos. 1 and 2 were constrained to make a fresh application to the High Court under Section 561-A to quash the proceeding.

It is difficult to see how in these circumstances it could ever be contended that what the High Court was being asked to do by making the subsequent application was to review or revise the Order made by it on the earlier application. Section 561-A preserves the inherent power of the High Court to make such Orders as it deems fit to prevent abuse of the process of the Court or to secure the ends of justice and the High Court must, therefore, exercise its inherent powers having regard to the situation prevailing at the particular point of time when its inherent jurisdiction is sought to be invoked. The High Court was in the circumstances entitled to entertain the subsequent application of Respondents Nos. 1 and 2 and consider whether on the facts and circumstances then obtaining the continuance of the proceeding against the respondents constituted an abuse of the process of the Court or its quashing was necessary to secure the ends of justice. The facts and circumstances obtaining at the time of the subsequent application of respondents Nos. 1 and 2 were clearly different from what they were at the time of the earlier application of the first respondent because, despite the rejection of the earlier application of the first

respondent, the prosecution had failed to make any progress in the criminal case even though it was filed as far back as 1965 and the criminal case rested where it was for a period of over one and a half years....."

26. From the aforesaid legal positions, this Court finds substance in the submission made by the learned counsel for the applicant and holds that this third application filed by the applicant for the different relief as also under the changed circumstances is maintainable

27. So far as the preliminary objection raised by the learned A.G.A. for the State qua the concealment of fact in filing the present application, is concerned, this Court may record that in paragraph-2 of the affidavit accompanying the present application, it has specifically been stated that "***this is a first criminal misc. application (482) before this Court Hon'ble Court,"*** when as matter of fact the applicant has earlier filed two applications giving rise to the same criminal case. For the reasons best known to the applicant, he has concealed the aforesaid fact while filing the present third application under Section 482 Cr.P.C., meaning thereby that the applicant has not approached this Court with clean hands, which amounts to interference with the administration of justice.

28. In **M/s. Tilokchand Motichand & Ors. Vs. H.B. Munshi & Anr.**, reported in AIR 1970 SC 898; **State of Haryana Vs. Karnal Distillery** reported in AIR 1977 SC 781; and **Sabia Khan & Ors. Vs. State of U.P. & Ors.** reported in (1999) 1 SCC 271, the Hon'ble Supreme Court held that filing totally misconceived petition amounts to abuse of the process of the Court and such a litigant is not required to be dealt with lightly, as petition containing misleading and inaccurate statement, if filed, to achieve an ulterior purpose amounts to abuse of the process of the Court.

29. In **Agriculture & Process Food Products Vs. Oswal Agro Furane & Ors.,** reported in *AIR 1996 SC 1947*, the Apex Court had taken a serious objection in a case filed by suppressing the material facts and held that if a petitioner is guilty of suppression of very important fact his case cannot be considered on merits. Thus, a litigant is bound to make "full and true disclosure of facts". While deciding the said case, the Hon'ble Supreme Court had placed reliance upon the judgment in King Vs. General Commissioner, reported in (1917) 1 KB 486, wherein it has been observed as under:-

"Where an ex parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent abuse of its process, to refuse to proceed any further with the examination of its merits....."

30. In **Abdul Rahman Vs. Prasony Bai & Anr., AIR 2003 SC 718; and S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar & Ors.**, reported in (2004) 7 SCC 166, the Hon'ble Supreme Court held that whenever the Court comes to the conclusion that the process of the Court is being abused, the Court would be justified in refusing to proceed further and refuse relief to the party. This rule has been

evolved out of need of the Courts to deter a litigant from abusing the process of the Court by deceiving it. However, the suppressed fact must be material one in the sense that had it not been suppressed, it would have led any fact on the merit of the case.

31. In **K.D. Sharma vs. SAIL,** reported in *(2008) 12 SCC 481*, the Apex Court has held that the jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary and it is imperative that the petitioner approaching the writ court must come with clean hands and put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim. The same law was reiterated in **G. Jayashree vs. Bhagwandas S. Patel** reported in *(2009) 3 SCC 141*.

32. The Hon'ble Supreme Court of India has repeatedly held that filing of false affidavit and concealment of material facts amounts to interference in the administration of justice and as such is criminal contempt of Court. In **Dhananjay Sharma versus State of Haryana & ors., reported in AIR 1995 SC 1795**, wherein in paragraphs 39 and 40, th

"39. The question, therefore, which now requires our consideration is as to what action, is required to be taken against the respondents.

40. Section 2 (c) of the Contempt of Courts Act, 1971 (for short the Act) defines criminal contempt as the publication (whether by words, spoken or written or by signs or visible representation or otherwise) of any matter or the doing of any other act whatsoever to (1) scandalise or tend to candalise or lower or tend to lower the authority of any Court: (2) prejudice or interfere or tend to interfere.....Thus, any conduct, which has the tendency to interfere with the administration of justice or the due course of judicial proceedings amounts to the commission of criminal contempt. ....."

33. The Apex Court in the case of **Sunkara Lakshminarasamma & Anr. Versus Sagi Subba Raju & Ors.** reported in **(2009) 7 SCC 460** held that filing of false affidavit knowingly is a contempt and exemplary cost be imposed.

34. In **Afzal & Anr. Versus State of Haryana & Ors.**, reported in JT 1996 (1) SC 328, the Apex Court in paragraph-32 has held as follows:

"32. The question then is: whether he committed contempt in the proceedings of this Court? Section 2 (b) defines "Contempt of Court" to mean any civil or criminal contempt. "Criminal contempt" defined in Section 2(c) means interference with the administration of justice in any other manner. A false or a misleading or a wrong statement deliberately and wilfully made by a party to the proceedings to obtain a favourable order would prejudice or interfere with the due course of judicial proceedings. ....."

35. In **Dhananjay Sharma vs. State of Haryana & others** reported AIR 1995

SC 1795, in paragraph-40 the Supreme Court has held as follows:

"40. .....Thus, any conduct which has the tendency to interfere with the administration of justice or the due course of judicial proceedings amounts to the commission of criminal contempt. ....."

36. In **Sabia Khan & Ors. Vs. State of U.P. & Ors., (1999) 1 SCC 271**, the Hon'ble Apex Court held that filing totally misconceived petition amounts to abuse of the process of the Court and such litigant is not required to be dealt with lightly.

37. In view of the aforesaid, this Court finds substance in the submission made by the learned A.G.A. for the State that this Court must view with disfavour any attempt by a litigant to abuse the process. The sanctity of the judicial process will be seriously eroded if such attempts are not dealt with firmly. A litigant like the applicant who takes liberties with the truth or with the procedures of the Court should be left in no doubt about the consequences to follow. Others should not venture along the same path in the hope or on a misplaced expectation of judicial leniency. Exemplary costs are inevitable, and even necessary, in order to ensure that in litigation, as in the law which is practised in our country, there is no premium on the truth. In the case in hand, the applicant has concealed the material fact by filing this third application and he has not approached this Court with clean hands, his application is not only liable to be rejected on this ground alone but also the applicant should be punished with exemplary cost.

38. Qua the submission raised by the learned A.G.A. that since the proceedings under Section 82 Cr.P.C. have been initiated against the applicant, his anticipatory bail application cannot be entertained, this Court also find substance in it.

39. In **Lavesh Vs. State of (NCT of Delhi** reported in (2012) 8 SCC 730, the Hon'ble Supreme Court has considered the scope of granting relief under under Section 428 Cr.P.C. vis-à-vis to a person who was declared as an absconder or proclaimed offender in terms of 82 Cr.P.C. In para 12, the Hon'ble Supreme Court has held as under:

"12. From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and was declared as "absconder". Normally, when the accused is "absconding" and declared as a "proclaimed offender", there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail." It is clear from the above decision that if anyone is declared as an absconder/proclaimed offender in terms of Section 82 of the Code, he is not entitled to the relief of anticipatory bail. In the case in hand, a perusal of the materials i.e., confessional statements of Sanjay Namdev, Pawan Kumar @ Ravi and Vijay @ Monu Brahambhatt reveals that the respondents administered poisonous substance to the deceased. Further, the statements of witnesses that were recorded and the report of the Department of Forensic Medicine & Toxicology Government Medical College & Hospital, Nagpur dated 21.03.2012 have

confirmed the existence of poison in milk rabri. Further, it is brought to our notice that warrants were issued on 21.11.2012 for the arrest of the respondents herein. Since they were not available/traceable, a proclamation under Section 82 of the Code was issued on 29.11.2012. The documents (Annexure-P13) produced by the State clearly show that the CJM, Chhindwara, M.P. issued a proclamation requiring the appearance of both the respondents/accused under Section 82 of the Code to answer the complaint on 29.12.2012. All these materials were neither adverted to nor considered by the High Court while granting anticipatory bail and the High Court, without indicating any reason except stating "facts and circumstances of the case", granted an order of anticipatory bail to both the accused. **It is relevant to point out that both the accused are facing prosecution for offences punishable under Section 302 and 120-B read with Section 34 of IPC. In such serious offences, particularly, the respondents/accused being proclaimed offenders, we are unable to sustain the impugned orders of granting anticipatory bail. The High Court failed to appreciate that it is a settled position of law that where the accused has been declared as an absconder and has not cooperated with the investigation, he should not be granted anticipatory bail."**

40. In **State of Madhya Pradesh Vs. Pradeep Sharma** as well as in the case of **Prem Shanker Prasad Vs. State of Bihar (Supra)**, the Hon'ble Supreme Court relying upon the judmgent of the Hon'ble Supreme Court in the case of **Lavesh (Supra)** has held that if anyone is declared as an absconder/proclaimed offender in terms of Section 82 of the Code, he is not entitled to the relief of anticipatory bail.

41 From the aforesaid legal positions as settled by the Hon'ble Surpeme Court, this Court holds that the applicant against whom proceedings 82 Cr.P.C. have been initiated by the court below after issuance of summons/bailable warrant/non-bailable warrant is not entitled to grant anticipatory bail. Anticipatory bail filed by such person is not maintainable as also the same cannot be entertained by this Court in exercise of powers under Section 482 Cr.P.C.

42. Lastly, this Court comes on the merit of the order impugned. While passing the order impugned the court below has recorded that though the fact has been mentioned in the second anticipatory bail application before the court below that the first anticipatory bail application was rejected due to non-mentioning of "apprehension to arrest", but after that before the Hon'ble High Court, the applicant has withdrawn his anticipatory bail application stating that applicant/accused is willing to appear before the lower court and this fact has not been mentioned in the anticipatory second bail application filed before the court below. The fact that he has obtained 15 days protection from the Hon'ble High Court, when non-bailable warrant has been issued against him, on the assurance that he shall appear before the court below on the due date, has also not been mentioned in the second anticipatory bail application. The court below has further recorded that above facts should have been mentioned in the second anticipatory bail application which has been allowed by the said court. The fact that the first anticipatory bail application was rejected only because apprehension to arrest was not recorded. The court below has also recorded that the first anticipatory bail application was rejected by that court on 19th October,

2021 on the basis of non-apprehension to arrest. Thereafter, the second anticipatory bail application was not presented before that Court but before the Hon'ble High Court, by means of Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 4527/2022. From perusal of the numbers of the first anticipatory bail application filed before the court below as well as from the anticipatory bail application filed before this Court, it is clear that the anticipatory bail application was presented before the Hon'ble High Court in the year 2022 while the first anticipatory bail application was rejected by that court below on 19.10.2021. Therefore, the court below has opined that either the applicant/accused should have appeared before the learned lower court according to his own statement recorded in the order of this Court or the second anticipatory bail application should have been presented before the Hon'ble High Court, again, where his first anticipatory bail application was rejected due to his non-coercion. Since the statements regarding the submission of the anticipatory bail application before the Hon'ble High Court were material statements in the facts and circumstances of this case, which were not mentioned in the bail application, the court below has come to the conclusion that not mentioning in the second anticipatory bail application was omission/concealment of material facts. On the basis of the aforesaid findings, the court below has passed the order impugned cancelling the anticipatory bail granted earlier to the applicant.

43. On examination of the order impugned, this Court finds that the court below has recorded categorical finding of fact and has rightly cancelled the anticipatory bail granted earlier to the applicant, which warrants no interference by this Court in exercise of powers under Section 482 Cr.P.C., as there is no illegality or infirmity in it.

44. In view of the deliberations and discussions made above, this Court holds that a accused-applicant who conceals facts and files a false affidavit in the High Court and who has made a mockery of the orders of the lower court by avoiding process of summon, bailable warrant, non-bailable warrant and the proceedings under Section 82 Cr.P.C. is not entitled to get leniency, mercy and justice in any way and that too from the Court which exercises inherent power under Section 482 Cr.P.C.

45. Accordingly, the present application is dismissed with cost of Rs. 10,000/- to be paid by the applicant to the High Court Legal Services Authority, Allahabad within a month from today. In case of default, the same shall be recovered by the District Magistrate, Mirzapur from his arrears of land revenue.

46. A copy of this order shall be given to the learned A.G.A. who shall communicate the District Magistrate, Mirzapur for necessary compliance of this order.

(2023) 3 ILRA 1095
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.02.2023

BEFORE

THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Misc. Anticipatory Bail Application No. 1379 of 2023
(U/s 438 Cr.P.C.)

Javed Ahmad ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Anurag Kumar

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 Section 438 - Direction for grant bail to person apprehending arrest - filing of first information report (F.I.R.) is not a condition precedent to exercise the power under Section 438(1) Cr.P.C. - Section 438 Cr.P.C. does not compel or oblige Courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. - "Reason to believe" which is something more serious than a mere apprehension of arrest - Mere "fear" is not "belief" - law does not permit to knock at the door of the Court for grant of anticipatory bail on merely vague assertions in the absence of any relevant material and certainly the Court will not grant anticipatory bail in such a case. (Para - 6,7,9,10,14)

Opposite Party No.2 gave some money to applicant - financial help for construction of his house - friends - asked for repayment of total outstanding money - abused and threatened him to repay the same - otherwise implicated in false and fabricated case - No F.I.R. lodged in the matter. **(Para - 3,4)**

HELD:- Applicant's apprehension of arrest not well founded, as he failed to explain how he has reasonable belief of being arrested. No justification to allow the present anticipatory bail application moved by the applicant for want of essential ingredients which are necessary for grant of anticipatory bail under Section 438 Cr.P.C. to any person.(Para -13,15)

Anticipatory bail application rejected. (E-7)

List of Cases cited:

1. Gurbaksh Singh Sibbia Vs St. of Punj., (1980) 2 SCC 565

2. Sushila Aggarwal & ors. Vs St. (NCT of Delhi) & anr., (2020) 5 SCC Page 1 (106)

3. Adri Dharan Das Vs St. of W.B., (2005) 4 SCC 303

4. Rajasekhara Reddy Vs The St. of A.P., (1998) (2) A.P.L.J. 462 (A.P. High Court)

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

1. Present Anticipatory Bail Application has been filed with the prayer to grant anticipatory bail to the applicant - Javed Ahmad in Case Crime No. Nil, under Sections Nil, Police Station - Mariyahun, District Jaunpur.

2. Heard learned counsel for the applicant, learned A.G.A. for the State and perused the material available on record.

3. It is submitted by the learned counsel for the applicant that the opposite party no.2 had given Rs.17,50,000/- to the applicant as financial help for construction of his house, as they were friends and subsequently Rs.1 lakh on respective dates were paid by the applicant to him. However, on 5.1.2023, opposite party no.2 asked for repayment of the total outstanding money and abused and threatened him to repay the same till 20.1.2023 otherwise he could be implicated in false and fabricated case. The applicant informed the incident to the S.P., Jaunpur on 7.1.2023 through registered post and till date he has already paid an amount of Rs.3,20,000/- to opposite party no.2 in his bank account on respective dates, but the applicant has apprehension of his arrest by the police any time after lodging of the F.I.R. against him. There is every likelihood that the applicant may be implicated after foisting of false case

against him. It is further submitted that the applicant has no criminal antecedents. If the applicant is enlarged on anticipatory bail, he will not misuse the liberty of the same.

4. Learned A.G.A. opposed the prayer.

5. It is admitted that no F.I.R. has been lodged so far in the matter.

6. It is true that filing of first information report (F.I.R.) is not a condition precedent to exercise the power under Section 438(1) Cr.P.C., as held in **Gurbaksh Singh Sibbia Vs. State of Punjab, (1980) 2 SCC 565,** but at the same time it is also to be kept in mind, as held in the aforesaid case by the Hon'ble Apex Court, that "when a person apprehends arrest and approaches a court for anticipatory bail, his apprehension (of arrest), has to be based on concrete facts (and not vague or general allegations) relatable to a specific offence or particular offences. Applications for anticipatory bail should contain clear and essential facts relating to the offence, and why the applicant reasonably apprehends his or her arrest, as well as his version of the facts. These are important for the court which is considering the application, the extent and reasonableness of the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not a necessary condition that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest."

7. In the landmark case of **Sushila Aggarwal and others vs. State (NCT of Delhi) and another, (2020) 5 SCC Page 1 (106),** it has been emphasized that Section 438 Cr.P.C. does not compel or oblige Courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc.

8. Prior to the touching of the merit of present application, a perusal of the relevant provisions of Section 438 Cr.P.C. is desirable.

"438. Direction for grant bail to person apprehending arrest. ? (1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter-alia, the following factors, namely?

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested;

either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application."

9. The condition to be focused upon is "Reason to believe" which is something more serious than a mere apprehension of arrest.

10. The Hon'ble Apex Court in **Adri Dharan Das Vs. State of West Bengal, (2005) 4 SCC 303** has emphasized over this requirement and held as under.

"Section 438 is a procedural provision which is concerned with the personal liberty of an individual who is entitled to plead innocence, since he is not on the date of application for exercise of power under Section 438 CrPC convicted for the offence in respect of which he seeks bail. The applicant must show that he has "reason to believe" that he may be arrested in a non-bailable offence. Use of the expression "reason to believe" shows that the belief that the applicant may be arrested must be founded on reasonable grounds. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. Mere "fear" is not "belief" for which reason it is not enough for the applicant to show that has some sort of vague apprehension that some one is going to make an accusation against him in pursuance of which he may be arrested. Grounds on which the belief on the applicant is based that he may be arrested in non-bailable offence must be capable of being examined. If an application is made to the High Court or the Court of Session, it is for the court concerned to decide whether a case has been made out of for granting of the relief sought. (Para 16)"

11. The aforesaid theory makes the legal position explicit that Section 438 (1) of Cr.P.C. applies not only at post FIR stage, but it does not require that the offence must have been registered. It is contemplated by this section that if a person is going to apply for anticipatory bail, he must have a reasonable belief that he may be arrested on accusation of having committed a non-bailable offence.

12. This Court takes note of what their Lordship held in **K. Rajasekhara Reddy Vs. The State of Andhra Pradesh, (1998) (2) A.P.L.J. 462 (Andhra Pradesh High Court)** ?

"The filing of a first information report is not a condition precedent to the exercise of the power under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an FIR is not yet filed."

13. If the aforesaid legal theory is translated into the facts and circumstances of the case in hand, the Court finds that the apprehension of arrest on the part of the applicant is not well founded. The applicant has failed to explain as to how he has reasonable belief of being arrested by the police. He has mentioned in his application that from the total money due to Sahab Lal, an amount of Rs.3,20,000/- has been paid by him in his bank account on respective dates. A statement of account has also been filed by the applicant. It also appears from

the perusal of the record that no complaint has been moved by the said Sahab Lal to any authority against the present applicant in connection with the recovery of his money given to the applicant. Further, no application before any court has been moved so far by opposite party no.2 to prosecute the applicant. Thus, no reasonable belief of being arrested exists there.

14. It is also noteworthy that no material in support of his plea of entertaining reasonable belief that he is likely to be arrested in connection with the commission of a non-bailable offence, has been produced on record by the applicant. The law does not permit to knock at the door of the Court for grant of anticipatory bail on merely vague assertions in the absence of any relevant material and certainly the Court will not grant anticipatory bail in such a case.

15. In view of that, I find no justification to allow the present anticipatory bail application moved by the applicant for want of essential ingredients which are necessary for grant of anticipatory bail under Section 438 Cr.P.C. to any person.

16. The anticipatory bail application is accordingly rejected.

(2023) 3 ILRA 1099
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.02.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

Criminal Misc. Ist Bail Application No. 18536 of 2020

Maneesh Pathak ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Amaresh Yadava, Sri Jitendra Singh, Sri Omar Zamin (A.C.)

Counsel for the Opposite Party:
G.A.

(A) Criminal Law - The Legal Services Authorities Act, 1987 - Chapter IV - Entitlement to legal services - Section 12 - criteria for giving legal services , Section 12(e) - "undeserved want" - right to bail is derived from statute but cannot be isolated from constitutional oversight - Legal aid is an indispensable instrument to secure the preambled objective of justice to all citizens - distinction between a lis - where civil rights are adjudicated & a criminal case in which the prisoner's personal liberty is engaged - Absence of the counsel at a bail hearing deprives the prisoner-applicant of all ability to influence the outcome of a proceeding where his personal liberty is at stake - While deciding bails the courts have to be cognizant of the entitlement of prisoners to legal aid, and also alert to their right of hearing - In the event of non appearance of a prisoner's counsel the court may appoint an amicus curiae to represent the prisoner and proceed with the hearing of the bail.(Para - 5,8,9,14,15 ,20)

FIR lodged to rationalise a fake encounter - staged by police authorities - No one from the police has suffered life threatening injury - recovered items cannot be linked to the crime - Applicant always cooperated with investigations and is innocent - trial moving at a snail's pace - applicant cannot be faulted for delay - applicant not a flight risk - always cooperated with investigation - explained his criminal history - convenient scapegoat for the police authorities – Bail application – dismissed for non prosecution – on account of absence of counsel. **(Para - 28)**

HELD:-Dismissal of a bail application for non prosecution on account of absence of counsel is impermissible, as it is contrary to the rights of prisoners to legal aid under the Legal Services Authorities Act, 1987 and violative of fundamental rights of the prisoners guaranteed under Article 21 of the Constitution of India. Applicant entitled to bail.**(Para – 19,29)**

Bail application allowed. (E-7)

List of Cases cited:

1. Ajeet Chaudhary Vs St. of U.P. , 2021 (1) ADJ 559

2. Junaid Vs St. of U.P. & anr., 2021 (6) ADJ 511

3. Anil Gaur @ Sonu @ Sonu Tomar Vs St. of U.P. , 2022 SCC OnLine AII 623

4. Saran J. in Gobardhan Singh & anr. Vs St. of U.P. , 2013 SCC Online AII 13141

5. Syed Mahmood, J. in Queen Empress Vs Pohpi & ors. , 1891 SCC Online AII 1

6. Khaili & ors. Vs St. of U.P. , 1981 Supp SCC 75

7. Kabira Vs St. of U.P. , 1981 Supp SCC 76

(Delivered by Hon'ble Ajay Bhanot, J.)

1. Matter is taken up in the revised call. None appears on behalf of the applicant to press the bail application. Name of counsel for the applicant is shown in the cause list.

2. The ordersheet discloses that the counsel for the applicant has not appeared before this Court on successive dates of hearing in the past. Earlier the Court had called for the status report from the trial court as well as a report from the District Legal Services Authority.

3. Question arises whether the bail application should be dismissed for non prosecution or an amicus curiae should be appointed to represent the applicant and the matter be heard on merits.

4. Shri Omar Zamin, learned counsel is appointed as amicus curiae to represent the applicant and assist the Court.

"Prison and the authorities conspire to rob each man of his dignity"1.

5. The right to bail is derived from statute but cannot be isolated from constitutional oversight.

6. Good authority has long entrenched the right of an accused to seek bail in the charter of fundamental rights assured by the Constitution of India. A more detailed discussion on constitutional law anchors of right of bail which flows from Article 21 of the Constitution of India can be seen in **Ajeet Chaudhary Vs. State of UP2 , Junaid Vs. State of UP. and another3 and Anil Gaur @ Sonu @ Sonu Tomar Vs. State of UP4.**

7. Constitutional moorings of the right of bail also bring the right of fair hearing within its ambit.

8. Legal aid is an indispensable instrument to secure the preambled objective of justice to all citizens. The national capacity to deliver equal justice is girded by the institutional ability to provide legal aid. Legal aid was exalted as a fundamental right by constitutional courts even before it was vested as a statutory right by the legislature under the Legal Services Authorities Act. [On the issue of legal aid and the scheme of the Legal

Services Authorities Act, 1987 see **Anil Gaur (supra)].**

9. Entitlement to legal services is provided for in Chapter IV of the Legal Services Authorities Act, 1987. Section 12 of the Legal Services Authorities Act, 1987 contains the criteria for giving legal services. Section 12(e) of the Act is germane to the controversy and is extracted below:-

"Section 12 (e) - a person under circumstances of underserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster."

10. The scope of the provision to provide free legal aid arose for consideration before this Court in **Anil Gaur (supra)** and was analysed thus:

"40. The eligibility criteria for giving legal services under Section 12(e) is broad based.

The breadth of the provision manifests the legislative intent to reach out to the last person at the bottom of the social heap. The section contemplates to give legal aid to persons who suffer from deprivation and exclusion caused by circumstances of want which are not of their making.

Under the provision persons facing circumstances of "undeserved want" become entitled for legal services. The phrase "undeserved want" is generic in nature. The word "such as" precedes the examples of "undeserved want" described in the section. The instances of "undeserved want" depicted in the provision are illustrative and not exhaustive, and are in the nature of externalities i.e. adverse circumstances over which a person has no control and which prevent recourse to justice.

The phrase "undeserved want" in the statute is not a fixed concept but an evolutionary exercise. The State Legal Services Authority is mandated to enquire whether the circumstances of a person being considered for legal aid fall within the sweep of "undeserved want".

11. The Bar is the frontline sentinel of citizens' rights and liberties. The courts are the last bastion of constitutional law and justice. Judges have an oath enshrined in the Constitution. Lawyers have a pledge seared in their consciences to serve justice in the nobel traditions of the legal profession. Translated in terms of lawyers' duties to their clients it essentially means this. Lawyers have to diligently prepare the briefs and vigilantly prosecute causes of litigants before the courts.

12. In bail applications special care has to be taken by the counsels since the applicant is in jail and the counsel is his sole representative before the court. Time honoured conventions of the nobel profession cast an unconditional duty on the prisoner's counsel to be present at the bail hearing. It is immaterial whether the counsel's professional remuneration has been paid or not. Failure of a counsel at to turn up at a bail hearing may even constitute a misconduct.

13. Dismissal of a lis for non prosecution is a practice evolved by courts over long years for efficient administration of justice. The practice is sound and has proved its efficacy in removing unnecessary cases which clog the legal

system. No litigant has a right to unlimited draught on the time of the court. Non appearance of counsel can also lead to an inference that the lis does not survive, or that a litigant does not wish to prosecute the same. Dismissal of such cases for default enables the judicial system to place surviving cases in which the litigants are interested on the courts' dockets.

14. With the dismissal of a case for non prosecution, the lis arrives at a terminus and is only subject to a restoration application being filed by the litigant and allowed by the court. It is important though to bear in mind the distinction between a lis where civil rights are adjudicated, and a criminal case in which the prisoner's personal liberty is engaged. A litigant can elect to waive civil claims by not prosecuting them. However, citizens cannot relinquish their personal liberty even by choice. Personal liberty is irrevocably vested in every citizen by the Constitution and the courts are its permanent guardians.

15. Absence of the counsel at a bail hearing deprives the prisoner-applicant of all ability to influence the outcome of a proceeding where his personal liberty is at stake. When a bail application is dismissed for non prosecution the prisoner's period of detention is enlarged by default even as he goes unrepresented and unheard before the court.

16. Prisoners who apply for bail often live in poor and destitute circumstances. On many occasions they do not have effective pairokars who can oversee the presence of counsels at bail hearings.

17. The abject conditions of a large number of forgotten prisoners were summed up by **Saran J. in Gobardhan Singh and another v. State of U.P.5:**

"This is not just an isolated case. We realize that there are a large number of such cases of forgotten "nameless" prisoners who have become "ticket numbers" and are languishing in jails for prolonged periods of time, as under trials (UTs) or as convicted prisoners whose appeals are pending almost interminably before Higher Courts, who may or may not have filed bail applications and who have become very old, or are ailing from an incurable disease, or who may even have become immobile or have lost any capacity to commit a further crime. The complainant (if any) has lost any interest in prosecuting them or in keeping them in jail any longer. Usually the families of such accused have been destroyed, or reduced to such abject poverty, as happens when a family member contracts a serious disease, that they cannot pay counsel's fee or incur the recurring unavoidable expenditures in Court offices to get applications and affidavits prepared or the matters listed, and the bail or case disposed of. The relatively luckier children and dependents may perhaps have been provided with a roof over their heads by a grudging relative, or they may have been placed in a State or private run children's home. Others may simply have been abandoned to the street. The daughters in the family may not have been married off, and may be getting exploited by some social deviant in the family or outside. Keeping such prisoners in jail any further, in the already overcrowded jails, serves no useful purpose and is an unnecessary burden on the State and the tax payer."

18. Prisoners have no remedy against absentee counsels and little control over the adverse situation that follows. In these circumstances the prisoner becomes a victim of "undeserved want" within the meaning of Section 12 (e) of the Legal Services Authorities Act, 1987 who is entitled to legal aid. Refusal of legal aid to this class of prisoners would entail denial of justice.

19. In this wake, dismissal of a bail application for non prosecution on account of absence of counsel is impermissible, as it is contrary to the rights of prisoners to legal aid under the Legal Services Authorities Act, 1987 and violative of fundamental rights of the prisoners guaranteed under Article 21 of the Constitution of India.

20. Personal liberty is the fount of all rights. Protection of liberty is the crown of the court process. While deciding bails the courts have to be cognizant of the entitlement of prisoners to legal aid, and also alert to their right of hearing. In the event of non appearance of a prisoner's counsel the court may appoint an amicus curiae to represent the prisoner and proceed with the hearing of the bail.

21. The narrative can profit by reference to authorities in point.

22. The cases discussed below arise out of criminal appeals. However, the principles of law enumerated therein can be safely applied by analogy to various criminal proceedings where the applicant is in jail and personal liberty of the prisoner hangs in balance.

23. The Allahabad High Court pioneered the cause of unrepresented prisoners in criminal proceedings in the fabled dissent of **Syed Mahmood, J. in Queen Empress v. Pohpi and others6.**

24. Duty of a counsel to appear in cases despite non receipt of fees and expenses and the obligation of the courts to protect the liberty of the prisoner by appointing an amicus curiae was emphasized in **Khaili and others Vs. State of Uttar Pradesh7** by holding:

"1. ...But even though the fees and expenses were not paid, the Advocate should not, in our opinion, have refused to argue the case. It must be remembered by every advocate that he owes a duty to the court, particularly in a criminal case involving the liberty of the citizen, and even if he has not been paid his fees or expenses, he must argue the case and assist the court in reaching the correct decision. We can appreciate a situation where an advocate may be unable to argue the case in the absence of instructions from the client, but non-receipt of fees and expenses can never be a ground for refusing to argue the case. The learned Advocate in the present case, however, refused to argue the case and consequently the learned Judge went through the record of the case and decided the appeal. Now one thing is clear that howsoever diligent the learned Judge might have been and however careful and anxious to protect the interests of the appellants, his effort could not take the place of an argument by an advocate appearing on behalf of the appellants. We think that in a case such as this, what the learned Judge should have done was to appoint an advocate amicus curiae and then proceed to dispose of the appeal on merits."

25. Similarly the Supreme Court set its face against the practice of dismissing

criminal appeals for default of appearance and advocated appointment of amicus curiae in **Kabira Vs. State of U.P.8:**

"2....We are, therefore, of the view that there has not been a proper disposal of the appeal preferred by the appellant. The appeal could not be dismissed by the learned Judge for default of appearance. If the appellant was not present, the learned Judge should have appointed some advocate as amicus curiae and then proceeded to dispose of the appeal on merits."

26. By means of the the bail application the applicant has prayed to be enlarged on bail in Case Crime No. 50 of 2019 at Police Station- Bardah, District-Azamgarh under Section 307 IPC. The applicant is in jail since 20.03.2019.

27. T he bail application of the applicant was rejected by the learned trial court on 04.06.2019.

28. The following arguments made by Shri Omar Zamin, learned counsel on behalf of the applicant, which could not be satisfactorily refuted by Shri Rishi Chaddha, learned AGA from the record, entitle the applicant for grant of bail:

(i). The FIR has been lodged to rationalise a fake encounter staged by the police authorities to burnish their credentials and defend illegal use of force upon applicant.

(ii). No one from the police has suffered life threatening injury.

(iii). The recovered items were planted on the applicant to implicate him in this case.

(iv). There is no independent witness to the recovery.

(v). Recovered articles cannot be linked with the crime.

(vi). Prosecution evidence does not connect the applicant with the offence.

(vii). It is contended that the applicant has always cooperated with the investigations and had joined the trial. The applicant is innocent.

(viii). The trial is moving at a snail's pace and and shows no sign of early conclusion. The applicant cannot be faulted for the delay in the trial.

(ix). Inordinate delay in concluding trial has lead to virtually an indefinite imprisonment of the applicant.

(x). Status report sent by the learned trial court records that the prosecution proposes to examine 12 witnesses as per the chargesheet. However, not a single witness has been examined till date. The trial court is making delay. The applicant is not responsible for the delay in the trial. Inordinate delay in concluding trial had lead to virtually an indefinite imprisonment of the applicant. The right of the applicant to speedy trial has been violated.

(xi). The applicant is not a flight risk. The applicant being a law abiding citizen has always cooperated with the investigation and undertakes to cooperate with the court proceedings. There is no possibility of his influencing witnesses, tampering with the evidence or reoffending.

(xii). The applicant has explained his criminal history. It is also contended that evidently the applicant is a soft target and a convenient scapegoat for the police authorities. The applicant has been nominated in the said cases only to show the proficiency of the police investigators. The said criminal cases do not have any bearing on the instant bail application.

29. In this wake without expressing any opinion on the merits of the case I am of the view that the applicant is entitled to be enlarged on bail.

30. Let the applicant- Maneesh Pathak be released on bail in the aforesaid case crime number, on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court below. The following conditions be imposed in the interest of justice:-

(i) The applicant will not tamper with the evidence or influence any witness during the trial.

(ii) The applicant will appear before the trial court on the date fixed, unless personal presence is exempted.

31. The learned trial court shall ensure that the sureties demanded of the applicant are commensurate with his socioeconomic status. Heavy sureties which the applicant can not fulfill in view of his socioeconomic constraints will render the right of bail nugatory.

32. High Court Legal Services Authority shall kindly consider the payment of the approved remuneration to Shri Omar Zamin, Advocate (Adv. Roll A/O0083/2012) who represented the applicant as amicus curiae before this Court.

33. A copy of this order be communicated to the learned trial court as well as District Legal Services Authority, Azamgarh, by Registrar Compliance by FAX.

(2023) 3 ILRA 1105
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.02.2023

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Bail Application No. 21738 of 2022

Kamlesh Pathak ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Umesh Singh, Mrs. Swati Agarwal Srivastava, Sri V.P. Srivastava (Sn. Adv.)

Counsel for the Opposite Party:
G.A., Sri Anurag Shukla, Sri Dharmendra Shukla, Sri Anil Tiwari (Sn. Adv.)

(A) Criminal Law - Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Section 3(1), 16, 17 and 22 - Predicate offence - 'actus reus' - `mens rea' - actus reus and the mens rea are to be inferred from the contents of the allegations made by the prosecution whereby the applicant is stated to be having criminal antecedents - With respect to a gangster, an inference can be drawn from the circumstances. (Para - 22)

Applicant and his gang members - caused day light murder of advocate and his sister – two other persons were injured - took illegal possession of land - public terrified of them -

interest of the public to book them under the U.P. Gangsters Act - gang chart was prepared - sent for sanction to the District Magistrate . **(Para - 6)**

HELD:-In predicate offence, the applicant is stated to have exhorted the other co-accused persons to fire at the deceased and injured persons. Element of actus reus and mens rea present. No reasonable grounds for believing that the applicant is not guilty of such offence and that he is not likely to commit any offence while on bail as is the requirement of Section 19(4) of the Act. Applicant having large criminal antecedents and being the head of the gang is not entitled for bail. **(Para - 22, 25, 26)**

Bail Application rejected. (E-7)

List of Cases cited:

1. Akbar Vs St. of U.P. , 2012 (76) ACC 187

2. Ashok Dixit Vs St. of U.P. & anr. , MANU/UP/0543/1987

3. Dharmendra Kirthal Vs St. of U.P. & anr. (2013) 8 SCC 368

4. Zeba Rizwan Vs St. of U.P. , Crl. Misc. Bail Appl. No.4691 of 2022

(Delivered by Hon'ble Krishan Pahal, J.)

1. List has been revised.

2. Supplementary affidavit filed today is taken on record.

3. Heard Shri V.P. Srivastava, learned Senior Counsel assisted by Ms. Swati Agrawal Srivastava, counsel for the applicant and Shri Anil Tiwari, learned Senior Counsel assisted by Shri Anurag Shukla, counsel for the informant as well as Shri Vibhav Anand Singh, learned A.G.A. for the State.

4. By means of the present bail application, the applicant seeks bail in Case Crime No.462 of 2020, under Section 3(1) of Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station- Auraiya, District- Auraiya, during the pendency of trial.

PROSECUTION STORY:

5. As per prosecution story, Ram Sahai, Station House Officer, P.S. Auraiya, District Auraiya alongwith other colleagues, in an official duty, was checking the vehicles and was involved in maintaining peace and order in the area and also to maintain lock-down in lieu of Covid-19 conditions by the order dated 11.07.2020 of District Magistrate. He received an information that Kamlesh Pathak is running an organized and active gang in the area as its' leader. The members of the said gang are (i) Ramu Pathak (ii), Santosh Pathak, (iii) Kuldeep Awasthi @ Pappu, (iv) Vikalp @ Chenu Awasthi, (v) Rajesh Shukla (Bhagwatacharya), (vi) Avneesh Pratap Singh, (vii) Sonu @ Lovkush, (viii) Asheesh Dubey, (ix) Shivam Awasthi and (x) Ravindra @ Lalla Chaubey. The said leader of the gang Kamlesh Pathak alongwith all the aforesaid members is involved in garnering illegal ransom, illegally possessing government land, fighting, firing and other illegal criminal activities etc. The applicant and his gang is not afraid of firing in broad day light. The members of the gang had got the various cases instituted against them settled in the light of the said terror. Nobody dares to depose on oath in court against them whereby all those cases get culminated into acquittals.

6. On 15.03.2020, Kamlesh Pathak and his gang members had caused day light murder of advocate Manju Chaubey and his sister Sudha Chaubey to take illegal

possession of land. The public at large are so much terrified of the members of the gang that nobody dares to come forward and speak or make a statement against them. Leaving them free, shall be against the interest of the public at large. The members of the gang keep on committing the offences referred in Sections 16, 17 and 22 of the U.P. Gangsters and Anti-Social Activities (Prevention) Act. Thus they usurped the properties of others and even get instituted false cases against them. It will be in the interest of public at large to book the members of the gang under the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986. Thus, in view to put an end to the said anti-social activities of the gang, a gang chart has been prepared by him on 26.02.2020, which was sent for the sanction before the learned District Magistrate, Auraiya. After receiving the sanction from the office of the District Magistrate, Auraiya, the aforesaid eleven members of the gang were booked under Section 3(1) of U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986.

RIVAL CONTENTIONS:

For Applicant:

7. Learned Senior Counsel for the applicant has stated that he has been booked owing to the political rivalry and has nothing to do with the said offence. Learned Senior Counsel has further stated that the applicant has been granted bail in the predicate offence in Case Crime Number 189 of 2020 under sections 147, 148, 149, 302, 307, 506 IPC and Section 7 of Criminal Law Amendment Act, Police Station Kotwali Auraiya, District Auraiya. Learned Senior Counsel has further stated that the bail of the applicant has even been rejected under Section 25/27 of Arms Act by the court concerned in Case Crime No. 190 of 2022.

8. Learned Senior Counsel has further stated that the said criminal history stands explained as the applicant is on bail in the case no.1 mentioned in the gang-chat and the bail application in the case No.2 mentioned in the gang-charge i.e. Case Crime No.190 of 2022 is being pressed alongwith this bail application only. Learned Senior Counsel has further stated that all the certified copies with respect to the criminal antecedents have been filed. In all, 37 cases have been instituted against the applicant. Learned Senior Counsel has further stated that, as mentioned in paragraph 3 of the supplementary affidavit filed today, the closure report has been filed in twelve cases from serial number 3 to 14 and the same have been accepted by the courts concerned.

9. Learned Senior Counsel has further stated that the applicant has been acquitted in sixteen cases i.e. from serial number 15 to 30. Three cases, that have been explained at serial number 31 to 33, have been withdrawn by the State. Learned Senior Counsel has further stated that the two cases, mentioned at serial number 34 and 35, are not proceeding any further as there is no detail on record about those cases and in two other cases, mentioned at serial number 36 and 37, the applicant has been enlarged on bail. Learned Senior Counsel has further stated that thus in effect only four cases could be stated to be pending against the applicant. Learned Senior Counsel has also referred to the letter sent by the Senior Consultant at Centre jail, Agra to the Senior Superintendent of jail whereby it has been mentioned that the applicant was suffering from K/C/O T2 DM (Type-2 Diabetes

mellitus) with systemic hypertension with anxiety neurosis. Learned Senior Counsel has further stated that the applicant was sent to the S.N. medical College, Agra where several tests were undertaken and then he was referred to King George's Medical College, Lucknow whereby he was examined and his E.C.G., 2D Eco and T.M.T. tests were undertaken and C.T. coronary angiography was referred to be conducted with respect to the applicant. Learned Senior Counsel has further stated that the applicant is a patient suffering from cardio vascular disease and being a senior citizen is entitled for bail.

10. Learned Senior Counsel has further stated that he has been booked out of political vendetta as he is an ex-MLA and ex-minister belonging to the Samajwadi Party and is against the current political set up.

11. Learned Senior Counsel has further stated there is no actus reus, which implies the guilty act, assigned to the applicant. Learned Senior Counsel has further stated that the rules have been framed in Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act in the year 2021 and the present FIR is of the year 2020, as such the said rules are not applicable to the applicant. Learned Senior Counsel has further stated that the applicant is not a previous convict. The ingredients of Section 19 sub-clause 4 stands fulfilled and the applicant is entitled for bail. Several other submissions have been made on behalf of the applicant to demonstrate the falsity of the allegations made against him. The circumstances which, as per counsel, led to the false implication of the applicant have also been touched upon at length. The criminal history assigned to the applicant stands explained. The applicant is languishing in jail since 16.03.2020. In case, the applicant is released on bail, he will not misuse the liberty of bail.

12. Learned Senior Counsel has placed much reliance on the judgment of this Court passed in the case of ***Akbar vs. State of U.P.1***, whereby it has been opined that at the time of trial if the delinquent has been acquitted, the same cannot be considered as a part of his criminal antecedents. To which, he has referred the Government Order of the Director General of Police, Uttar Pradesh dated 20.11.2003.

13. Learned Senior Counsel has further placed much reliance on the judgment of this Court passed in the case of ***Ashok Dixit vs. state of U.P. and Another2,*** stating that the provisions of the Act cannot be used as a weapon to wreck vengeance or harass or intimidate innocent citizens or to settle scores on political rivals. The relevant para 75 is being reproduced as under:-

"75. But nevertheless we must sound a note of caution. Provision of the Act cannot be used as a weapon to wreak vengeance or harass or intimidate innocent citizens or to settle scores on political or other fronts. The prosecution has to bear in mind that it has to bring home the guilt. Then, there is a further provision for appeal. Thus, the power of judicial review of this Court has been preserved. It is ultimately found that a person was proceeded with in sheer bad faith out of malice and by way of political vendetta the authorities do not enjoy any immunity under Section 22 of the Act. This immunity is confined only to acts done in good faith."

14. Learned Senior Counsel has also placed much reliance on the judgment of

Apex Court passed in the case of Dharmendra Kirthal vs. State of U.P. and Another3, whereby it has been opined that personal liberty has its own glory and is to be put on a pedestal in trial to try offenders, it is controlled by the concept of "rational liberty". In essence, liberty of an individual should not be allowed to be eroded but every individual has an obligation to see that he does not violate the laws of the land or affect others' lawful liberty to lose his own.

15. Learned Senior Counsel has also placed reliance on the judgment of this Court passed in **Criminal Misc. Bail Application No.4691 of 2022 (Zeba Rizwan vs. State of U.P.)** dated 23.05.2022, whereby the locus of the counsel for the victim in the predicate offence was questioned and it was opined that allowing him to argue the matter shall open a pandora's box.

For State:

16. Per contra, learned Senior Counsel for the informant in the predicate offence and learned A.G.A. have vehemently opposed the bail application on the ground that the applicant is the person who very much qualifies to the definition of gangster defined under the Act and it has been at the outset stated that the bail granted to the applicant in the predicate offence of Section 302 IPC is without jurisdiction and has been challenged in the Apex Court by filing Special Leave to Appeal (crl.) No(s). 6080 of 2022 dated 13.04.2022.

17. Learned Senior Counsel has further stated that the applicant is the name of terror in the area and his muscle power is but evident from the fact that no witnesses did ever dare to depose against him in court and almost all of them have turned hostile leading to his acquittal.

18. Learned Senior Counsel has further stated that the predicate offence is a broad day light murder of an advocate and his sister at 3:00 PM and two other persons were injured in it. The bail granted is challenged, as such the applicant is not entitled for bail. Learned Senior Counsel has further stated that the influence of the applicant is but evident from the factum that the closure report has been filed in twelve cases by the police which include attempt to murder, forgery and attempt to dacoity etc.

19. Learned Senior Counsel has further stated that the supplementary affidavit filed today on behalf of the applicant is based on false facts and a perjury has been committed in it as the cases referred as acquittal cases in it at serial nos.25, 26 and 29 have been withdrawn, as such may have been listed in the column of withdrawn State cases. Thus, in all six cases have been withdrawn by the State. The trial is going on in the predicate offence and there is every likelihood of applicant influencing the witnesses as he has the long criminal antecedents.

20. Learned Senior Counsel has further stated that even the criminal history of two cases has not been explained whereby it has been stated that the cases are not proceedings any further. This cannot be considered as a proper explanation of the said criminal history. The bail of the applicant in Case Crime No.190 of 2020, under Section 25/27 of Arms Act is still pending and is being argued today in this Court.

21. Learned Senior Counsel has further placed much reliance on the judgment of this Court passed in Criminal Misc. Bail Application No.23584 of 2014 (Rohit @ Rohit Yadav vs. State of U.P.) dated 06.08.2014, whereby the counsel for the informant in the predicate offence was permitted to oppose the bail application.

CONCLUSION:

22. The latin term *''actus reus'* implies guilty act. Thus, it is the physical component of crime. It is true that there can be no offence without a criminal act. We have to consider mens rea alongwith actus reus. Actus reus is latin for guilty act and mens rea is latin for guilty mind. Both elements are required for the criminal act to be complete. The actus reus and the mens rea are to be inferred from the contents of the allegations made by the prosecution whereby the applicant is stated to be having criminal antecedents and in the said predicate offence, the applicant is stated to have exhorted the other co-accused persons to fire at the deceased and injured persons. Thus, the element of actus reus and mens rea are present in the said case and being a leader of the gang, the same find place in the present case also.

23. With respect to a gangster, an inference can be drawn from the circumstances. The delinquent herein is a legislature aka an Ex-minister, but the same cannot absolve him of the activities committed impersonal.

24. It is true that under normal circumstances, if otherwise the case of the delinquent for bail is made out, the criminal antecedents are not to be considered, but herein the gravity of offence and the criminal antecedents that too the cases of murder, attempt to murder, attempt to dacoity and forgery etc. weigh against the applicant.

25. It is true that there is a possibility of misuse of the legislations that too depends on the person executing it. The present case does not seem to be a misuse of the act and the applicant having such a large criminal antecedents and being the head of the gang is not entitled for bail.

26. From the perusal of the record, I do not find that there are reasonable grounds for believing that the applicant is not guilty of such offence and that he is not likely to commit any offence while on bail as is the requirement of Section 19(4) of the Act.

27. Considering the submissions advanced by the counsel for the parties, nature of allegations, gravity of offence and all attending facts and circumstances of case, the Court is of the opinion that it is not a fit case for bail. Hence, the bail application of applicant is hereby **rejected.**

28. However, it is directed that the aforesaid case pending before the trial court be decided expeditiously, if there is no legal impediment.

29. It is clarified that the observations made herein are limited to the facts brought in by the parties pertaining to the disposal of bail application and the said observations shall have no bearing on the merits of the case during trial.

(2023) 3 ILRA 1111
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.02.2023

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Bail Application No. 23624of 2020

Anees ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Syed Ali Imam, Sri Laxmi Shankar, Sri Mohd. Umar Iqbal Khan

Counsel for the Opposite Party:
G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 498-A, 323 & 302 - Dowry prohibition Act,1961 - Section 3/4 - Indian Evidence Act, 1872 - Section 32 - Dying declaration - dying declaration is hearsay evidence - dying declaration entitled to great weight - accused has no power of cross-examination - declaration should be of such nature as to inspire confidence in its correctness, and that it was not a result of tutoring or prompting or product of imagination - stage of adjudicating a bail application - court not inclined to delve into the quality or quantity of evidence but to see whether the delinquent appears to have committed the crime and he is entitled for bail or not - neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Para - 17,18,19,26)

victim was a young lady - succumbed to burn injuries sustained at the time alleged in the F.I.R. - statements of hostile witnesses and Autopsy report are evidence of their condition - Contention - statement of the deceased to the ASI and the treating doctors must pass the test of dying declaration or not. (Para - 13 to16)

HELD:- Applicant's case not fit for grant of bail due to the evidence, judgments, and the fact that a young lady was set to fire in the precincts of the place they both used to live. **(Para - 27)**

Bail Application rejected. (E-7)

List of Cases cited:

1. Uttam Vs The St. of Mah. , (2022) 8 SCC 576

2. U.O.I. Vs K.A. Najeeb , AIR (2021) SC 712

3. Kaka Singh Vs St. of M.P., AIR (1982) SC 1021

4. Smt. Paniben Vs St. of Guj. , AIR (1992) SC 1817

5. Varikuppal Srinivas Vs St. of A.P. , (2009) 2 SCC (Cri) 136

6. Munnu Raja & anr. Vs The St. of M.P. , (1976) 2 SCR 764

7. K. Ramachandra Reddy & anr. Vs The Public Prosecutor , AIR (1976) SC 1994

8. Surajdeo Oza & ors. Vs St. of Bihar , AIR (1979) SC 1505

9. St. Of U.P. Vs Madan Mohan & ors., Air (1989) Sc 1519

10. Betal Singh Vs St. of M.P. , 1996 Scc (Cri) 624

11. Paras Yadav & ors. Vs St. Of Bihar , (1999) Scc (Cri) 104

12. St. Of U.P. Vs Chet Ram & ors. , (1989) Scc (Cri) 388

13. St. Of Karn. Vs Shariff , 2003 Crlj 1254 (SC)

14. Vinod Kumar Vs St. of Punj. , 2015 (2) SCC 220

15. Hussain & anr. Vs U.O.I. , (2017) 5 SCC 702

(Delivered by Hon'ble Krishan Pahal, J.)

1. List has been revised.

2. Heard Sri Mohd. Umar Iqbal Khan, learned counsel for the applicant and Sri Vibhav Anand Singh, learned A.G.A. for the State as well as perused the material available on record.

3. The present bail application has been filed by the applicant in Case Crime No.2815 of 2018, under Sections 498-A, 323, 302 I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station Loni, District Ghaziabad, with the prayer to enlarge him on bail.

PROSECUTION STORY:

4. As per prosecution story, the informant lodged an FIR at Police Station Loni, District Ghaziabad on 12.12.2018 alleging that he is a resident of town Kandhala, District Shamli, UP and he had married his sister to the applicant Anees as per Muslim customs about seven years before her death. After the marriage, the applicant Anees and co-accused persons, namely, Naseem, Nafees and Smt. Asgari are stated to have subjected the deceased to cruelty for demand of dowry and used to beat her up every now and then. It was learnt that applicant had an affair with some another girl as the sister of the informant and other family members of Anees had seen him in a compromising condition with the said girl. The said fact was brought to the knowledge of family members of the informant about two months before the date of incident. The applicant is stated to have confessed and had promised that said act shall not be repeated as such the sister of the informant had gone with the applicant. The deceased person was taken by the applicant to Loni and both were residing in Aksha Masjid, Prem Nagar, Loni. On 10.12.2018 at about 10:40 p.m., a phone call was received by the informant stating that his sister has been set to fire by sprinkling kerosene oil on her by her in-laws. The informant and his family members reached at G.T.B. Hospital, Delhi on 11.12.2018 at about 03:00 a.m. from Punjab. The deceased person had stated to all the family members that the applicant and his family members had been beating her for several days and kerosene oil was sprinkled on her by all the accused persons and she was set afire. It is also stated in the FIR that there is a video recording of the statement of his sister at Police Chowki Loni.

RIVAL CONTENTIONS:

For Applicant:

5. Learned counsel for the applicant has stated that the applicant has been falsely implicated in the present case. The trial is going on and in all four witnesses of fact have been examined. Learned counsel has stated that PW-1 Nadeem is the informant and has not supported the prosecution story and he has been declared hostile by the public prosecutor and has been cross-examined by him as such. Learned counsel has stated that it has come up in the statement of PW-1 that when he reached the hospital he found his sister unconscious and she had not made any statement before them. Learned counsel has further stated that PW-2 Ishrar has also followed the suit and has not supported the prosecution story. Learned counsel has also stated that PW-3 Haqiqat is the brother-in-law of the informant and he has also not supported the prosecution story and has even denied of any videographic recording of statement of the deceased person. PW-4 Smt. Fahmida is the mother of the deceased

person and she has also not supported the prosecution story. Learned counsel has stated that all these witnesses have resiled from their earlier statements recorded by the Investigating Officer. Learned counsel has stated that signature of the witnesses has also been taken by the person conducting inquest proceedings on their statements. The said statements are not admissible in the law as they are hit by Section 162 Cr.P.C. Learned counsel has stated that there is dying declaration of the deceased person which was recorded by ASI at G.T.B Hospital. Learned counsel has stated that the said statement indicates that the applicant had sprinkled some liquid on the deceased person and set her afire. Learned counsel has stated that the said dying declaration is not admissible under the Indian Evidence Act as it has not been recorded as per law. Learned counsel has further stated that there is overwriting in the date of recording of the said dying declaration and it cannot be said that it was recorded on 10.12.2018 itself.

6. Learned counsel has further stated that no presumption under Section 113-B of Indian Evidence Act can be drawn in the present case as the marriage of the applicant with the deceased person was solemnized in the year, 2010 as such a period of more than seven years has passed till the date of offence. Even the charge-sheet has been filed under Sections 498-A, 323, 302 I.P.C. and 3/4 of Dowry Prohibition Act. Learned counsel has stated that the trial is moving at a snail's pace and there is no likelihood of early conclusion of trial. The Assistant Sub-Inspector who has recorded the said dying declaration has not been examined by the Investigating Officer and has not even been produced in the court.

7. Learned counsel has stated that the Apex Court in the case of ***Uttam vs. The State of Maharashtra1*** has opined as follows:-

7. It was canvassed by the learned counsel for the appellant that once the High Court had rejected the written dying declarations of the deceased on the ground that there were several conspicuous loopholes in recording of the said statements, there was no good reason for the High Court to have relied on the oral statements allegedly made by the deceased to PW-2 and PW-12, which were equally unreliable and therefore, ought to have met the same fate as the written dying declarations of the deceased. To buttress his submission that where there are multiple dying declarations and each one is inconsistent with the other, then all the said dying declarations ought to be discarded without any hesitation, learned counsel has cited ***Nallapati Sivaiah v. SDO [Nallapati Sivaiah v. SDO, (2007) 15 SCC 465 : (2010) 3 SCC (Cri) 560]****. The unreliability of an oral dying declaration made to a family member in the absence of the doctor was sought to be questioned by citing* ***Arvind Singh v. State of Bihar [Arvind Singh v. State of Bihar, (2001) 6 SCC 407 : 2001 SCC (Cri) 1148], Arun Bhanudas Pawar v. State of Maharashtra [Arun Bhanudas Pawar v. State of Maharashtra, (2008) 11 SCC 232 : (2009) 1 SCC (Cri) 112] and Poonam Bai v. State of Chhattisgarh [Poonam Bai v. State of Chhattisgarh, (2019) 6 SCC 145 : (2019) 2 SCC (Cri) 754].***

8. On the other hand, Mr Sachin Patil, learned counsel appearing for the respondent State of Maharashtra has with his usual vehemence, disputed the arguments advanced by the other side and

stated that both the written dying declarations, the first one recorded by the IO at 3.20 p.m. and the second one recorded by the SEM (PW-9) at 4.30 p.m., on the very same day, were consistent and the deceased had clearly stated that it was the appellant who had set her on fire. He also alluded to the two fitness certificates issued by the attending doctor (PW-10) in respect of the deceased before her statements were recorded and contended that the said certificates showed that she was in a sound state of mind and competent to depose. Similarly, the oral dying declarations subsequently made by the deceased in the presence of her father (PW-2) and the mediator (PW-12) were also stated to be consistent with the version of the victim and worthy of credence. The narration as to the manner in which the deceased was set on fire was stated to be consistent and it was contended that the cross-examination of the said prosecution witnesses did not elicit anything favourable to the appellant on the above aspect. The learned State Counsel referred to the Chemical Analyser Report in respect of the clothes of the deceased and the appellant that were seized from the spot to urge that it lent credence to the version of the prosecution that the appellant had poured kerosene on the deceased and had set her on fire.

9. In support of his submission that where there are conflicting dying declarations, the Court can accept one and discard the other as long as it is satisfied that the basic statement of the deceased had remained consistent, the learned State Counsel cited ***State of U.P. v. Veerpal [State of U.P. v. Veerpal, (2022) 4 SCC 741 : (2022) 2 SCC (Cri) 224], Rizan v. State of Chhattisgarh [Rizan v. State of Chhattisgarh, (2003) 2 SCC 661 : 2003 SCC (Cri) 664] and Bhagwan Tukaram Dange v. State of Maharashtra [Bhagwan Tukaram Dange v. State of Maharashtra, (2014) 4 SCC 270 : (2014) 2 SCC (Cri) 302] . The decision in Trimukh Maroti Kirkan v. State of Maharashtra [Trimukh Maroti Kirkan v. State of Maharashtra, (2006) 10 SCC 681 : (2007) 1 SCC (Cri) 80]*** *was cited to state that the onus remains on the accused to explain how the death had taken place within the privacy of the home, away from public gaze.*

10. We have given our thoughtful consideration to the arguments advanced by the learned counsel for the parties and carefully perused the record. The entire issue in the present case hinges on the admissibility and evidentiary value of the dying declarations made by the deceased, two of which were in writing and recorded by PW-9 and PW-14 and the other two were oral and communicated by the deceased to PW-2 and PW-12.

11. Dying declaration is the last statement that is made by a person as to the cause of his imminent death or the circumstances that had resulted in that situation, at a stage when the declarant is conscious of the fact that there are virtually nil chances of his survival. On an assumption that at such a critical stage, a person would be expected to speak the truth, courts have attached great value to the veracity of such a statement. Section 32 of the Evidence Act, 1872 (for short "the Evidence Act") states that when a statement is made by a person as to the cause of death, or as to any of the circumstances which resulted in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing made by the deceased victim to the witness, is a relevant fact and is

admissible in evidence. It is noteworthy that the said provision is an exception to the general rule contained in Section 60 of the Evidence Act that "hearsay evidence is inadmissible" and only when such an evidence is direct and is validated through cross-examination, is it considered to be trustworthy.

12. In ***Kundula Bala Subrahmanyam v. State of A.P. [Kundula Bala Subrahmanyam v. State of A.P., (1993) 2 SCC 684 : 1993 SCC (Cri) 655],*** *this Court had highlighted the significance of a dying declaration in the following words : (SCC p. 697, para 18)*

"18. Section 32(1) of the Evidence Act is an exception to the general rule that hearsay evidence is not admissible evidence and unless evidence is tested by cross-examination, it is not creditworthy. Under Section 32, when a statement is made by a person, as to the cause of death or as to any of the circumstances which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing, made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased, called the dying declaration, falls in that category provided it has been made by the deceased while in a fit mental condition. A dying declaration made by person on the verge of his death has a special sanctity as at that solemn moment, a person is most unlikely to make any untrue statement. The shadow of impending death is by itself the guarantee of the truth of the statement made by the deceased regarding the causes or circumstances leading to his death. A dying declaration, therefore, enjoys almost a sacrosanct status, as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the courts, it becomes a very important and a reliable piece of evidence and if the court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration, by itself, can be sufficient for recording conviction even without looking for any corroboration....."

8. Learned counsel has further stated that the so called dying declaration which is annexed as Annexure No.4 to the affidavit filed with the bail application is not supported by any medical certificate of treating doctor. Learned counsel has stated that the deceased was almost burnt more than 90% as such was not in a position to talk. The said statement made by the deceased to any person is not admissible at all.

9. Learned counsel has stated that the period of incarceration of applicant is also to be considered as he is languishing in jail since 14.12.2018, i.e., more than four years. Thus learned counsel has placed much reliance on the judgment of the Apex Court in the case of ***Union of India vs. K.A. Najeeb2*** wherein the Apex Court has observed that *"We are conscious of the fact that the charges levelled against the respondent are grave and a serious threat to societal harmony. Had it been a case at the threshold, we would have outrightly turned down the respondent's prayer. However, keeping in mind the length of the period spent by him in custody and the unlikelihood of the trial being completed anytime soon, the High Court appears to have been left with no other option except to grant bail."*

10. Learned counsel has also placed reliance on the judgment of the Apex Court passed in the case of ***Kaka Singh vs. State of Madhya Pradesh3*** whereby it has been held by the Apex Court that "Where the deceased was unconscious and could never make any dying declaration, the evidence with regard to it is to be rejected".

11 . Several other submissions have been made on behalf of the applicant to demonstrate the falsity of the allegations made against him. The circumstances which, as per counsel, led to the false implication of the applicant have also been touched upon at length. It is also argued that there is no criminal history of the applicant. In case, the applicant is released on bail, he will not misuse the liberty of bail.

For State:

12. Per contra, learned A.G.A. has vehemently opposed the bail application on the ground that there is a memo attached with the case diary and has been proved by the PW-2 whereby it has been stated that there was a videographic recording of the statement of the deceased person. The said memo is proved as Ext-Ka-5. Learned A.G.A. has stated that it has nowhere been stated by the prosecution that the statement record by the ASI is dying declaration but has stated that said statement before ASI and even before treating doctors, namely, Dr. Shahbaz Mansoori and Dr. Alfaraz Mohd tantamount to dying declaration as they have been duly recorded by them during the course of their official duty. Learned A.G.A. has further stated that both the dying declarations although are in different language contain more or less the similar allegations against the applicant. The truthfulness of the said statement that tantamount to dying declaration can be taken from the fact that only the applicant has been implicated and not his other family members, although the FIR is lodged against four accused persons. Learned A.G.A. has stated that the said statements recorded by ASI at Guru Teg Bahadur Hospital had been taken in Hindi and that by doctor had been recorded in English. Learned A.G.A. has stated that there are no material inconsistencies in the said dying declarations. It is settled law of the Apex Court that conviction can be recorded solely on the basis of dying declaration. Learned A.G.A. has relied on the judgment of the Apex Court in the case of ***Smt. Paniben vs. State of Gujarat4*** wherein all the relevant case law has been taken into account and it has been opined that there is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. Learned A.G.A. has stated that merely because the dying declaration is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.

CONCLUSION:

13. The only bone of contention is as to whether the statement of deceased to the ASI and the treating doctors pass the test of dying declaration or not.

14. The victim was a young lady who has succumbed to burn injuries sustained at the time alleged in the First Information Report. This factum stands proved by the statements of the hostile witnesses and the Autopsy report.

15. The statement of the deceased is stated to have been recorded by the ASI which has been filed by the counsel for the

applicant and has been disputed on the ground that there is overwriting in the date transcribed by its author.

16. Learned AGA has placed reliance on another statement of the deceased which have been recorded by the two treating doctors and duly signed by the two family members of the deceased. Both the statements are to the point and brief.

17. The dying declaration is hearsay evidence. It is settled law that though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination.

Case Law:

18. The Apex Court in the landmark judgement of ***VARIKUPPAL SRINIVAS v. STATE OF A.P.5*** has categorically opined as follows:

"7. This is a case where the basis of conviction of the accused by the trial Court was the dying declarations. The situation in which a person is on his deathbed, being exceedingly solemn, serene and grave, is the reason in law to accept the veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. Besides should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eye-witness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence.

8. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination.

Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence."

19. The Supreme Court in ***Munnu Raja & Anr. Vs. The State of Madhya Pradesh6*** has opined "There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration."

20. In ***K. Ramachandra Reddy and Anr. v. The Public Prosecutor7*** the Apex Court has held *"The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result*

of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration."

21. The Supreme Court in ***Surajdeo Oza and Ors. v. State of Bihar8*** has categorically opined as *"Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth."*

22. Another important judgement of the Apex Court in ***State of Uttar Pradesh Vs. Madan Mohan and Ors.9*** elucidates "*Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon."*

23. In the case of ***BETAL SINGH V/S STATE OF MP10*** the Apex Court has categorically held that in a case of Bride burning, the Dying declaration recorded by a police officer, can be acted upon if the same is found to be true, coherent, consistent, and free from any effort to prompt the deceased to make such a statement. The same view was expressed in ***PARAS YADAV AND OTHERS V/S STATE OF BIHAR11 and STATE OF UTTAR PRADESH V/S CHET RAM AND OTHERS12.***

24. Another point raised by learned counsel for applicant is that the said dying declaration if considered so is not in the form of question and answers. The said contention do not find force as the Apex Court in its judgement ***STATE OF KARNATAKA V/S SHARIFF13*** has held that a Dying declaration if not recorded in question-answer form cannot be discarded on that ground alone. The statement recorded in narrative form is more natural and gives version of incident as it has been perceived by victim.

25. From the perusal of both the statements aka "dying declarations" it transpires that the contents are almost the same although the ASI has recorded it in vernacular Hindi and the treating doctors have done so in English. There is nothing on record to suggest that the police or the treating doctors had any animosity with the applicant. The investigating officer has fairly exonerated the accused who were although named in FIR, but their names were not mentioned in the statements of the deceased person that tantamount to dying declaration. A presumption of fair action at the part of police and the treating doctors must arise here.

26. At the stage of adjudicating a bail application this court is not inclined to delve into the quality or quantity of evidence but to see whether the delinquent appears to have committed the crime and he is entitled for bail or not.

27. After hearing learned counsel for the parties, going through the evidence on record and also taking into consideration the aforesaid judgments and the fact that a young lady has been set to fire by the applicant within the precincts of the place they both used to live, I do not find it a fit case for grant of bail to the applicant.

28. The bail application is found devoid of merits and is, accordingly, ***rejected.***

29. However, looking to the period of detention of the applicant, it is directed that the aforesaid case pending before the trial court be decided expeditiously, preferably

within a period of one year from the date of production of a certified copy of this order or as early as possible in view of the principle as has been laid down in the recent judgements of the Apex Court in the cases of ***Vinod Kumar Vs. State of Punjab14 and Hussain and Another vs. Union of India15***, if there is no legal impediment.

30. It is clarified that the observations made herein are limited to the facts brought in by the parties pertaining to the disposal of bail application and the said observations shall have no bearing on the merits of the case during trial.

(2023) 3 ILRA 1119
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.02.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

Criminal Misc. Bail Application No. 25088 of 2021

Vipin ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Jitendra Kumar Yadav, Sri Shams Uz Zaman (A.C.)

Counsel for the Opposite Party:
G.A.

(A) Criminal Law -The Legal Services Authorities Act, 1987 - Chapter IV - Entitlement to legal services - Section 12 - criteria for giving legal services , Section 12(e) - "undeserved want" - right to bail is derived from statute but cannot be isolated from constitutional oversight - Legal aid is an indispensable instrument to secure the preambled objective of justice to all citizens - distinction between a lis - where civil rights are adjudicated & a criminal case in which the prisoner's personal liberty is engaged - Absence of the counsel at a bail hearing deprives the prisoner-applicant of all ability to influence the outcome of a proceeding where his personal liberty is at stake - While deciding bails the courts have to be cognizant of the entitlement of prisoners to legal aid, and also alert to their right of hearing - In the event of non appearance of a prisoner's counsel the court may appoint an amicus curiae to represent the prisoner and proceed with the hearing of the bail.(Para - 5,8,9,14,15,20)

Applicant was planted with 1 Kg. and 100 gram Charas - burnish credentials of police authorities - no independent witness to recovery - quantity of prohibited substance exaggerated - no reliable forensic science laboratory report produced - search and seizure made in violation of NDPS Act - criminal history explained - falsely framed in two other cases - trial moving at a snail's pace - law abiding citizen - cooperated with police investigations - not responsible for delay - not a flight risk - always cooperated with court proceedings - Bail application – dismissed for non-prosecution – on account of absence of counsel.(Para -28)

HELD:-Dismissal of a bail application for non-prosecution on account of absence of counsel is impermissible, as it is contrary to the rights of prisoners to legal aid under the Legal Services Authorities Act, 1987 and violative of fundamental rights of the prisoners guaranteed under Article 21 of the Constitution of India. Applicant entitled to bail.**(Para - 19,29)**

Bail application allowed. (E-7)

List of Cases cited:

1. Ajeet Chaudhary Vs St. of U.P. , 2021 (1) ADJ 559

2. Junaid Vs St. of U.P. & anr. , 2021 (6) ADJ 511

3. Anil Gaur @ Sonu @ Sonu Tomar Vs St. of U.P. , 2022 SCC Online AII 623

4. Gobardhan Singh & anr. Vs St. of U.P. , 2013 SCC Online AII 13141

5. Queen Empress Vs Pohpi & ors. , 1891 SCC Online AII 1

6. Khaili & ors. Vs St. of U.P. , 1981 Supp SCC 75

7. Kabira Vs St. of U.P. , 1981 Supp SCC 76

(Delivered by Hon'ble Ajay Bhanot, J.)

1. Matter is taken up in the revised call. None appears on behalf of the applicant to press the bail application. Name of counsel for the applicant is shown in the cause list.

2. The ordersheet discloses that the counsel for the applicant has not appeared before this Court on successive dates of hearing in the past. Earlier the Court had called for the status report from the trial court as well as a report from the District Legal Services Authority.

3. Question arises whether the bail application should be dismissed for non prosecution or an amicus curiae should be appointed to represent the applicant and the matter be heard on merits.

4. Shri Shams Uz Zaman, learned counsel is appointed as amicus curiae to represent the applicant and assist the Court.

"Prison and the authorities conspire to rob each man of his dignity"1.

5. The right to bail is derived from statute but cannot be isolated from constitutional oversight.

6. Good authority has long entrenched the right of an accused to seek bail in the charter of fundamental rights assured by the Constitution of India. A more detailed discussion on constitutional law anchors of right of bail which flows from Article 21 of the Constitution of India can be seen in **Ajeet Chaudhary Vs. State of UP2 , Junaid Vs. State of UP. and another3 and Anil Gaur @ Sonu @ Sonu Tomar Vs. State of UP4.**

7. Constitutional moorings of the right of bail also bring the right of fair hearing within its ambit.

8. Legal aid is an indispensable instrument to secure the preambled objective of justice to all citizens. The national capacity to deliver equal justice is girded by the institutional ability to provide legal aid. Legal aid was exalted as a fundamental right by constitutional courts even before it was vested as a statutory right by the legislature under the Legal Services Authorities Act. [On the issue of legal aid and the scheme of the Legal Services Authorities Act, 1987 see **Anil Gaur (supra)**].

9. Entitlement to legal services is provided for in Chapter IV of the Legal Services Authorities Act, 1987. Section 12 of the Legal Services Authorities Act, 1987 contains the criteria for giving legal services. Section 12(e) of the Act is germane to the controversy and is extracted below:-

"Section 12 (e) - a person under circumstances of underserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster."

10. The scope of the provision to provide free legal aid arose for consideration before this Court i**n Anil Gaur (supra)** and was analysed thus:

"40. The eligibility criteria for giving legal services under Section 12(e) is broad based.

The breadth of the provision manifests the legislative intent to reach out to the last person at the bottom of the social heap. The section contemplates to give legal aid to persons who suffer from deprivation and exclusion caused by circumstances of want which are not of their making.

Under the provision persons facing circumstances of "undeserved want" become entitled for legal services. The phrase "undeserved want" is generic in nature. The word "such as" precedes the examples of "undeserved want" described in the section. The instances of "undeserved want" depicted in the provision are illustrative and not exhaustive, and are in the nature of externalities i.e. adverse circumstances over which a person has no control and which prevent recourse to justice.

The phrase "undeserved want" in the statute is not a fixed concept but an evolutionary exercise. The State Legal Services Authority is mandated to enquire whether the circumstances of a person being considered for legal aid fall within the sweep of "undeserved want".

11. The Bar is the frontline sentinel of citizens' rights and liberties. The courts are the last bastion of constitutional law and justice. Judges have an oath enshrined in the Constitution. Lawyers have a pledge seared in their consciences to serve justice in the nobel traditions of the legal profession. Translated in terms of lawyers' duties to their clients it essentially means this. Lawyers have to diligently prepare the briefs and vigilantly prosecute causes of litigants before the courts.

12. In bail applications special care has to be taken by the counsels since the applicant is in jail and the counsel is his sole representative before the court. Time honoured conventions of the nobel profession cast an unconditional duty on the prisoner's counsel to be present at the bail hearing. It is immaterial whether the counsel's professional remuneration has been paid or not. Failure of a counsel at to turn up at a bail hearing may even constitute a misconduct.

13. Dismissal of a lis for non prosecution is a practice evolved by courts over long years for efficient administration of justice. The practice is sound and has proved its efficacy in removing unnecessary cases which clog the legal system. No litigant has a right to unlimited draught on the time of the court. Non appearance of counsel can also lead to an inference that the lis does not survive, or that a litigant does not wish to prosecute the same. Dismissal of such cases for default enables the judicial system to place surviving cases in which the litigants are interested on the courts' dockets.

14. With the dismissal of a case for non prosecution, the lis arrives at a terminus and is only subject to a restoration application being filed by the litigant and allowed by the court. It is important though to bear in mind the distinction between a lis where civil rights are adjudicated, and a criminal case in which the prisoner's

personal liberty is engaged. A litigant can elect to waive civil claims by not prosecuting them. However, citizens cannot relinquish their personal liberty even by choice. Personal liberty is irrevocably vested in every citizen by the Constitution and the courts are its permanent guardians.

15. Absence of the counsel at a bail hearing deprives the prisoner-applicant of all ability to influence the outcome of a proceeding where his personal liberty is at stake. When a bail application is dismissed for non prosecution the prisoner's period of detention is enlarged by default even as he goes unrepresented and unheard before the court.

16. Prisoners who apply for bail often live in poor and destitute circumstances. On many occasions they do not have effective pairokars who can oversee the presence of counsels at bail hearings.

17. The abject conditions of a large number of forgotten prisoners were summed up by Saran J. in **Gobardhan Singh and another v. State of U.P.5**:

"This is not just an isolated case. We realize that there are a large number of such cases of forgotten "nameless" prisoners who have become "ticket numbers" and are languishing in jails for prolonged periods of time, as under trials (UTs) or as convicted prisoners whose appeals are pending almost interminably before Higher Courts, who may or may not have filed bail applications and who have become very old, or are ailing from an incurable disease, or who may even have become immobile or have lost any capacity to commit a further crime. The complainant (if any) has lost any interest in prosecuting them or in keeping them in jail any longer. Usually the families of such accused have been destroyed, or reduced to such abject poverty, as happens when a family member contracts a serious disease, that they cannot pay counsel's fee or incur the recurring unavoidable expenditures in Court offices to get applications and affidavits prepared or the matters listed, and the bail or case disposed of. The relatively luckier children and dependents may perhaps have been provided with a roof over their heads by a grudging relative, or they may have been placed in a State or private run children's home. Others may simply have been abandoned to the street. The daughters in the family may not have been married off, and may be getting exploited by some social deviant in the family or outside. Keeping such prisoners in jail any further, in the already overcrowded jails, serves no useful purpose and is an unnecessary burden on the State and the tax payer."

18. Prisoners have no remedy against absentee counsels and little control over the adverse situation that follows. In these circumstances the prisoner becomes a victim of "undeserved want" within the meaning of Section 12 (e) of the Legal Services Authorities Act, 1987 who is entitled to legal aid. Refusal of legal aid to this class of prisoners would entail denial of justice.

19. In this wake, dismissal of a bail application for non prosecution on account of absence of counsel is impermissible, as it is contrary to the rights of prisoners to legal aid under the Legal Services Authorities Act, 1987 and violative of fundamental rights of the prisoners guaranteed under Article 21 of the Constitution of India.

20. Personal liberty is the fount of all rights. Protection of liberty is the crown of the court process. While deciding bails the

courts have to be cognizant of the entitlement of prisoners to legal aid, and also alert to their right of hearing. In the event of non appearance of a prisoner's counsel the court may appoint an amicus curiae to represent the prisoner and proceed with the hearing of the bail.

21. The narrative can profit by reference to authorities in point.

22. The cases discussed below arise out of criminal appeals. However, the principles of law enumerated therein can be safely applied by analogy to various criminal proceedings where the applicant is in jail and personal liberty of the prisoner hangs in balance.

23. The Allahabad High Court pioneered the cause of unrepresented prisoners in criminal proceedings in the fabled dissent of Syed Mahmood, J. in **Queen Empress v. Pohpi and others6.**

24. Duty of a counsel to appear in cases despite non receipt of fees and expenses and the obligation of the courts to protect the liberty of the prisoner by appointing an amicus curiae was emphasized in **Khaili and others Vs. State of Uttar Pradesh7** by holding:

"1. ...But even though the fees and expenses were not paid, the Advocate should not, in our opinion, have refused to argue the case. It must be remembered by every advocate that he owes a duty to the court, particularly in a criminal case involving the liberty of the citizen, and even if he has not been paid his fees or expenses, he must argue the case and assist the court in reaching the correct decision. We can appreciate a situation where an advocate may be unable to argue the case in the absence of instructions from the client, but non-receipt of fees and expenses can never be a ground for refusing to argue the case. The learned Advocate in the present case, however, refused to argue the case and consequently the learned Judge went through the record of the case and decided the appeal. Now one thing is clear that howsoever diligent the learned Judge might have been and however careful and anxious to protect the interests of the appellants, his effort could not take the place of an argument by an advocate appearing on behalf of the appellants. We think that in a case such as this, what the learned Judge should have done was to appoint an advocate amicus curiae and then proceed to dispose of the appeal on merits."

25. Similarly the Supreme Court set its face against the practice of dismissing criminal appeals for default of appearance and advocated appointment of amicus curiae in **Kabira Vs. State of U.P.8:**

"2....We are, therefore, of the view that there has not been a proper disposal of the appeal preferred by the appellant. The appeal could not be dismissed by the learned Judge for default of appearance. If the appellant was not present, the learned Judge should have appointed some advocate as amicus curiae and then proceeded to dispose of the appeal on merits."

26. By means of the the bail application the applicant has prayed to be enlarged on bail in Case Crime No.61 of 2021 at Police Station-Khudaganj, District-Shahjahanpur under Sections 8/20 of NDPS Act.

27. The applicant was in jail since 11.03.2021 and was granted interim bail by this Court on 01.02.2023.

28. The following arguments made by Shri Shams Uz Zaman, learned counsel on behalf of the applicant, which could not be satisfactorily refuted by Shri Sunil Kumar Srivastava, learned AGA from the record, entitle the applicant for grant of interim bail:

(i). 1 Kg. and 100 gram Charas was planted on the applicant to implicate him in this case to burnish the credentials of the police authorities.

(ii). There is no independent witness to the recovery.

(iii). The quantity of the prohibited substance is exaggerated as inaccurate instruments have been used for weighment. The recovered substance is in fact below the commercial quantity notified under the NDPS Act.

(iv). No reliable forensic science laboratory report drawn up in accordance with latest scientific protocol by experts which affirms that the seized substance is a prohibited drug has been produced.

(v). The search and seizure has been made in violation of the mandatory provisions of the NDPS Act.

(vi). The applicant has explained his criminal history. Learned AGA contends that the applicant has a criminal history of some more cases. Rejoining this issue, learned counsel for the applicant contends that the applicant is in jail. He is financially destitute and does not have an effective pairokar or counsel. Hence details of the cases could not be obtained and stated in the bail application. However, relying on the records available with the learned AGA, learned counsel for the applicant submits that the applicant belongs to the economically poor strata of the society and is a convenient scapegoat for the police authorities. The applicant was falsely framed in the said cases. The said cases do not have any bearing on the instant case.

(vii). The learned trial court in its status report has disclosed that the prosecution proposes to examine 7 witnesses to bring home the charges. Till date not a single witness has been examined. The applicant is in jail for the past one and a half months. The trial is moving at a snail's pace and is not likely to conclude anytime in the near future.

(viii). The applicant is a law abiding citizen who cooperated with the police investigations and had joined the trial. The applicant is not responsible for the delay in the trial.

(ix). Inordinate delay in concluding trial had has led to virtually an indefinite imprisonment of the applicant without there being any credible evidence to implicate him in the offence and violates the rights of the applicant to speedy trial.

(x). The applicant is not a flight risk. The applicant being a law abiding citizen has always cooperated with the investigation and undertakes to cooperate with the court proceedings. There is no possibility of his influencing witnesses, tampering with the evidence or reoffending.

29. In the light of the preceding discussion and without making any observations on the merits of the case, the bail application is allowed.

30. Let the applicant- **Vipin** be released on bail in the aforesaid case crime number, on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court below. The following conditions be imposed in the interest of justice:-

(i) The applicant will not tamper with the evidence or influence any witness during the trial.

(ii) The applicant will appear before the trial court on the date fixed, unless personal presence is exempted.

31. The learned trial court shall ensure that the sureties demanded of the applicant are commensurate with his socioeconomic status. Heavy sureties which the applicant can not fulfill in view of his socioeconomic constraints will render the right of bail nugatory.

32. High Court Legal Services Authority shall kindly consider the payment of the approved remuneration to Shri Shams Uz Zaman, Advocate (Adv. Roll A/S0815/2012) who represented the applicant as amicus curiae before this Court.

33. A copy of this order be communicated to the learned trial court as well as District Legal Services Authority, Shahjahanpur, by Registrar Compliance by FAX.

(2023) 3 ILRA 1125
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.02.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

FAFO No. 1145 of 2016

Raghav Das Chela Mahant Mathura Das Mahant & Anr. ...Appellants

Versus

Kali Ram Das Chela Mahant Ganga Ram Das & Ors. ...Respondents

Counsel for the Appellants:
Sri Ram Kishore Pandey, Sri R.K. Pandey, Sri Sachin Ohja

Counsel for the Respondents:
Sri Gulrez Khan, Sri G. Khan, Sri Javed Husain Khan, Sri Pradeep Chandra Tripathi, Sri W.H. Khan (Sr. Advocate)

Civil Law – Civil Procedure Code, 1908- Order 32, 41, Rule 15, 27, - Hindu Public Religious Institution Prevention from Dissipation of Properties Temporary Powers Act, - Section 6, - Indian Evidence Act, 1872 - Section - 114(e), 90, - Limitation Act, 1963 - Section - 5 - Delay Condonation application - Admissibility of document - presumption of correctness - photocopy of the order was presented before the court below along with the delay Condonation application - said document was registered on the file as 35C/169C by learned appellant court - Delay Condonation application was allowed by the learned appellate court on the foot of aforesaid document - Order passed by the learned appellate court allowing delay Condonation application has attained finality – court finds that, once a challenge to a particular document has been waived, the party cannot resile from its conscious stand and assail the same at belatedly in appeal - Held, after the decision of application under Section 5 Limitation Act - Paper was considered by learned predecessor at the time of decision of application under section 5 Limitation Act for Condonation of delay in filing the present appeal - Court considered view that the Court below committed illegality by completely ignoring of provisions of law contained in order 32 Rule 15 of the Civil Procedure Code in commencing the proceedings and passing the impugned judgment and decree without appointing the Guardian of the original defendant who was a

person of sound mind at the time during the pendency of the proceedings in original suit before him - hence, no exception can be taken to the reasoning or the analysis of the appellate court in the impugned order - Appeal fails - dismissed. (Para - 5, 6, 11, 12)

Appeal Dismissed. (E-11)

List of Cases cited:

1. R.V.E. Venkatachala Gounder Vs Arulmigu Viswesarasami and V.P. Temple, (2003) 8 SCC 752,

2. The Roman Catholic Mission Vs The St. of Madras & anr., AIR 1966 SC 1457,

3. E.S.I. Corp Vs Jagdish Prasad (FAFO No. 103/2001 decided on Dated 23.03.2022),

4. Jagannath Ji/Jagdish Ji Virajman Mandir Katra & anr. Vs Mahant Vijai Ram Das Chela Ganga Ram Das & anr., Writ-C No.36104 of 2013, order dated 01.05.2013,

5. Iqbal Basith & ors. Vs N. Subbalakshmi & ors., (2021) 2 SCC 718,

6. Lakhi Baruah Vs Padma Kanta Kalita, (1996) 8 SCC 357.

(Delivered by Hon'ble Ajay Bhanot, J.)

1. Heard Shri Ram Kishore Pandey, learned counsel assisted by Shri Sachin Ojha, learned counsel for the appellants and Shri W.H.Khan, learned Senior Counsel assisted by Shri Gulrez Khan, learned counsel for the respondents.

2. The following issues which arise for consideration in this appeal is that :

i). Whether the document (order of Assistant Commissioner dated 04.10.1978) was admissible in evidence?

ii) Whether on account of the failure of the appellant to object to admissibility of the said document at the time of its presentation before the learned court below precludes the appellants from raising such objections at a later stage in the proceedings?

3. The photocopy of the order dated 04.10.1978 was presented before the court along with the delay condonation application. The document was registered as 35C/169C by the learned appellant court. The delay condonation application was allowed by the learned appellate court on the foot of the aforesaid document. The order passed by the learned appellate court dated 01.05.2013 allowing the delay condonation application has attained finality. The appellants assailed the aforesaid order dated 01.05.2013 by instituting the writ petition registered as Writ-C No.36104 of 2013 (Jagannath Ji/Jagdish Ji Virajman Mandir Katra and another v. Mahant Vijai Ram Das Chela Ganga Ram Das and another). The following order was passed by this Court in the said writ petition:

"Sri R.K.Pandey, learned counsel for the petitioners states that the writ petition has become infructuous.

The writ petition is dismissed as such."

4. It is evident that the appellants did not press the challenge to the order allowing delay condonation application. The appellant waived their rights to challenge all documents on which reliance was placed in the said order. The delay condonation application was part of the appeal court proceedings.

5. Once a challenge to a particular document has been waived, the party

cannot resile from its conscious stand and assail the said document belatedly in appeal. The rational for insisting upon the parties to object to the document at the earliest stage is not far to seek. Such a challenge is consistent with rules of fair play, and enables the opposing side to rectify curable defects or lead evidence to support the document.

6. The narrative will now be fortified by the authorities in point. Considering the belated challenge to the admissibility of a document, the Supreme Court in R.V.E. Venkatachala Gounder v. Arulmigu Viswesarasami and V.P. Temple reported at (2003) 8 SCC 752 held thus:

"20. The learned counsel for the defendant-respondent has relied on The Roman Catholic Mission Vs. The State of Madras & Anr. AIR 1966 SC 1457 in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes:- (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit."

7. This Court in E.S.I. Corp. v. Jagdish Prasad, reiterated the unexceptional requirement of law to take out an objection about the admissibility of a document in the first instant and at the first available opportunity. In Jagdish Prasad (supra) held thus:

"9. This Court is of opinion that an objection about admissibility of secondary evidence must be taken before the Court of first instance, where the secondary evidence is filed without foundation. If that objection is not taken before the Court, where the evidence is filed on behalf of a party, it cannot be later on urged in appeal.

15. In view of this position of the law, there is no doubt that unless an objection about the admissibility of evidence is taken in the Court of first instance, where the evidence is led, it cannot be raised in appeal for the first time."

8. The law set its face against a challenge to the admissibility of a document when the party failed to raise an objection at the earliest or permitted the court to proceed on the foot of such document in Iqbal Basith and others v.

N.Subbalakshmi and others, reported at (2021) 2 SCC 718, the Supreme Court in Iqbal Basith (supra) held thus:

"13. Both the courts then proceeded to consider the title of the appellants to decide lawful possession. The respondents had themselves produced a certified copy of Ex.1 dated 07.09.1946. The appellants produced photocopies of all other resolutions, government orders and sale deed in favour of their vendor O.A. Majid Khan by the Municipality. The failure to produce the originals or certified copies of other documents was properly explained as being untraceable after the death of the brother of P.W.1 who looked after property matters. The attempt to procure certified copies from the municipality was also unsuccessful as they were informed that the original files were not traceable. The photocopies were marked as exhibits without objection. The respondents never questioned the genuineness of the same. Despite the aforesaid, and the fact that these documents were more than 30 years old, were produced from the proper custody of the appellants along with an explanation for non production of the originals, they were rejected without any valid reason holding that there could be no presumption that documents executed by a public authority had been issued in proper exercise of statutory powers. This finding in our opinion is clearly perverse in view of Section 114(e) of the Indian Evidence Act 1872, which provides that there shall be a presumption that all official acts have been regularly performed. The onus lies on the person who disputes the same to prove otherwise."

9. Similarly, an old public document also attracts the presumption of correctness which is relatable to Section 90 of the Evidence Act. The Supreme court in Lakhi Baruah v. Padma Kanta Kalita, reported at (1996) 8 SCC 357 upon considering the challenge to an old public document held thus:

"14. It will be appropriate to refer to Section 90 of the Evidence Act, 1872 which is set out hereunder:

90. Presumption as to documents thirty years old.? Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person?s handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

15. Section 90 of the Evidence Act, 1872 is founded on necessity and convenience because it is extremely difficult and sometimes not possible to lead evidence to prove handwriting, signature or execution of old documents after lapse of thirty years. In order to obviate such difficulties or improbabilities to prove execution of an old document, Section 90 has been incorporated in the Evidence Act, 1872 which does away with the strict rule of proof of private documents. Presumption of genuineness may be raised if the documents in question is produced from proper custody. It is, however, the discretion of the court to accept the presumption flowing from Section 90. There is, however, no manner of doubt that judicial discretion under Section 90 should

not be exercised arbitrarily and not being informed by reasons."

10. In this case the offending document dated 04.10.1978 was in the nature of a public document having been issued by a statutory authority upon enquiry. The document being an old one and having been produced by credible person attracts the presumption of correctness as laid down in Lakhi Baruah (supra).

11. The learned appellate court dwelt at length on the objection to the admissibility of the said document and held as under:

"Point for determination number three:-

Learned counsel for the respondent has referred to order of the Assistant Commissioner Jhansi Division dated October 4, 1978, passed by him in inquiry under section 6 of the Hindu Public Religious Institution (Prevention from Dissipation of Properties (Temporary Powers) Act, 1962. Copy of whic his on file as 35C/169C. Perusal of this order shows that there was a dispute between the original plaintiff and original defendant regarding the management of the properties of the same deity and inquiry was done by the then Assistant Commissioner of Jhansi Division, the original plaintiff, had objected to the appointment of the original defendant as Shebait of the temple as he was not fit for this job on various grounds. An inquiry was conducted by the Assistant Commissioner and during this inquiry, it was found by him and was held by him that the original defendant, who appeared before the impugned inquiry, was not a person of sound mind and hence he was not able to manage the properties of the temple. He, thus rejected the claim of original defendant and the original plaintiff as well and appointed a receiver to look after the affairs of and management of the temple and its properties. This order became final between the parties.

Learned counsel for the respondent has raised preliminary objection regarding the maintainability, rather admissibility of copy of this order on the ground that since it was filed during the time of hearing of application under Section 5 Limitation Act, filed for condoning the delay in finding the present appeal and was not filed are admitted by the Court under Order 41 Rule 27 Civil Procedure Code, hence it cannot be looked into also that it was photocopy of a certified copy, I am unable to accept this argument because after the decision of application under Section 5 Limitation Act, the papers and file became a part and parcel of the present appeal and also that when this paper was considered by my learned predecessor at the time of decision of application under section 5 Limitation Act for condonation of delay in filing the present appeal, no such objection regarding photocopy was raised and the order condoning delay also shows that this point, and finding of the Assistant Commissioner in this order was the main ground for correlation of delay.

Hence it is established that since the ex parte judgment under attack in the present appeal was passed on August 20, 1979, whereas the order of the Assistant Commissioner was passed on October 4, 1978 in the above noted proceedings in which the original plaintiff was a party, hence this finding was known to the original plaintiff during the pendency of the

original suit number 469 of 1975 that the original defendant was person of unsound mind doing the proceedings in that original suit. The record of the lower court file also shows that no steps were taken by the original plaintiff for appointment of guardian ad litem of the insane original defendant and the proceedings were done by the court below without appointing such a guardian. When the original defendant became insane during the proceedings, all the powers of attorney, if any, executed by him lost its legal significance.

On the basis of above discussion, I am of the considered view that the Court below committed illegality by completely ignoring of provisions of law contained in order 32 Rule 15 of the Civil Procedure Code in commencing the proceedings and passing the impugned judgment and decree without appointing the Guardian of the original defendant who was a person of sound mind at the time during the pendency of the proceedings in original suit before him. The point for determination number three is answered accordingly."

12. No exception can be taken to the reasoning or the analysis of the learned appellate court in the impugned order. The impugned order is liable to be affirmed and the appeal fails.

13. The instant appeal is dismissed.

(2023) 3 ILRA 1130
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2022

BEFORE

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

FAFO No. 2691 of 2004

The New India Assurance Co. Ltd.
...Appellant
Versus
Smt. Guddi @ Sarojni & Anr.
...Respondents

Counsel for the Appellant:
Sri Ashok Kumar Srivastava, Sri Sayed Ali Murtaza

Counsel for the Respondents:
Sri Sanjay Kumar

Civil Law – The Workmen's Compensation Act, 1923 - Section 30, - Motor Vehicles Act, 1988, Section - 167 - Appeal - insurance company Challenged the Award - Accident - deceased was employed as cleaner on a insured vehicle and dies during course of employment - maintainability of claim petition - just because another vehicle is involved in the accident will the claim petition before Workman Compensation Commissioner be not maintainable - said question raised by insurance company is answered by the legislation itself under section 167 of MV Act, - count finds that, Commissioner cannot be said to have gone beyond his jurisdiction - substantial question of law - held, all the substantial question of law framed in the appeal are questions of facts and the finding of the Commissioner on the said issues are not perverse - High Court cannot enter into the arena of facts unless they are proved to be perverse - therefore, this appeal fails and is dismissed. (Para -6, 11, 12, 13)

Appeal Dismissed. (E-11)

List of Cases cited:

1. C. Manjammu Vs Divisional Manager, New India Assurance Comp. Ltd. (2022 ACJ 2661),

2. North East Karnataka Road Transport Corporation Vs Smt. Sujata (Civil Appeal No. 7470/2009 Decided on Dt. 02.11.2018),

3. ESIC Vs S. Prasad (FAFO No. 1070/1993 decided on Dt. 26.10.2017),

4. Golla Rajanna Etc. Etc. Vs Divisional Manager & anr. (2017 1i) TAC 259 SC),

5. Shahajahan & anr. Vs M/s Shri Ram Gen. Insurance Co. Ltd. & anr. (2021 (4) TAC 687 SC).

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

1. Heard learned counsel for the appellant.

2. By way of this appeal, The New India Assurance Company Limited has challenged the award dated 23.8.2004 passed by Workmen's Compensation Commissioner, Assistant Labour Commissioner, Kanpur Region, Kanpur in Case No.WCA 121 of 2003 awarding compensation of Rs.211790/-with interest at the rate of 6%.

3. The brief facts leading to the litigation as culled out from the judgment are that a claim was filed by the claimants claiming compensation for the loss of their breadwinner who admittedly was a cleaner on the vehicle owned by the the respondent - owner and on the fateful date i.e.22.5.2003 the vehicle met with an accident. A claim petition was filed before the Workmen's Compensation Commissioner, Kanpur claiming a sum of Rs.4,23,580/- with 12% rate of interest.

4. The respondent no.1 has admitted the fact that the deceased was employed with him and the vehicle was insured with the insurance company. After elaborate evidence being laid the learned Commissioner awarded the award in favour of the claimant. I have even perused the Annexure No.2 of the investigating officer but nowhere it has been mentioned that the vehicle was not insured. A private investigation was never examined. Hence, the same could have not been relied. The FIR is very elaborate the insured truck was involved in the accident. All these being questions of facts have been considered by the Court below.

5. On perusal of memo of appeal, this Court finds that following substantial questions of law have been framed by the appellant:

"i) Whether in view of the law that the deceased motorcyclist being a "Third Party" vis-a-vis the offending truck no. HR-38 C-4849, the claimant / respondent no. 1 had the remedy of filing a claim petition under Section 166 of the Motor Vehicles Act before the concerned Motor Accident Claims Tribunal has the learned Commissioner erred in entertaining the present petition under the provisions of the Workmens' Compensation Act merely because the deceased was allegedly employed as a cleaner on the insured truck at the relevant time ?

ii) Whether in view of the admitted fact that neither the insured truck no. UP-70 D-9927 was involved in the accident nor the accident had occurred due to the use of the insured truck, has the learned Commissioner erred in fastening the liability to pay the assessed compensation on the appellant insurance company, merely because the deceased was allegedly employed on the insured truck at the relevant time ?

iii) Whether in view of the fact that the opposite party / respondent no. 2 i.e. the alleged employer had not appeared on the witness stand before the learned Commissioner nor the claimant / respondent no. 1 could lead any

documentary evidence in support of her contentions regarding the employment and income of the deceased, has the learned Commissioner erred in ignoring the evidence of the appellant insurance company that the deceased was not an employee of the aforesaid opposite party / respondent no. 2 ?

6. The facts narrated above in nutshell will have to evaluated in view of the judgments of the Apex Court in **C. Manjammu V. Divisional Manager, New India Assurance Company Limited reported in 2022 ACJ 2661**.The finding of facts are said to be perverse where no evidence is adduced by the party in whose favour decision is penned. The commissioner has considered evidence led by the claimants as well as the evidence led by the insurance company. The findings are not such which can be said to be perverse. Just because another vehicle is involved in the accident will the claim petition before Workman Compensation Commissioner be not maintainable. The said question raised by the insurance is answered by the legislation itself and Section 167 of the Motor Vehicle Act, 1988 gives the option to the claimants to claim compensation under either of the Acts. In our case the Commissioner cannot be said to have gone beyond his jurisdiction. The question no.2 is answered in question itself first the deceased was held to be employed on the insured truck and then he is submitted that other owner of other vehicle is not party and the liability would be that of the insurance company. Issue no.3 is a finding of fact and in view of the decision of Apex Court in **C. Manjammu** (supra) this Court cannot delve into the same.

7. At the outset, it is relevant to discuss the scope of this Court to entertain appeal against the award of Workmen's Compensation Commissioner.

8. 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."

9. 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."

10. 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."

11. 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.

12. 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.

13. 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 cleaner, the said factual finding cannot be interfered by this Court.

14. 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.

15. 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) 3 ILRA 1134
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.01.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJIT SINGH, J.

Government Appeal No. 650 of 1993

State of U.P. ...Appellant
Versus
Badri Lodhi ...Opposite Party

Counsel for the Appellant:
A.G.A.

Counsel for the Opposite Party:
Sri C.B.Singh, Sri Avdhesh Narayan Tiwari, Sri Surendra Singh

Criminal Law - Indian Penal Code, 1860—Section 302—Murder—Criminal Procedure Code, 1973—Section 378(3)—Appeals against acquittal—Scope of interference by appellate court—Principles reiterated–If view taken by trial court in acquitting accused is one of possible reasonable views - appellate court should generally not interfere with order of acquittal—Prosecution failed to establish a complete chain of circumstances—Evidence scanty–No substantial and compelling reasons to interfere with acquittal order–.

Appeal dismissed. (E-9)

List of Cases cited:

1. M.S. Narayana Menon @ Mani Vs St. of Kerala & anr., (2006) 6 S.C.C. 39

2. St. of Goa Vs Sanjay Thakran & anr., (2007) 3 S.C.C. 75

3. Chandrappa Vs St. of Karn. (2007) 4 S.C.C. 415

4. St. of Uttar Pradesh Vs Ram Veer Singh & ors., 2007 A.I.R. S.C.W. 5553

5. Girja Prasad (Dead) by L.R.s Vs St. of M.P., 2007 A.I.R. S.C.W. 5589

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

7. Mookkiah & anr. Vs St. Representatives by the Inspector of Police, T. N., reported in AIR 2013 SC 321

8. St. of Karnataka Vs Hemareddy, AIR 1981, SC 1417

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

10. St. of Pun. Vs Madan Mohan Lal Verma, (2013) 14 SCC 153

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

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

Hon'ble Ajit Singh, J.)

1. This appeal under Section 378 (3) of Criminal Procedure Code (in short 'Cr.P.C.'), at the behest of the State, has been preferred against the judgment and order dated 7.1.1993, passed by learned IInd Additional Sessions Judge, Jalaun, at Orai, in Criminal Case No.145 of 1992 (State of Uttar Pradesh vs. Badri Lodhi), under Sections 302 of Indian Penal Code (hereinafter referred to as 'I.P.C.') and also under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Police Station-Kotwali Orai, District Jalaun, whereby the learned trial-court acquitted the accused-respondent.

2. The brief facts of this case are that in the night intervening between May 7 & 8, 1992 at about mid-night in village Dhamni, Police Station Kotwali Orai, District Jalaun the accused Badri Lodhi shot dead by fire arm the son of the informant when the deceased was sleeping on cot in the front of his shop.

3. The case was registered at Police Station Kotwali Orai on 8.5.1992 at 3:30 a.m. The written report is said to have been scribed by Sukh Lal Chamar of village Dhamni. It is claimed by the prosecution that at that time the first informant Tundey reached the police station to make over the said written FIR to the police on the basis of which the chik was scribed being Ex.Ka. 3 and the case was registered in the G.D. Vide Ex.Ka. 4. It was alleged by Tundey in Ex.Ka. 2 that he was Chamar by caste and that in the village there were complaints of easy virtues of the wife of Maheshwari Lodhi and it was generally said by the persons in the village that the said wife of Maheshwari Lodhi was maintaining illicit illusion relation with the son of complainant and due to this the accused was having enmity with the deceased, the son of Tundey. It was averred in the FIR that on account of this reason accused Badri Lodhi was harbouring animosity against the deceased and therefore, in the relevant night of the incident at about dead of night when the deceased was sleeping on a cot infront of his shop where the electricity was burning, the accused holding a gun in his hand came from eastern direction and with a view eliminating the deceased discharged a fire on the deceased injuring him in the right side of abdomen. The version in the FIR onwards was that on the outcries of the deceased, Tundey, his wife and his younger brother Sant Ram as also witness Chhakki immediately reached the spot and saw that the accused was running away towards west having shot at the deceased, who could not be apprehended despite efforts being made by Tundey and others. After the incident, the injured was taken to hospital but he breathed his lost on the way at Orai. It was alleged that the dead body was kept in the hospital and villagers were present.

4. On the basis of this written report, a case was registered against the accused by by the informant-Tundey (PW-2) at Police Station Kotwali Orai on 8.5.1992 at 3:30 a.m.. After registration of the case, the investigation followed. The Investigating Officer recorded the statements of the complainant and other witnesses, visited the site and prepared the site-plan. After investigation, the Investigating Officer of the case submitted charge-sheet against the accused-Badri Lodhi.

5. Accused-Badri Lodhi was charged under Sections 302 of the Indian Penal Code and also under Section 3(2)(v) of the

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. The case being exclusively triable by court of session was committed for trial to the court of session by competent Magistrate. Accused person denied charges and claimed to be tried.

6. To bring home the charges, the prosecution produced following witnesses, namely:

1.	Dr. A.K. Saxena	PW 1
2.	Tunde	PW2
3.	Chakki	PW3
4.	Sant Ram	PW4
5.	Subhash Chandra Sakya	PW5

7. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1.	Postmortum Report	Ex.ka 1
2.	Written report	Ex.ka 2
3.	First Information Report	Ex.ka 3
4.	General Diary	Ex.ka 4
5.	G.D. Report	Ex.ka 5
6.	Panchayatnama and connected papers	Ex.ka 6 to Ka 10
7.	Site Plan with index	Ex.ka 11
8.	Recovery memo of Blood Stained & plain earth	Ex.ka 12

8. After prosecution evidence, the accused person was examined under Section 313 Cr.P.C. in which he told that false evidence has been led against him.

9. We have heard Patanjali Mishra, learned AGA for the State-appellant, Sri Surendra Singh, learned counsel for accused- respondent and perused the record.

10. 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.

11. 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 and another,*** *(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."

12. 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."

13. 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.

14. Even in the case of State of Goa vs. Sanjay Thakran and another, 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."

15. Similar principle has been laid down by the Apex Court in cases of ***State of Uttar Pradesh vs. Ram Veer Singh and others***, *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.

16. In the case of ***Luna Ram vs. Bhupat Singh and others,*** 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."

17. Even in a recent decision of the Apex Court in the case of ***Mookkiah and another vs. State Representatives 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]"

18. 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."

19. In a recent decision, the Hon'ble Apex Court in ***Shivasharanappa and others 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."

20. 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."

21. 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."

22. 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 with acquittal can only be justified when it is based on a perverse view.

23. We have perused the depositions of prosecution witnesses, documentary evidence supporting ocular versions, arguments advanced by learned counsel for the parties. We have been taken through the record. We are unable to accept the

submissions of the State counsel for the following reasons and the judgments of the Apex Court which lay down the criteria for consideration of appeals against acquittal. The chain has been found to be incomplete. While going through the judgment it is very clear that the court below has given a categorical finding that the evidence is so scanty that the accused cannot be punished /convicted for the offences for which he was charged. The factual scenario in the present case will not permit us to take a different view then that taken by the court below. In that view of the matter we are unable to satisfy ourselves. Thus we concur the findings of the court below.

24. After considering the facts and circumstances of the present case and appraisal of the evidence available on record and on the contours laid down by the judgment of the Apex Court, we have no other option but to concur with the reasoning of acquittal recorded by the learned Sessions Judge for the aforesaid reasons.

25. 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) 3 ILRA 1141
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.02.2023

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-B No. 4678 of 1989

Ram Naresh & Anr. ...Petitioners
Versus
Board of Revenue, U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri S.N. Singh, Sri A.N. Bhargava. Sri Ajay Kumar Banerjee, Sri Anil Kumar Rai, Sri R.N. Singh, Sri Vishnu Singh

Counsel for the Respondents:
C.S.C., Sri A.P. Srivastava, Sri Ajay Kumar Banerjee, Sri Anil Pathak, Sri Manoj Kumar Singh, Sri Prabhakar Singh, Sri Rakesh Pathak, Sri S.P. Singh

A. Civil Law - U.P. Zamindari Abolition and Land Reforms Act,1950 - Section 229B - Declaratory Suit - Surrender - petitioner filed a suit u/s 229B of the UP Z.A. & L.R. Act claiming co-tenancy right, alleging that plot in dispute is ancestral and after death of common ancestor plaintiff and defendant no. 1 become owner in possession of the plot in dispute - Defendant alleged that plaintiff has surrendered the land & that plaintiff's rights has been extinguished - Held - plaintiff and defendant are member of the family and possession of one co-sharer is possession of all, as such merely by living/residing in the Sasural, the plaintiff will not be deprived of his right in the plot in dispute - the plea of surrender set up by the defendant not proved - plaintiff entitled to the decree of ½ share in the plot - (Para 10, 16)

B. U.P. Zamindari Abolition and Land Reforms Act,1950 - Section 229B - Limitation for filing suit - there is no limitation for filing suit under Section 229B of U.P.Z.A. & L.R. Act (Para 16)

C. U.P. Consolidation of Holdings Act, 1953 - Section 49 - right of co-sharer will not be defeated due to non-claiming of partition of joint share and separate chak in joint property during consolidation proceeding and even the right of co-sharer will not come to an end under Section 49 of the U.P. Consolidation of Holdings (Para 13)

Allowed. (E-5)

List of case cited:

1. Bechu Vs Board of Revenue & ors. 1966 ALJ 1063

2. Jaggu & anr. Vs Deputy Director of Consolidation 1982 RD 217

3. Ram Briksha & anr. Vs Deputy Director Consolidation & ors. 2017 (6) ADJ 356 (DB)

4. Karbalai Begum Vs Mohd. Sayeed & anr. AIR 1981 SC 77

5. Sharda Devi Vs Board of Revenue U.P. & ors. 1985 RD 93

6. Pan Kumari Vs Board of Revenue U.P. at Allahabad & ors. 2005 (99) RD 529

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

1. Heard Mr. Vishnu Singh, Counsel for the petitioner. Nobody appeared for the contesting respondents.

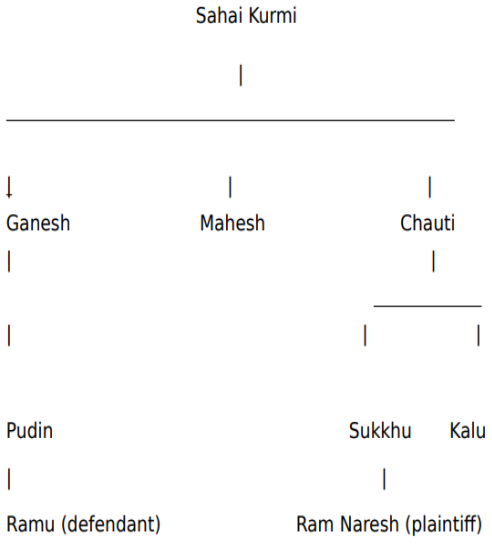
2. Brief facts of the case are that petitioner filed a suit under Section 229B of the UP Z.A. & L.R. Act claiming co-tenancy right in respect to the plot in suit situated in village Bharlai, Paragna Sheopur, District Varanasi with the allegation that plot in dispute is ancestral and after death of common ancestor plaintiff and defendant no. 1 become owner in possession of the plot in dispute. It is also alleged in the plaint that plaintiff's father deposited the amount and obtained bhumidhari sanad on 10.01.1950 but after death of plaintiff's father the name of defendant no. 1 was only recorded in the revenue records hence the suit. Defendant-respondents filed written statement in the aforementioned suit denying the plaint allegations and in the additional statement it has been alleged that plaintiff has surrendered the land in question in 1912 and since then respondents have been in continuous possession of the plot in question. It is further alleged that on the basis of surrender of the land plaintiff's rights has been extinguished. Trial Court vide judgment and decree dated 16.02.1976 dismissed the plaintiff's suit. Against the decree of the Trial Court dated 16.02.1976 petitioner filed an appeal before the Commissioner which was allowed vide judgment dated 14.10.1977. Against the judgment of the First Appellate Court dated 14.10.1977 second appeal No. 15 of 1977-78 was filed before the Board of Revenue by the defendants, the second appeal No. 15 of 1977-78 was heard by Board of Revenue and vide order dated 31.07.1978 allowed the second appeal setting aside the judgment and decree of First Appellate Court and the judgment of the Trial Court was affirmed. Against the judgment of Second Appellate Court dated 31.07.1978 petitioner filed Writ Petition No. 9421 of 1978 which was allowed by this Court vide judgment dated 25.09.1985 and remanded the matter before the Board of Revenue to decide the second appeal afresh in accordance with law. After remand order dated 25.09.1985 passed by this Court second appeal was heard by Board of Revenue afresh and vide judgment dated 28.12.1988 the second appeal was allowed again setting aside the judgment and decree of First Appellate Court date 14.10.1977 hence this writ petition. This Court while entertaining the writ petition on 28.03.1989 passed the following interim order:

"Issue notice.

Till further orders of this Court, the operation of the order dated 28.12.1988 passed by respondent no.1 shall remain stayed."

3. In pursuance of the order dated 28.03.1989 contesting respondents put in

appearance through Counsel and filed counter-affidavit. Petitioner has filed his rejoinder-affidavit also to the counter-affidavit filed by respondent no. 4.



4. Counsel for the petitioner submitted that plot in dispute is ancestral and placed the following pedigree in order to demonstrate that plaintiff Ram Naresh was co-sharer/co-tenant of the plot in dispute:-

5. Counsel for the petitioner further submitted that Board of Revenue has committed manifest error of law in accepting the case of surrender when all the courts had held that property is joint and comes down from a common ancestor and the case of surrender had been rejected by this Hon'ble Court. He further submitted that Second Appellate Court has no jurisdiction to reappraise the evidence and interfered with the finding of fact recorded by First Appellate Court. He further submitted that First Appellate Court after considering the evidence on record has recorded finding of fact that merely because the petitioner's father started living in his Sasural his valuable right will not be extinguished but the Board of Revenue has erred in holding otherwise. He further submitted that possession of one co-sharer is the possession of all over the joint land as such the finding with respect to possession could not be interfered with in second appeal. He further submitted that the admission of the petitioner was considered even by this Court while deciding the writ petition filed by the petitioner against the order of Board of Revenue and has held that it did not make out a case of ouster. He further submitted that impugned order passed by the Board of Revenue is wholly illegal, without jurisdiction and manifestly erroneous as such the same is liable to quashed. learned. Counsel for the petitioner placed reliance upon the judgment reported in ***1966 ALJ 1063 Bechu Vs. Board of Revenue & Ors 1982 RD 217 Jaggu & Anr. Vs. Deputy Director of Consolidation 2017 (6) ADJ 356 (DB) Ram Briksha & Anr. Vs. Deputy Director Consolidation and Ors.***

6. I have considered the arguments advanced by learned Counsel for the petitioner and perused the record.

7. There is no dispute about the fact that petitioner and respondent no. 4 are Co-Bhumidhar of the plot in dispute. There is also no dispute about the fact that suit under Section 229B of U.P. Z.A. & L.R. Act filed by the petitioner was dismissed by the Trial Court but in the first appeal the decree of the Trial Court was reversed and plaintiff's suit was decreed. There is also no dispute about the fact that in second appeal the Board of Revenue has set aside the judgment and decree of First Appellate Court and restored the decree of the Trial Court. There is also no dispute about the fact that in writ petition filed by petitioner

against the judgment of the Second Appellate Court, the judgment and decree of the Second Appellate Court was set aside and the matter was remanded back before the Second Appellate Court to decide the second appeal afresh but the Second Appellate Court again allowed the second appeal affirming the judgment of the Trial Court by which the plaintiff's suit was dismissed.

8. The plaint allegation as set up in the suit was that parties are co-sharer as such the plaintiff is entitled to the co-tenancy right in the disputed plot. So far as the plea of ouster is concerned, there was no plea regarding that in the written statement as such Board of Revenue had no jurisdiction to entertain the plea in the second appellate jurisdiction and dismissed the plaintiff's suit. This Court while allowing the writ petition against the first order of the Second Appellate Court has recorded finding that the word ouster has not been used in the written statement nor such a plea was specifically raised in the written statement.

9. So far as the plea of surrender of the land in dispute by the plaintiff is concerned, this plea has already discussed by the Trial Court while deciding the suit. Decision of trial court on issue No. 3 relating to plea of surrender as set up by defendant is relevant for perusal which is as under:-

"वाद विन्दु संख्या-3"

प्रतिवादी की ओर से असल दस्तवरदारी दि० 10.1.1912 नविस्ता सुखू बहक युद्धदीन प्रस्तुत की गई है दस्तबरदारी के हासिये के गवाह रामदेव डी०डब्लू०3 को भी प्रतिवादी की ओर से प्रस्तुत किया गया है। वादी की ओर से केवल इस दस्तबरदारी का तहरीर करना अस्वीकार किया है।

इस सम्बन्ध में मैंने दोनों पक्षों के विद्वान वकीलों के तर्क ध्यान पूर्वक सुने हैं। वादी के विद्वान वकील का तर्क है कि कथित दस्तबरदारी पूर्णतयः फर्जी है तथा में पढ़ने व कत्तई मानने योग्य नहीं है विद्वान वकील का तर्क है कि रामदेव गवाह स्वयं अपनी जन्म तिथि 1901 ई० बताता है यदि कथित दस्तबरदारी 1912 में लिखी गई थी तो उस समय यह गवाह मात्र 11-12 साल का रहा होगा। ऐसी स्थिति में यह दस्तावेज स्वयं फर्जी सिद्ध हो जाता है। विद्वान वकील का दूसरा तर्क है कि दस्तबरदारी 200 रूपया में लिखी गयी थी। न तो उसे रजिस्टर्ड कराया गया था और न वह कभी कागजात माल में एक्ट बयान हुई विद्वान वकील के खतोनी 1356 फ० जो वादी ने प्रस्तुत की है की और ध्यान आकर्षित करते हुये कहा है कि यदि कथित दस्तबरदारी वास्तव में सही होती तो 1356 फ० मैं सुखूँ असल तनाह कास्तकार दर्ज न होगा।

प्रतिवादी के विद्वान वकील का तर्क है कि दस्तबरदारी 30 वर्ष पुराना document है इसलिये उसे evidence में पढ़ा जाना चाहिये। विद्वान वकील ने यह भी तर्क किया है कि भारतीय गवाह प्रायः अनपढ़ होते हैं अतः उन्हें सन् आदि का सही ज्ञान नहीं होता। डी०डब्लू 3 रामदेव ने जहां अपना 1901 ई० में होना बताया है वही अपनी आयु 84 वर्ष होना भी कहा है। उससे स्पष्ट है कि उसे अपनी जन्म की सन् सही नहीं मालूम। विद्वान वकील ने रजिस्ट्री न कराये जाने के सम्बन्ध में कोई संतोषप्रद तर्क नहीं किया है जहां तक इस दस्तबरदारी के एक्ट अपान होने का सम्बन्ध है प्रतिवादी के विद्वान वकील ने कहा है कि कागजात माल में लगातार प्रतिवादी का यह नाम चला आना व तनाह काविज रहना स्वयं दस्तबरदारी की existence व उस पर Act upon करने की बात सिद्ध करते हैं।

दोनों पक्षों के विद्वान वकीलों को सुनने तथा सम्बन्धित साक्ष्य को देखने से उपरान्त में यह निष्कर्ष निकालता हूँ कि कथित दस्तबरदारी technically proved नहीं है न apparently act upon की गई है न evidence में पढ़ने योग्य है। दस्तबरदारी पर आधारित प्रतिवादीगण का case technically proved नहीं होता। प्रश्नगत वाद विन्दु इसलिये नकारात्मक निर्णीत किया जाता है।

10. Since the First Appellate Court has recorded finding of fact while allowing the appeal of the plaintiff and decreeing the plaintiff's suit that plaintiff and defendant are member of the family and possession of one co-sharer is possession of all, as such merely by living/residing in the Sasural, the

plaintiff will not be deprived of his right in the plot in dispute, the findings recorded by the First Appellate Court will be relevant for perusal, which is as follows:-

"वाद बिन्दु नं० 3 में अवर न्यायालय ने तनकीह बनाई है कि क्या सुक्खू ने आराजी निजाई में अपना कुल हक व हिस्सा बहक पुदीन पिता प्रतिवादी को दस्तवरदारी कर दी थी। इस वाद विन्दु का भी निर्णय अवर न्यायालय ने यह किया है कि कथित दस्तवरदारी प्रमाणित नहीं है। यह वाद विन्दु नकारात्मक में निर्णय किया गया है जब उपरोक्त दो तनकीहों पर फैसला वादी के पक्ष में हुआ है तब फिर वादी के दावा को मन्जूर करने में अवर न्यायालय को जो एतराज हुआ है उसको सावधानी से देखना पड़ेगा। दस्तवरदारी के दस्तावेज को अवर न्यायालय ने फर्जी होल्ड किया है दस्तवरदारी 200/- में लिखी गयी थी ऐसा कहा गया है परन्तु न तो उसे रिजस्टर्ड कराया गया और न तो उसका कभी कागजात में इन्द्राज हुआ। वादी के पिता सुक्खू 1356 फ० तक असल काश्तकार दर्ज हैं। दस्तवरदारी के आधार पर प्रतिवादीगण का केस प्रमाणित नहीं होता। परन्तु अवर न्यायालय पर इस बात का प्रभाव जरूर पड़ा है कि प्रतिवादी असर्दाराज से तनहा काविज चला जाता है और वादी के दावे से तमादी खारिज हो गया है क्योंकि वादी के पिता सुक्खू ससुराल चला गया था और इस कारण लम्बे अर्से से उसका आराजी निजाई से कोई संबंध नहीं रहा। इस कारण प्रतिवादी कब्जा मुखालिफाना से तनहा मालिक हो चुका है और दावा टाइमवार्ड है। जो महत्वपूर्ण तनकीह हैं। उन पर अवर न्यायालय का आदेश वादी के माफिक होने पर भी वादी के पिता का दूसरे गॉव में चला जाना, अपने ससुराल में जाकर रहने लगा इसे बड़ा अपराध माना गया कि उसके दावे में तमादी खारिज हो गयी। जबकि ससुराल किसी फारेन कन्ट्री में नहीं है और न वादी के पिता की नागरिकता में कोई अन्तर आया है यह भारत के आंचलिक प्रदेशों की पिछड़ी हुई जन भावना का फल है कि ससुराल को भी परदेश मान बैठे और ससुराल जाने से आदमी अपना हक खो बैठता है।

मैं वादी के पिता का ससुराल में जाकर रहने से कोई ऐसा अनुचित या गैर कानूनी बात नहीं देखता जिससे उसका अधिकार गायब हो जाय और वादी का दावा कामयाब न हो सके। सहकाश्तकारों में जो मोखसी जायदाद होती है उस पर एक का कब्जा सबका कब्जा माना जाता है। अतः रामू का नाम लिऐ जाने से या उसका कब्जा रहने से वादी के कब्जा पर कोई प्रतिकूल असर नहीं पड़ता। तस्तवरदारी की बात गलत सावित हुई है। सच बात तो यह मालूम होता है कि प्रतिवादी वादी के भोलेपन का नाजायज फायदा उठा करके उसका हक मारना चाहता है। अतः मुझे अवर न्यायालय का आदेश गलत मालूम होता है।

उपरोक्त विवेचना के अनुसार में इस अपील को मन्जूर करता हूं, अवर न्यायालय का आदेश रद्द किया जाता है और वादी प्रतिवादीगण के साथ सहसीरदार घोषित किया जाता है। हिस्से का प्रश्न धारा 229 बी जेड०ए०एण्ड एल०आर० एक्ट के मुकदमें में नहीं उठाया जा सकता। अतः इस पर निर्णय देना आवश्यक नहीं है।

दिनांक 14.10.77 (आर०एन०मिश्रा)
अतिरिक्त आयुक्त"

11. The Second Appellate Court has exercised his second appellate jurisdiction and allowed the second appeal which has been mentioned by this Court while allowing the writ petition No. 9421 of 1978 filed by petitioner vide order dated 25.09.1985, the relevant portion of the judgment of this Court regarding exercise of the second appellate jurisdiction is as follows:-

"The question now arises as to which court should be directed to give a fresh decision. The first appellate Court has decreed the suit. I see no reason as to why the petitioner should be deprived of the finding given by the first appellate court in his favour. I, therefore, consider it appropriate Court in his favour. I, therefore, consider it appropriate that the Board of Revenue should be hear the appeal and give a fresh decision."

12. The case law cited by learned counsel for the petitioner in ***Bechu (supra), Jaggu (supra) and Ram Briksha (supra),*** are relevant for consideration.

13. In **Ram Briksha (supra),** it has been held by the Division Bench of this Court that right of co-sharer will not be defeated due to non-claiming of partition of joint share and separate cheque in joint property during consolidation proceeding and even the right of co-sharer will not

come to an end under Section 49 of the U.P. Consolidation of Holdings Act. Paragraph No. 36 to 39 of the judgment ***Ram Briksha (supra***) will be relevant which are as follows:-

"36. On these parameters, the issues that have been raised before us are being considered and in our considered opinion rights of the parties in a holding cannot be permitted to be defeated merely because they have not at all participated in consolidation proceedings and as to whether the bar of Section 49 of U.P. Consolidation of Holdings Act, 1953 would be attracted or not would essentially be a question of fact that can be answered on the basis of evidence adduced and to the said bar in question exceptions have to be carved out wherein suit in question would be not barred and Section 49 of U.P. Consolidation of Holdings Act, 1953 would not come into play where from the series of documents and circumstances it is reflected that planned fraud has been made to delete the plaintiffs name from the revenue records. From the record of the consolidations, it is clearly reflected that neither the incumbent, who has proceeded to get his name recorded nor consolidation authorities have proceeded to discharge their duties faithfully in consonance with the provisions of U.P. Consolidation of Holdings Act wherein the consolidation authorities are empowered to ascertain the share of each owner if there be more owners than one and in case such an exercise has not been undertaken, then it would be a case of legal malice and it cannot be ipso facto presumed that there has been ouster from the property in question and in such a situation an incumbent, who claims his right in the property in question has got every right to regain his property based on title for the reason that the right has been sought to be defeated based on fraud and manipulation.

The provisions of Section 49 of U.P. Consolidation of Holdings Act, 1953 in such backdrop would not at all be attracted and the suit in question would not at all be prima facie barred where suit in question is filed for possession of the suit property based on property interest. The reference is answered as follows:

Issue No.I

37. Whether use of words "could or ought to have been taken" in latter part of Section 49 of the Act, compulsorily forces the co-sharers, who are living jointly, peacefully and have no grievance against their father/brother/co-sharer, whose name is recorded in representative capacity, or they were willing to live jointly, due to situation of their family, i.e. (father and minor son), (mother and minor son), (brother and minor brother) and (some co-sharer was student and had gone abroad for study and fully depends upon other co-sharers) etc., to file an objection under Section 9 of the Act for separation of his share?

A. Because of the words "could or ought to have been taken" in latter part of Section 49 of the Act, same does not compulsorily forces the co-sharers, who are living jointly, peacefully and have no grievance against their father/brother/co-sharer whose name is recorded in representative capacity or they were willing to live jointly due to situation of their family and who have not filed an objection under Section 49 of the Act for separation of their share inasmuch as under the provisions of U.P. Consolidation of Holdings Act, 1953, it is the statutory

obligation cast upon the authorities and the incumbent, who has been holding the property in question in the representative capacity to get the records corrected and in case in designed manner the obligation in question has not been discharged by Consolidation Authorities as well as by the incumbent holding the property in the representative capacity, then in such a situation Section 49 of the Act would not at all be attracted and such situation would be covered under the contingency of planned fraud to drop the name of other co-sharers from the revenue records.

Issue No.II

38. Whether by operation of law, the parties can be thrown into litigation against their will/need and by not raising claim to land or partition and separation of the chak their right to property can be taken away in spite of protection available under Article 19 (1) (f) and now Article 300-A of the Constitution.

A. The answer is that a party cannot be thrown in litigation against their will/need and by not raising claim to land of partition and separation of chak, their rights to property cannot be taken away under the protection provided for under Article 19(1)(f)/Article 300-A of the Constitution of India.

Issue No.III

39. Whether, in spite of well settled legal principle in respect of joint property, right of a co-sharer will come to an end under Section 49 of the Act, on the notification under Section 52, due to not claiming partition of his share and separate chak in his name, although, there had been no ouster from joint property?

A. The rights of the co-sharers will not at all come to an end under Section 49 of the Act, on the notification under Section 52 due to not claiming partition of his share and separate chak in his name and till there is no ouster from the joint property his right in the property will continue to exist.

The reference is accordingly answered. The Writ Petition alongwith connected matters shall now be placed before the appropriate Bench according to roster for disposal in light of this judgement."

14. The Apex Court in the case of Karbalai Begum Vs. Mohd. Sayeed & Anr. reported in AIR 1981 SC 77 has also discussed the plea of Section 49 of U.P. Consolidation of Holdings Act as well as the right of co-sharer in respect to the joint property, the Paragraphs No. 12 to 15 of the judgment rendered in Karbalai Begum (supra) are as follows:-

"12. The last ground on which the High Court non-suited the appellant was that after the chakbandi was completed under the U.P. Consolidation of Holdings Act, the suit was barred by s. 49 of the said Act. It is well settled that unless there is an express provision barring a suit on the basis of title, the courts will not easily infer a bar of suit to establish the title of the parties. In Subha Singh v. Mahendra Singh & Ors. this Court made the following observations:-

"It was thus abundantly clear that an application for mutation on the basis of inheritance when the cause of action arose, after the finalisation and publication of the scheme under Section 23, is not a matter in regard to which an application could be

filed "under the provisions of this Act" within the meaning of clause 2 of Section 49. Thus, the other limb of Section 49, also is not attracted. The result is that the plea of the bar of the civil courts' jurisdiction to investigate and adjudicate upon the title to the land or the sonship of the plaintiff has no substance."

13. In view of the clear decision of this Court, referred to above, the High Court erred in law in holding that the present suit was barred by s. 49 of the U.P. Consolidation of Holdings Act.

14. Thus, the grounds on which the High Court reversed the decision of the District Judge are not sustainable in law and the judgment of the High Court cannot be allowed to stand.

15. We, therefore, allow the appeal with costs throughout, set aside the judgment of the High Court, decree the plaintiff's suit for joint possession as far as plots Nos. 201 and 274 are concerned and restore the judgment of the District Judge. The cost allowed by this Court would be set- off against the sum of Rs. 15,000/- (fifteen thousand only) deposited by the respondents in the High Court and paid to the appellant and the balance may be refunded to the respondents."

15. On the point of exercise of Second Appellate Court jurisdiction, this Court in the case reported in ***1985 RD 93 Sharda Devi Vs. Board of Revenue U.P. & Ors.*** has held that Second Appellate jurisdiction shall not be exercised to set aside the finding of fact recorded by courts below on the basis of evidence however grossly erroneous they may appear. Paragraph No. 17 & 24 of the judgment are relevant which are as follows:-

"17. There is a string of decisions i.e. Afsar Sheikh v. Sulemanbibi [(1976) 2 SCC 142 : A.I.R. 1976 S.C. 163.] , Ladhi Prasad v. Karnal Distillery Co. Ltd. [A.I.R. 1963 S.C. 1279.] , Mst. Rajraniv. Rajaram [A.I.R. 1980 All. 2020.] , and Kharbuja Kuer v. Jang Bahadur [A.I.R. 1963 S.C. 1203.] , and on the basis of ratio of these cases it is clear that finding that no fraud or collusion was proved by Respondent Nos. 2 to 6 are findings of fact and the Board of Revenue has exceeded its jurisdiction under Section 100 C.P.C. to set aside these findings of fact. In view of the provisions of Section 331(4) of the Act second appeal would lie only on the question of law and not on the question of fact, hence Board of Revenue has clearly committed an error apparent on the face of record in setting aside the findings of fact recorded by first appellate Court and the trial Court about fraudulent nature of transaction. Further just on suspicion it cannot be assumed nor findings of fact can be set aside but the Board of Revenue has held that "there appears to be some suspicion that after the decree in suit under Section 176 of the Act why should successful party enter into compromise, surrender the rights in suit under Section 229-B of the Act, but the trial could not judge the evidence of the parties. But if the convenience of parties lay in entering into compromise subsequently, Board of Revenue should not stand in the way." It is well known that bad compromise is better than a good law suit. In case the vendees have entered into compromise admitting claim of petitioner hence they had do rights in the plots to execute the sale deed in favour of respondent Nos. 2 to 6.

24. In view of the discussion hereinbefore, I am of the view that the Board of Revenue has clearly exceeded

jurisdiction under Section 100 C.P.C. read with Section 331(4) of the Act. There was no scope of the second appellate Court to set aside the findings of fact recorded by the Additional Commissioner about the fraudulent or collusive nature of the decree. The findings of fact were also based on evidence and howsoever grossly erroneous they may appear to be, when in fact they were not erroneous, much less grossly erroneous, the second appellate Court had no jurisdiction to interfere with the same. The vendors, respondent Nos. 7 and 8 had no right, title or interest left in the plots in dispute after admitting the claim of the petitioner in the compromise decree, so as to be able to transfer any interest by the sale deed dated 11.7.1966 in favour of vendees. Hence the vendees did not derive any title out of the sale deed."

16. It is material that plot in dispute is ancestral one and acquired by common ancestor Sahai Kurmi. It is also material that plaintiff and defendant are co-sharer, the plea of surrender set up by the defendant has not been proved as such the plaintiff is entitled to the decree of ½ share in the plot as held by first Appellate Court vide judgment and decree dated 14.10.1977 as well as in view of ratio of law laid down by Apex Court in Karbalai Begum (supra) and this Court in **Ram Briksha (supra)**. So for as scope of suit under Section 229B of U.P.Z.A. and L.R. Act is concerned as well as limitation for filing suit under Section 229B of U.P.Z.A. & L.R. Act is concerned this Court in the case reported in ***2005 (99) RD 529 Pan Kumari Vs. Board of Revenue U.P. at Allahabad & Ors.*** has held that there is no limitation for filing suit under Section 229B of U.P.Z.A. & L.R. Act, the Paragraph No. 6 of the judgment is relevant which is as follows:-

"6. Sri. R.C. Singh submits that the suit under Section 229-B was barred by limitation. In support of this contention he relies upon Section 341 of the U.P. Zamindari Abolition and Land Reforms Act, which provides that the Limitation Act would be applicable to proceedings under the U.P. Zamindari Abolition and Land Reforms Act and limitation in a suit for declaration would be governed by Article 137 of Schedule 1 of the Limitation Act as there is no period prescribed for such a suit under the U.P.Z.A. & L.R. Act. Section 341 itself provides that the provisions of certain Acts including the Limitation Act shall apply to the proceedings under the U.P.Z.A. & L.R. Act unless otherwise provided in the U.P.Z.A. & L.R. Act. Rule 338 of the U.P.Z.A. and L.R. Rules provides that the suits, applications and other proceedings specified in Appendix III shall be instituted within the time specified therein for them respectively. Recourse to the provisions of the Limitation Act would be available only If there is no provision under Rules in respect of the period of limitation for the different classes of suits or proceedings mentioned therein. In Appendix III the period of limitation provided for different classes of suits has been given. As regards suits under Section 229-B column 4, which prescribes the period of limitation for different classes of suit says "none". It would therefore be treated that there is no limitation for filing a suit under Section 229-B. Section 9 of the Civil Procedure Code provides that all suits of civil nature shall be instituted in the civil Court except those, which have been excepted. A suit under Section 229-B falls within the excepted category and such suits even though they involve declaration are suits of a special character. Article 137 of the Limitation Act relied upon by Sri Singh in any case is applicable only to

applications and not to suits and therefore has no play. When the rule making authority has provided different periods of limitation for different classes of suits it would be treated that provisions prescribing period of limitation in the Limitation Act would not be applicable to suits under the U.P.Z.A. & L.R. Act. Section 189 U.P.Z.A. & L.R. Act sets out the circumstances in which the interest of a bhumidar is extinguished. Clauses (a), (aa) and (b) relate to cases where the bhumidar dies leaving no heir, or where he has let out his holding in contravention of the provisions of the Act or where the land is acquired. Sub-section (c) of Section 189 provides that where a bhumidar has lost-possession the bhumidari right would extinguish when the right to recover possession is lost. In Ram Naresh v. Board of Revenue 1985 Rev Dec. 444 relied upon by Sri R.C. Singh it was held that the provisions of Section 27 of the Limitation Act would be attracted to suits instituted under Section 229-B. Section 27 provides that on the determination of the period limited for instituting a suit for possession the right to such property shall be extinguished. The rule is an exception to the general rule that limitation bars the remedy but does not extinguish the right. If, however, a person is in possession his right can not be extinguished unless the case is covered by Clauses (a), (aa) and (b) of Section 189. He can therefore seek a declaration of his right at any point of time. If a person has been dispossessed he would have to institute a suit under Section 129 U.P.Z.A. & L.R. Act. Appendix III provides the period for limitation for filing a suit under Section 209. It would follow therefore that a suit under Section 229-B would be barred by limitation the bhumidar is out of possession and his right to file a suit under Section 209 is barred by limitation. The finding of fact recorded on the question of possession is that the plaintiffs have established their continuous possession over the disputed land. The finding is not shown to be vitiated by any error. As the rights of the plaintiff were never extinguished no question of limitation arises. For the reasons given above the writ petition lacks merit and is dismissed."

17. Considering the entire facts and circumstances, as well as ratio of law laid down by this Court as well as by Apex Court, the judgment passed by Board of Revenue dated 28.12.1988 allowing the second appeal of contesting respondent and dismissing the plaintiff's suit for co-tenancy right for ½ share, cannot be sustained in the eye of law, accordingly, impugned judgment dated 28.12.1988 passed by Board of Revenue, Allahabad (Annexure 5 to the writ petition) is liable to be set aside and the same is hereby set aside.

18. ***The writ petition stands allowed.***

19. The judgment of the First Appellate Court dated 14.10.1977 passed by Additinal Commissioner, Varanasi Division, Varanasi is hereby affirmed.

20. No order as to costs.

(2023) 3 ILRA 1150
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.12.2021

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Writ-C No.9400 of 2021

Smt. Nahida Fatima @ Naheed Fatima
...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Tanzeel Ahmad, Sri Saumitra Dwivedi

Counsel for the Respondents:
C.S.C.

A. Criminal Law - The Arms Act, 1959 - Section 17(3) - Cancellation of Arm Licence - licensing authority may suspend a licence or revoke a licence arm license, if necessary for the *security of the public peace* or *for public safety* - while cancelling a licence, the District Magistrate acts as a quasi-judicial authority therefore the District Magistrate must record the finding as to how and under what circumstance, the possession of arms licence by the petitioner, is detrimental to the public peace or the public security and safety - mere involvement in a criminal case or mere pendency of criminal case or apprehension of abuse of Arms Act, are not sufficient ground for passing of the order of suspension or revocation of licence - 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 (Para 15, 16, 17)

B. Criminal Law - The Arms Act, 1959 - Cancellation of Arm Licence - Petitioner was granted Arms License - she never misused the arm nor was she involved in any offence of criminal nature - An incident of murder took place, in which some of the family members of the petitioner including her husband were implicated - her Arm License was cancelled due to apprehensions of potential misuse by her husband and brother-in-law - subsequently cause for cancellation, ended since the husband of the petitioner was acquitted in the criminal case whereas the brother-in-law was no more - Impugned orders set aside (Para 18, 20)

Allowed. (E-5)

List of Cases cited:

1. Ram Murti Madhukar Vs D. M., Sitapur 1998 (16) LCD-905

2. Ram Karpal Singh Vs Commissioner, Devi Patan Mandal, Gonda & ors. 2006 (24) LCD 114

3. Ram Prasad Vs Commissioner & ors. dated 07.02.2020

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Shri Tanzeel Ahmad, learned counsel for the petitioner, learned Standing Counsel for the State-respondents.

2. The petitioner has preferred the present petition inter-alia with the prayer to quash the order dated 01.11.2019 passed by the Commissioner Bareilly Division Bareilly in Appeal No. 00614 of 2018 filed under Section 18 of the Indian Arms Act, 1959 as well as the order dated 22.03.2018 passed by the District Magistrate, Badaun in Case No. 08 of 2014 under Section 17-(3) of the Act of 1959.

3. Though time was granted to the learned Standing Counsel to file counter affidavit vide order dated 18.03.2021 but till date no counter affidavit has been filed.

4. Today when the matter is taken up, it is argued by the learned Standing Counsel that since pure questions of law is involved in the present case, writ petition could be decided on merits even in the absence of the counter affidavit.

5. Facts in brief as contained in the writ petition are that the petitioner was granted an Arms License in the year 2004 and she never misused the aforesaid arm at any point of time as well as she was never involved in any offence of criminal nature whatsoever. On 03.11.2013 an incident of murder had taken place at Mohalla

Khandsari, Police Station-Kotwali, District-Badaun and in this regard a report was lodged against the unknown persons by one Harish which was registered as Case Crime No. 980 of 2013 under section 452, 302 IPC of Police Station-Kotwali, District-Budaun.

6. During the investigation some of the family members of the petitioner including her husband has been falsely implicated in the said offence. Pursuant to the aforesaid, the petitioner was directed to deposit her fire arm in the police station, which was duly deposited by her on 21.11.2013 . It is further stated that in the Session Trial No. 86 of 2014 arising out of Crime No. 980 of 2013 under Section 452, 302/34 and 302/120-B IPC, the husband of the petitioner has been acquitted by the trial court.

7. In view of the aforesaid, a case was registered against the petitioner under Section 17 (3) of the Arms Act, 1959. Immediately thereafter vide order dated 27.12.2013 the Arms License of the petitioner was suspended and a show cause notice was issued to the petitioner in this regard that why her Arm License should not be cancelled. The petitioner duly submitted her reply / objections on 06.03.2014 to the aforesaid show cause notice. Thereafter upon the aforementioned reply of the petitioner, another documentary rebuttal on behalf of the S.S.P., Badaun through S.H.O., Kotwali, District-Badaun was filed in the Court of District Magistrate on 05.08.2014. Thereafter the fire arm license of the petitioner was cancelled by the District Magistrate, Badaun vide order dated 23.02.2018.

8. Aggrieved against the aforesaid, a statutory appeal was filed by the petitioner before the Commissioner, Bareilly Division, Bareilly as provided under Section 18 of the Act, 1959 being Appeal No. 00614 of 2018. It is argued that various grounds were taken in the appeal but without considering the same, the order dated 01.11.2019 was passed by the Commissioner rejecting the appeal filed by the petitioner. Aggrieved against the aforesaid, the petitioner has preferred the present petition.

9. It is argued by Shri Tanzeel Ahmad, learned counsel for the petitioner that the cause for cancellation of the arm license of the petitioner has now been ended since the husband of the petitioner has been acquitted in the said criminal case whereas the brother-in-law (devar) of the petitioner is also no more. It is further argued that both the orders namely the order passed by the District Magistrate cancelling the arm license of the petitioner as well as the order passed by the Commissioner of the Division rejecting the appeal filed by the petitioner are absolutely illegal and both are liable to be set aside. It is further argued that law is well settled that if some relative of the license holder is involved in any offence, the same cannot be a ground for cancellation of the arm license.

10. On the other hand, it is argued by the learned Standing Counsel that since the family members of the petitioner are involved in criminal cases, license of the petitioner was rightly cancelled. It is further argued that the cogent reasons were given by the authorities while cancelling the license of the petitioner, hence it is argued that the present petition filed by the petitioner is on baseless ground and the same is liable to be dismissed.

11. Heard counsel for the parties and perused the record.

12. It appears from perusal of the record that the arm license of the petitioner

was cancelled by the District Magistrate vide its order dated 22.03.2018, appeal filed against the said order was also rejected vide order dated 01.11.2019 and both orders were passed by the authorities against the petitioner mainly on the ground that the family members of the petitioner are having criminal antecedents.

13. Law in this connection is well settled that arm license cannot be cancelled only on the ground of apprehension. It is also settled law that in case of pendency of the criminal cases arm license cannot be cancelled. A complete procedure in this regard has been provided under Section 17 of the Arms Act, 1959 which reads as follows:-

Section 17 of the Arms Act, 1959, deals with variation, suspension and revocation of the fire arm licence. Section 17 is reproduced 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 therefore 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."

14. A bare reading of Section 17 (3) of the Arms Act makes it evident that the licensing authority may by order in writing suspend a licence for such period as he things fit or revoke a license; (b) if the licencing authority deems it necessary for the security of public peace or for public safety to suspend or revoke the license. These two expressions "Security of public peace" and "for public safety" are of utmost importance. The licensing authority must be satisfied of the existence of these pre conditions."

15. Law in this connection is also well settled as has been held in the series of cases by this Court from time to time. In the case of **Ram Murti Madhukar vs. District Magistrate, Sitapur [1998 (16) LCD-905]**, this Court has held in paragraph no. 8 as under :-

"(8) It is also well settled in law that mere pendency of criminal case or apprehension of abuse of Arms Act, are not sufficient ground for passing of the order of suspension or revocation of licence under Section 17 of the Act. A reference in this regard may be made to the decisions of this Court in Ganesh Chandra Bhatt v. D. M. Almora, AIR 1993 All 291"

16. In the case of **Ram Karpal Singh vs. Commissioner, Devi Patan Mandal, Gonda and Ors. [2006 (24) LCD 114],** this Court has held as following in paragraph nos. 6 and 7, which are being reproduced hereunder:-

"6, Learned counsel for the petitioner had relied upon the two judgments of this Court reported in 2002 ACC; Habib v. State of U.P.

7. Para 3 of the said judgment is reproduced as under:

"Para 3: The question as to whether mere involvement in a criminal case or pendency of a criminal case can be a ground for revocation of the license under Arrns Act, has been deal with by a

Division Bench in this Court reported in Sheo Prasad Misra v. The District Magistrate, Basti and others, wherein the Division Bench relying upon the earlier decision reported in Mai Uddin v. Commissioner, Allahabad, found that mere involvement in criminal case cannot be in any way affect the public security or public interest and the order canceling or revoking the .licence of fire arm has been set aside. The present impugned order also suffers from the same infirmity as was pointed out by the Division Bench in the above mentioned cases. I am in full agreement with the view taken by the Division Bench that these orders cannot be sustained and deserve to be quashed and are hereby quashed."

17. This Court in the case of **Ram Prasad vs. Commissioner and Ors. decided on 07.02.2020** has held as under. Relevant paragraphs of the said judgments i.e. 16, 19, 22, 23, 24, 25, 28, 32 and 36 are being quoted hereunder:-

"16. The matter which requires consideration is, whether on the ground of pendency of the criminal case the petitioner's fire arm licence could be cancelled and his appeal could be dismissed, notwithstanding his acquittal on 17.1.2003. It also requires consideration if the ground in the impugned orders that if the petitioner's fire arm licence remain with the petitioner, it would not be in the public interest and public security, are justified for cancellation and based on substantial material."

19. In Masiuddin Vs. Commissioner, Allahabad Division, Allahabad and another reported in 1972 A.L.J. 573 this Court held in paragraph Nos. 4 and 7 as under:

"4. After a license is granted, the right to hold the license and possess a gun is a valuable individual right in a free country. The security of public peace and public safety is a valuable social interest. Section 17 shows that Parliament had decided that neither of the two valuable interests should unduly impinge on the other Section 17 seeks to establish a fair equilibrium between the two contending interests. It says: Hear the licensee first; and then cancel the license "if necessary for the security of the public peace or for public safety". True, there is no express provision for hearing. But the nature of the right affected, the language of Sec. 17, the grounds for cancellation, the requirement of a reasoned order and the right of appeal plainly implicate a fair hearing procedure. Jai Narain Rai v. District Magistrate, Azamgarh. While cancelling a licence, the District Magistrate acts as a quasi-judicial authority.

7. A license may be cancelled, inter alia on the ground that it is "necessary for the security of the public peace or for public safety" to do so. The District Magistrate has not recorded a finding that it was necessary for the security of the public peace or for public safety to revoke the license. The mere existence of enmity between a licensee and another person would not establish the "necessary' connection with security of public peace or public safety. There should be something more than mere enmity. There should be some evidence of the provocative utterances of the licensee or of his suspicious movements or of his criminal designs and conspiracy in reinforcement of the evidence of enmity. It is not possible to give an exhaustive list of facts and circumstances from which an inference of threat to public security or public peace

may be deduced. The District Magistrate will have to take a decision on the facts of each case. But in the instant case there is nothing in his order to indicate that it was necessary for the security of the public peace or for public safety to cancel the license of the petitioner. Mere enmity is not sufficient."

22. In Chhanga Prasad Sahu Vs. State of U.P. and others reported in 1984 AWC 145 (FB), after noticing the provisions of Section 17 (3) of the Arms Act the Full Bench in paragraph 5 held as follows:

"A perusal of abovementioned provisions indicates that the licensing authority has been given the power to suspend or revoe an arms licence only if any of the conditions mentioned in sub-clauses (a) to (e) of sub-section (3) of Section 17 of Act exists." sub section (5) of Section 17 makes it obligatory upon the licensing authority to, while passing the order revoking/suspending an arms licence, record in writing the reasons therefore and to, on demand, furnish a brief statement thereof to the holder of the license unless it considers that it will not be in the public interest to do so."

In paragraph-9 it has been emphasised as under:-

"it is true that in order to revoke/suspend an arms licence, the licensing authority has necessarily to come to the conclusion that the facts justifying revocation/suspension of licence mentioned in grounds (a) to (e) of section 17 exist"

23. In Ilam Singh v. Commissioner, Meerut Division and others [1987 ALL. L.J. 416] this Court held that under Section 17(3) (b) the licencing authority may suspend or revoke a licence if it becomes necessary for the security of public peace or public safety. In this case no report was lodged against the licensee indicating that he had used the gun in the incident which led to the breach of public peace or public safety. It was held that there must be some positive incident in which the petitioner participated and used his gun which led to breach of public peace or public safety and in the absence of the use of the gun by the licencee against the security of public peace or public safety the licence of the gun could not be suspended or revoked. The relevant paragraphs 4 and 5 of the judgment in Ilam Singh (supra) are being reproduced as under:

"4. Having heard the learned counsel for the petitioner I am of the view that the submissions raised by the learned counsel for the petitioner cannot be said to be without substance. Section 17(3) (b) of the Arms Act enacts that licensing authority may by order in writing suspend a licence or revoke the same if it becomes necessary for the security of public peace or the public safety. When once a person has been granted a licence and he acquires a gun, it becomes one of his properties. In the present case no incident of breach of security of the public peace or public sfety at the behest of the petitioner has been pointed out. Even no report was lodged against the petitioner indicating that he used his gun in the incident which led to the breach of public peace or public safety. Even though some reports might have been lodged but that could not be said to be a sufficient reason to cancel the licence."

5. There must be some positive incident in which the petitioner participated and used his gun which led to

the breach of the public peace or public safety. In the absence of the use of the gun by the petitioner against the security of public peace or public safety the licence of the gun of the petitioner was not liable either to be suspended or revoked. The licensing authority as well as the Commissioner committed errors on the face of the record in cancelling the licence of the gun held by the petitioner in utter disregard of the provisions of Section 17 (3) (b) of the Arms Act. In view of these facts the impugned orders cannot be sustained and deserves to be quashed."

24. In Habib v. State of U.P. and others [2002 (44) ACC 783] this Court held that mere involvement in a criminal case cannot in any way affect the public security or public interest and the order cancelling or revoking licence of fire arm was not justified. Paragraph 3 of this judgment reads as under:

"3. The question as to whether mere involvement in a criminal case or pendency of a criminal case can be a ground for revocation of the licence under Arms Act, has been dealt with by a Division Bench of this court reported in Sheo Prasad Misra Vs. The District Magistrate, Basti and others, wherein the Division Bench relying upon the earlier decision reported in Masi Uddin v. Commissioner, Allahabad, found that mere involvement in criminal case cannot in any way affect the public security or public interest and the order cancelling or revoking the licence of fire arm has been set aside."

25. In Satish Singh v. District Magistrate, Sultanpur 2009 (4) ADJ 33 (LB), this Court elaborately explained what is detrimental to the security of the public peace or public safety and held that mere involvement in criminal case cannot in any way affect the public security or public interest. Paragraphs 6 and 7 of Satish Singh case (supra) are being reproduced as under:

"6. A plain reading of section 17 indicates that the arms licence can be cancelled or suspended on the ground that the licensing authority deems it necessary for security of the public peace or the public safety. In the present case, while passing the impugned order, neither the District Magistrate nor the appellate authority has recorded the finding as to how and under what circumstance, the possession of arms licence by the petitioner, is detrimental to the public peace or the public security and safety. Merely because criminal case is pending more so, does not seem to attract the provisions of section 17 of the Arms Act. To attract the provisions of section 17 of the Arms Act with regard to public peace, security and safety it shall always be incumbent on the authorities to record a finding that how, under what circumstances and what manner, the possession of arms licence shall be detrimental to public peace, safety and security. In absence of such finding merely on the ground that a criminal case is pending without any mitigating circumstances with regard to endanger of public peace, safety and security, the provisions contained under Section 17 of the Arms Act, shall not satisfy.

7. Needless to say that right to life and liberty are guaranteed under Article 21 of the Constitution of India and the arms licences are granted for personal safety and security after due inquiry by the authorities in accordance with the provisions contained in Arms Act, 1959.

The provisions of section 17 of the Arms Act with regard to suspension or cancellation of arms licence cannot be invoked lightly in an arbitrary manner. The provisions contained under Section 17 of the Arms Act should be construed strictly and not liberally. The conditions provided therein, should be satisfied by the authorities before proceeding ahead to cancel or suspend an arms licence. We may take notice of the fact that any reason whatsoever, the crime rate is raising day by day. The Government is not in a position to provide security to each and every person individually. Right to possess arms is statutory right but right to life and liberty is fundamental guaranteed by Article 21 of the Constitution of India. Corollary to it, it is citizen's right to possess firearms for their personal safety to save their family from miscreants. It is often said that ordinarily in a civilised society, only civilised persons require arms licence for their safety and security and not the criminals. Of course, in case the government feels that arms licence are abused for oblique motive or criminal activities, then appropriate measures may be adopted to check such mal-practice. But arms licence should not be suspended in a routine manner mechanically, without application of mind and keeping in view the letter and spirit of Section 17 of the Arms Act."

28. In Thakur Prasad Vs. State of U.P. and others reported 2013(31) LCD 1460 (LB) this Court after referring to the earlier pronouncements in the case of Ram Murli Madhukar Vs. District Magistrate, Sitapur [1998 (16) LCD 905] and Habib Vs. State of U.P., 2002 ACC 783, held in paragraphs 10 and 11 as follows:

"10. "Public peace" or "public safety" do not mean ordinary disturbance of law and order public safety means safety of the public at large and not safety of few persons only and before passing of the order of cancellation of arm license as per Section 17 (3) of the Act the Licensing Authority is under an obligation to apply his mind to the question as to whether there was eminent danger to public peace and safety involved in the case in view of the judgment given by this court in the case of Ram Murli Madhukar v. District Magistrate, Sitapur [1998 916) LCD 905], wherein it has been held that license can not be suspended or revoked on the ground of public interest (Jan-hit) merely on the registration of an F.I.R. and pendency of a criminal case."

11. Further, this Court in the case of Habib v. State of U.P. 2002 ACC 783 held as under:

"The question as to whether mere Involvement in a criminal case or pendency of a criminal case can be a ground for revocation of the licence under Arms Act, has been dealt with by a Division Bench of this Court in Sheo prasad Misra Vs. District Magistrate, Basti and Others, 1978 AWC 122, wherein the Division Bench relying upon the earlier decision in Masi Uddin Vs. Commissioner, Allahabad, 1972 ALJ 573, found that mere involvement in criminal case cannot, in any way, affect the public security or public interest and the order cancelling or revoking the licence of fire arm has been set aside. The present impugned orders also suffer from the same infirmity as was pointed out by the Division Bench in the above mentioned cases. I am in full agreement with the view taken by the Division Bench that these orders cannot be sustained and deserves to be quashed and are hereby quashed.

There is yet another reason that during the pendency of the present writ

petition, the petitioner has been acquitted from the aforesaid criminal case and at present there is neither any case pending, nor any conviction has been attributed to the petitioner, as is evident from Annexure SA-I and II to the supplementary affidavit filed by the petitioner. In this view of the matter, the petitioner is entitled to have the fire-arm licence."

32. In Ghanshyam Gupta v. State of U.P. and others [2016 (34) LCD 3035] this Court has again held that the necessary ingredients to invoke jurisdiction of the licencing authority in terms of Section 17 were clearly lacking and no finding had been returned on the basis of materials produced in that regard by the licencing authority, which must justify passing of the order of cancellation. Paragraph 9 of the said judgment is being quoted as under:

"9. In a recent decision of Lucknow Bench of this court in Surya Narain Mishra v. Stae of U.P. and others, reported in 2015 (7) ADJ 510, similar view has been taken by this Court relying upon subsequent decisions. Para-14 of the judgment is reproduced:

"14. In the case of Raj Kumar Verma v. State of U.P., 2013 (80) ACC 231 this court in paragraph No.3 held as under:-

"The ground for issue of show-cause notice, suspension and ultimately cancellation of the licence is that one and precisely one criminal case was registered against the petitioner. The District Magistrate has also held that the petitioner has been enlarged on bail. He has gone further to observe that if the licence remained intact, the petitioner, may disturb public peace and tranquility. The same findings have been given by the Commissioner, Unmindful of the fact that this Court is repeating the law of the land, but the deaf ears of the administrative officers do not ready to succumb the law of the land. The settled law is that mere involvement in a criminal case without any finding that involvement in such criminal case shall be detrimental to public peace and tranqulity shall not create the ground for the cancellation of Armed Licence. In Ram Suchi v. Commissioner, Devipatan Division reported in 2004 (22) LCD 1643, it was held that this law was relied upon in Balram Singh Vs. Satate of U.P. 2006 (24) LCD 1359. Mere apprehension without substance is simply an opinion which has no legs to stand. Personal whims are not allowed to be reflected while acting as a public servant.

36. In the present case the petitioner's licence was cancelled by the District Magistrate on the ground of pendency of criminal case against him. The petitioner was later on acquitted of the criminal case by order dated 17.1.2003. A perusal of the order of acquittal does not show the use of fire arm. After acquittal the very basis of the order of cancellation vanished. The finding of the District Magistrate as affirmed by the Commissioner, that it was not in the interest of public peace and the public security that the licence remained with the petitioner/licencee, is not based on any evidence/material, except the police reports which in their turn were in view of the pendency of the criminal case against the petitioner. On mere apprehension expressed in the impugned orders that the petitioner would misuse the fire arm and would extend threat to the persons of the weaker section of the society, the arm licence could not be cancelled."

18. On the basis of the aforesaid judgments as reproduced herein-above, the Court is of the opinion that the case of the present petitioner is on a much better footing, since in the present case no criminal case whatsoever has been lodged against the petitioner/ arm license holder at any point of time and only on the basis of apprehension that the fire arm could be used by her family members, the Arm License of the petitioner was cancelled. It is further clear from record that the license of the petitioner was cancelled on the sole ground of apprehension that the aforesaid Arm License could be misused by the husband and brother-in-law of the petitioner as stated above and as per record, the husband has already been acquitted in the criminal case itself, insofar as the brother-in-law (devar) is concerned, he is no more and hence the sole ground of cancellation, i.e., apprehension cannot stand firm.

19. In this view of the matter, the Court is of the firm opinion that the petitioner has a prima facie case for the grant of reliefs as prayed by her in the present writ petition.

20. In view of the facts as stated above, the order dated 01.11.2019 passed by the Commissioner Bareilly Division Bareilly in Appeal No. 00614 of 2018 filed under Section 18 of the Indian Arms Act, 1959 as well as the order dated 22.03.2018 passed by the District Magistrate, Badaun in Case No. 08 of 2014 under Section 17-(3) of the Act of 1959 are liable to be set aside and are hereby set aside.

21. Writ petition stands allowed.

22. No order as to costs.

(2023) 3 ILRA 1160
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2022

BEFORE

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

Writ-C No. 19960 of 2022

Prem Pal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashish Kumar Singh

Counsel for the Respondents:
C.S.C., Ms. Meenakshi Singh (State Law Officer), Sri Anadi Krishna Narayana

A. Civil Law - Interpretation of Statues - It is a cardinal principle of construction of a statute that when the language of the statute is plain and unambiguous, then the court must give effect to the words used in the statute - However, if on going through the plain meaning of the language of statutes, it leads to anomalies, injustices and absurdities, then the court may look into the purpose for which the statute has been brought and would try to give a meaning, which would adhere to the purpose of the statute. (Para 5)

B. Civil Law - Land Acquisition - The Land Acquisition Act, 1894 - Section 28A - Re-determination of the amount of compensation on the basis of the award of the Court - Where the court allows any amount of compensation in excess of the amount awarded by the collector u/s 11, the persons interested in all the other land covered by the same notification u/s 4(1), notwithstanding that they *had not made an application to the Collector u/s 18*, by application to the Collector, require that the amount of compensation payable to

them may be re-determined on the basis of the amount of compensation awarded by the court - interpretation of expression '*had not made an application to the Collector u/s 18*' - The expression "did not make an application", mean, did not make an effective application, which had been entertained by making the reference and the reference was answered - once the Collector entertains an application objecting to the award and makes a reference u/s 18, and after the reference is made and answered by the Court, that the right u/s 28A to seek re-determination based on an award passed by the Court at the instance of another landholder would be extinguished - it is not permissible for a landowner to make a reference and get it answered and then subsequently make another application when some other person gets the reference answered and obtains a higher amount - however, there is no reference made at the instance of a person whose case is withheld by the Collector on the ground of limitation or otherwise not adjudicated upon by the Court on merits (Para 6)

Allowed. (E-5)

List of Cases cited:

1. U.O.I. & anr. Vs Hansoli Devi and others, (2002) 7 SCC 273

2. Aswini Kumar Ghose Vs Arabinda Bose AIR 1952 SC 369 : 1953 SCR 1

3. Quebec Railway, Light Heat & Power Co. Ltd. Vs Vandry AIR 1920 PC 181

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

1. This writ petition is directed against an order passed by the Special Land Acquisition Officer (Joint Organization), Aligarh dated 30.04.2022, rejecting the petitioner's application under Section 28A of the Land Acquisition Act, 1894 (for short, "the Act') as not maintainable.

2. The short facts giving rise to the petition are that the petitioner, Prem Pal Singh moved an application under Section 28A of the Act on 04.08.1999 saying that his land comprising Khasra No. 404/1, measuring 1.533 hectares, situate in the Revenue Village Devsaini, Pargana and Tehsil Koil, District Aligarh had been acquired by the State for planned industrial development by the Uttar Pradesh State Industrial Development Corporation Limited, Kanpur. L.A.R. No. 42 of 1996, Mohd. Salim vs. State of U.P. and others, being a reference made by the Collector on the basis of objections to the award by the ousted landholder in that case, was allowed and compensation enhanced to ₹80/- per square yard vide award dated 22.05.1999. It was prayed that the petitioner's land was covered by the same notification and, therefore, he was entitled to a re-determination of the compensation awarded to him in accordance with the award made by the Court.

3. The Special Land Acquisition Officer found on facts that the petitioner had said in Paragraph No.6 of his application under Section 28A of the Act that against the award passed by the Special Land Acquisition Officer, he had preferred objections under Section 18 of the Act, submitting them for the purpose of a reference to be made to the Court but his objections were not referred to the District Judge, but were rejected as time barred. The Special Land Acquisition Officer construed the provisions of Section 28A of the Act to mean that a person, whose land was acquired under the provisions of the Act and who is aggrieved against the Collector's award, may make an application

for re-determination of compensation if he has not made an application under Section 18 for a reference to the Court against the award. It has been opined that since the petitioner had admittedly made an application, seeking a reference against the Special Land Acquisition Officer's award to the Court, which was withheld on the ground of limitation, his application under Section 28A of the Act was not maintainable.

4. Apparently, the understanding of the Special Land Acquisition Officer about the scope of a person aggrieved by the award of compensation made by the Collector is not correct. The Special Land Acquisition Officer has thought that the moment a person "aggrieved' by the Collector/ Special Land Acquisition Officer's award, moves an application to the Collector under Section 18 of the Act seeking a reference, the right to re-determination of the compensation under Section 28A, based on the Court's award in another case arising out of the same acquisition, is extinguished.

5. To the understanding of the Special Land Acquisition Officer, there is no distinction whether the application under Section 18 of the Act preferred by a person aggrieved by the Collector's award is withheld by the Collector and never entertained, and a case where it is entertained with a reference made to the Court that is answered. In either case, the Special Land Acquisition Officer seems to think that an application under Section 28A of the Act, based on an award of the Court made in the case of another landholder covered by the same notification for re-determination under Section 28A of the Act, would not be maintainable.

6. As already remarked, the construction placed by the Special Land Acquisition Officer upon the scope of the right under Section 28A of the Act is manifestly illegal, inasmuch as unless the Collector entertains an application objecting to the Collector's award or the Special Land Acquisition Officer's award and makes a reference under Section 18, there is no reference under Section 18 of the Act at all. It is only after a reference is made and answered by the Court, that the right under Section 28A to seek re-determination based on an award passed by the Court at the instance of another landholder in a reference under Section 18 would be extinguished. The right under Section 28A of the Act can logically not be extinguished by the petitioner making an unsuccessful attempt to get a reference made to the Court. In the latter case, there is no reference made at the instance of a person whose case is withheld by the Collector on the ground of limitation or otherwise not adjudicated upon by the Court under Section 18 on merits. This question has been authoritatively considered and answered by the Constitution Bench of the Supreme Court in **Union of India and another v. Hansoli Devi and others, (2002) 7 SCC 273**, where it has been held:

9. Before we embark upon an inquiry as to what would be the correct interpretation of Section 28-A, we think it appropriate to bear in mind certain basic principles of interpretation of a statute. The rule stated by Tindal, C.J. in Sussex Peerage case [(1844) 11 Cl & Fin 85 : 8 ER 1034] still holds the field. The aforesaid rule is to the effect : (ER p. 1057)

"If the words of the statute are in themselves precise and unambiguous, then

no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver."

It is a cardinal principle of construction of a statute that when the language of the statute is plain and unambiguous, then the court must give effect to the words used in the statute and it would not be open to the courts to adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In Kirkness v. John Hudson & Co. Ltd. [(1955) 2 All ER 345 : 1955 AC 696 : (1955) 2 WLR 1135] Lord Reid pointed out as to what is the meaning of "ambiguous" and held that : (All ER p. 366 C-D)

"A provision is not ambiguous merely because it contains a word which in different contexts is capable of different meanings. It would be hard to find anywhere a sentence of any length which does not contain such a word. A provision is, in my judgment, ambiguous only if it contains a word or phrase which in that particular context is capable of having more than one meaning."

It is no doubt true that if on going through the plain meaning of the language of statutes, it leads to anomalies, injustices and absurdities, then the court may look into the purpose for which the statute has been brought and would try to give a meaning, which would adhere to the purpose of the statute. Patanjali Sastri, C.J. in the case of Aswini Kumar Ghose v. Arabinda Bose [AIR 1952 SC 369 : 1953 SCR 1] had held that it is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute. In Quebec Railway, Light Heat & Power Co. Ltd. v. Vandry [AIR 1920 PC 181] it had been observed that the legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the legislature will not be accepted except for compelling reasons. Similarly, it is not permissible to add words to a statute which are not there unless on a literal construction being given a part of the statute becomes meaningless. But before any words are read to repair an omission in the Act, it should be possible to state with certainty that these words would have been inserted by the draftsman and approved by the legislature had their attention been drawn to the omission before the Bill had passed into a law. At times, the intention of the legislature is found to be clear but the unskilfulness of the draftsman in introducing certain words in the statute results in apparent ineffectiveness of the language and in such a situation, it may be permissible for the court to reject the surplus words, so as to make the statute effective. Bearing in mind the aforesaid principle, let us now examine the provisions of Section 28-A of the Act, to answer the questions referred to us by the Bench of two learned Judges. It is no doubt true that the object of Section 28-A of the Act was to confer a right of making a reference, (sic on one) who might have not made a reference earlier under Section 18 and, therefore, ordinarily when a person makes a reference under Section 18 but that was dismissed on the ground of delay, he would not get the right of Section 28-A of the Land Acquisition Act when some other person makes a reference and the reference is answered. But Parliament having enacted Section 28-A, as a beneficial provision, it

would cause great injustice if a literal interpretation is given to the expression "had not made an application to the Collector under Section 18" in Section 28-A of the Act. The aforesaid expression would mean that if the landowner has made an application for reference under Section 18 and that reference is entertained and answered. In other words, it may not be permissible for a landowner to make a reference and get it answered and then subsequently make another application when some other person gets the reference answered and obtains a higher amount. In fact in Pradeep Kumari case [(1995) 2 SCC 736] the three learned Judges, while enumerating the conditions to be satisfied, whereafter an application under Section 28-A can be moved, had categorically stated (SCC p. 743, para 10) "the person moving the application did not make an application to the Collector under Section 18". The expression "did not make an application", as observed by this Court, would mean, did not make an effective application which had been entertained by making the reference and the reference was answered. When an application under Section 18 is not entertained on the ground of limitation, the same not fructifying into any reference, then that would not tantamount to an effective application and consequently the rights of such applicant emanating from some other reference being answered to move an application under Section 28-A cannot be denied. We, accordingly answer Question 1(a) by holding that the dismissal of an application seeking reference under Section 18 on the ground of delay would tantamount to not filing an application within the meaning of Section 28-A of the Land Acquisition Act, 1894.

(emphasis by Court)

7. In the present case, since on the petitioner's application under Section 18 of the Act, no reference was made by the Special Land Acquisition Officer, which was declined on the ground of limitation, it cannot be said that there was any reference made at the petitioner's instance that was decided by the Court so as to curtail the petitioner's right to take advantage of the remedy under Section 28A of the Act.

8. This Court is, therefore, of the opinion that the impugned order declining to re-determine the compensation payable to the petitioner on an application filed under Section 28A of the Act is manifestly illegal and based on a flawed understanding of the provisions of Section 28A. The petitioner's application under Section 28A is competent and maintainable.

9. In the result, this writ petition succeeds and is allowed. The impugned order dated 30.04.2022 passed by the Special Land Acquisition Officer (Joint Organization), Aligarh (Annexure No.1 to the writ petition) is hereby quashed. In consequence, the petitioner's application under Section 28A of the Act is restored to file, which the Special Land Acquisition Officer shall consider and decide by a reasoned and speaking order after hearing the parties concerned expeditiously.

(2023) 3 ILRA 1164
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.02.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ-C No. 25126 of 2012

M/s Shiva Enterprises & Anr. ...Petitioners
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioners:
Sri R.D. Tiwari, Sri Arun Kumar Singh, Sri M.D. Singh Shekhar (Sr. Adv.), Sri M.C. Chaturvedi (Sr. Adv.)

Counsel for the Respondents:
A.S.G.I., Ms. S.C., Sudha Pandey, Sri Narendra Kumar Pandey

A. The Indian Partnership Act, 1932 – Section 45 - liability for acts of partners done after dissolution - If the firm has been dissolved but no notice to the creditors or public notice of such a dissolution is given, the act of a partner shall bind the other partners even after dissolution, as if, the act was done before the dissolution - thus, till public notice of the dissolution is given, other partners will continue to remain liable for the act of one partner, as if, such an act was done in a continuing partnership - Public notice would include personal information or knowledge of such dissolution to the third party - The third party cannot take a plea of lack of information for want of public notice, where, the third party was informed or had knowledge of the dissolution - only persons who were not aware of the retirement of a particular partner could take advantage of Section 32(3) or Section 45 (Para 13, 16, 17)

B. Partnership firm M/s Maa Gayatri Construction, was dissolved and a proprietorship firm with the same name was reconstituted with Ranveer Singh as the sole partner - second petitioner ceased to be the partner of M/s Maa Gayatri Construction upon dissolution - Both the partners informed the respondent Bank of the dissolution of the firm - Ranveer Singh deposited forged cheque in the account of his firm on account of which Bank suffered loss due to the fraud - Bank seized the bank account of the second petitioner to satisfy the loss caused to the Bank by the sole proprietor of M/s Maa Gayatri Construction for the reason that second petitioner earlier was a partner of the firm M/s Maa Gayatri Construction - Held - As the bank had notice/information of the dissolution of the firm, therefore the outgoing partner/ second petitioner would not be liable for the fraud committed by the reconstituted proprietorship firm, from the date of notice/ information to the bank in view of Section 45 of the Act - In view of Section 45 of the Act the second petitioner would not be liable for any act of the proprietorship firm after the dissolution of the earlier partnership firm (Para 24, 30)

Allowed. (E-5)

List of Cases cited:

1. Malayandi Vs Narayanan 36 IC 225

2. Muthuswami Vs Sankaralingam 2 LW 823

3. Ratanji Bhagwanji & Co. Vs Prem Shanker AIR 1938 All 619

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

1. Heard Sri M.D. Singh Shekhar and Sri M.C. Chaturvedi, learned Senior Counsels assisted by Shri R.D. Tiwari and Shri Arun Kumar, learned counsels for the petitioners, and Sri Narendra Kumar Pandey and Ms. Sudha Pandey, learned counsel for respondent Bank.

2. The first petitioner i.e. M/s Shiva Enterprises, is a proprietorship firm, second petitioner is the proprietor of the firm. The firm is engaged in the business of construction. Initially, petitioner-firm was a partnership firm which was subsequently dissolved in 2008, thereafter, became a sole proprietorship firm. The firm has a current account, with overdraft facility, being Account No. 1886009300021932, with Panjab National Bank, Branch Kidwai Nagar, Kanpur Nagar.

3. On 9 July 2009, partnership firm in the name and style M/s Maa Gayatri Construction was constituted, wherein, one Ranveer Singh and second petitioner were partners. The firm was having facility of current account being Account No. 1886002100023313 in the same branch of the respondent-bank. On 11 July 2011, one of the partner of M/s Maa Gayatri Construction filed an application with the fourth respondent stating therein that the partnership firm has since been dissolved and second partner i.e. second petitioner, henceforth, has no concern with the affairs of the firm. In other words, Ranveer Singh informed the Bank that the firm (M/s Maa Gayatri Construction) has been reconstituted as proprietorship firm of the same name and Ranveer Singh is the sole proprietor. Thereafter, on 12 July 2011, second petitioner being the outgoing partner of the dissolved firm filed an application before the fourth respondent informing that he is no more the partner of M/s Maa Gayatri Construction, with a further request that the account of the firm i.e. A/c No. 1886002100023313, having "zero' balance, be closed upon dissolution of the firm. The statement of account dated 4 July 2011 has been filed (at Annexure-5) to the writ petition to substantiate that on the date when the application was moved by the second petitioner informing the fourth respondent that second petitioner is no longer partner, the outstanding balance in the aforenoted account of the dissolved firm was "zero'.

4. It appears that on 21 July 2011, Ranveer Singh, sole proprietor of the reconstituted firm, i.e., M/s Maa Gayatri Construction placed a cheque, bearing No. FAQ 237452 dated 20 July 2011, for an amount at Rs.55,11,000/- in the account of the dissolved firm (A/c No. 1886002100023313). The amount was credited in the bank account which was later transferred by Ranveer Singh to one Prashant Shukla having account in Indus Bank, Swaroop Nagar, Kanpur Nagar, the deposited money was subsequently withdrawn by Prashant Shukla. It subsequently surfaced that the aforenoted amount at Rs.55,11,000/- was debited from the account of Meerut Institute of Engineering and Technology (A/c No. 2159000100049043). On receiving telephonic information from Chief Manager, Punjab National Bank, Branch Sports Complex, Meerut, that the original Cheque No. FAQ 237452 is with the issuing party, the fourth respondent lodged an FIR being Case Crime No. 676 of 2011, under Sections 419, 420 IPC, Police Station Naubasta, District Kanpur Nagar, alleging the fraud. In other words, the cheque deposited by Ranveer Singh in the account of his firm (M/s Maa Gayatri Construction) was forged and manufactured document. The Bank suffered loss due to the fraud.

5. During investigation, name of Ranveer Singh, Arvind Verma and Adhyant Tiwari surfaced, subsequently, they came to be arrested. Prashant Shukla was absconding. The charge-sheet was submitted against the accused persons, including, Ranveer Singh, sole proprietor of M/s Maa Gayatri Construction on 11 September 2011. The accused including Ranveer Singh came to be convicted under Sections 420, 467, 468, 471 read with 120-B IPC, Police Station Naubasta, District Kanpur Nagar, and sentenced to 5 years simple imprisonment and fine at Rs.10,000/- each, by the Additional Chief Metropolitan Magistrate-I, Kanpur Nagar, vide order dated 11 December 2017, in Criminal Case No. 6350 of 2011, State vs. Ranveer Singh and others.

6. It is admitted that second petitioner was neither named in the FIR, nor, was he charge-sheeted. Application under Section 319 of the Code of Criminal Procedure, 19731, was filed by the prosecution during trial seeking to summon the second petitioner to face trial along with other co-accused. The application was rejected. The order was not challenged, consequently, attained finality.

7. In the intervening period, the fourth respondent seized the bank account of M/s Shiva Enterprises of the second petitioner to satisfy the loss caused to the Bank by the sole proprietor of M/s Maa Gayatri Construction. Probably for the reason that second petitioner earlier was a partner of the firm M/s Maa Gayatri Construction. The second petitioner, thereafter, made several representations to the bank to permit the petitioner to operate the bank account of his firm M/s Shiva Enterprises, but in vain. It is submitted that the respondent-bank did not respond to the applications, consequently, petitioner was not permitted to operate the bank account (A/c No. 1886009300021932), thereafter, on 21 December 2012, the fourth respondent seized the Fixed Deposit Receipts2 of the second petitioner, which had no concern with the account and the affairs of M/s Maa Gayatri Construction. It is submitted that seizure order was passed behind the back of the petitioner without affording an opportunity of hearing to the petitioner.

8. Petitioners have challenged the seizure order dated 21 December 2012, through an amendment application, and the order dated 31 October 2011, directing the second petitioner being jointly and severally liable to make good the loss caused to the bank, so as to enable the bank to permit the second petitioner to operate the bank account of M/s Shiva Enterprises.

9. In the afore-noted factual backdrop, the short question that arises for determination is as to whether the respondent bank was justified in seizing the bank account and F.D.Rs. of the petitioner firm (M/s Shiva Enterprises) to satisfy the loss caused to the bank by a third firm (M/s Maa Gayatri Construction) after the petitioner ceased to be a partner.

10. The facts, inter se, parties are not in dispute.

11. The Indian Partnership Act, 19323, defines dissolution of firm and liability for acts of partners done after dissolution. Section 39 & 40 is extracted:

"39. Dissolution of a firm.-- The dissolution of a partnership between all the partners of a firm is called the "dissolution of the firm'.

40. Dissolution by agreement.-- A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners."

12. As per the provisions of the Act, dissolution of the firm can be brought about on consent of the partners or by an agreement. Notwithstanding the dissolution of a firm the partners continue to be liable as such to third parties of any act done by any of them before the dissolution. A partner who retires from the firm is not liable to third parties for the acts done by any of the partners of a firm. After dissolution of a firm, partners are bound during the winding up of the firm to complete the transactions begun but unfinished.

13. If the firm has been dissolved but no notice to the creditors or public notice of such a dissolution is given, the act of a partner shall bind the other partners even after dissolution, as if, the act was done before the dissolution.

14. In case of dissolution, after the notice to the creditors or the public notice of the dissolution is given the acknowledgement given by one partner cannot bind the other partners. In other words, after the dissolution of the firm the outgoing partner would not be liable either to a third party or upon reconstitution of the firm for the act of the firm/partner until public notice is given to the creditor.

15. Section 45 of the Act provides for the liability of acts of partners after dissolution. Section 45 is extracted:

"45. Liability for acts of partners done after dissolution.--

(1) Notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm, if done before the dissolution, until public notice is given of the dissolution :

Provided that the estate of a partner who dies, or who is adjudicated an insolvent, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable under this section for acts done after the date on which he ceases to be a partner.

(2) Notices under sub-section (1) may be given by any partner."

16. As per Section 45, it therefore follows, that even after the dissolution of a firm, partners continue to be liable as such to third parties for any act done by them which would have been an act of the firm if done before the dissolution until public notice is given of the dissolution. Thus, till the time public notice of the dissolution is given, other partners will continue to remain liable for the act of one partner, as if, such an act was done in a continuing partnership. Thus the principle of presumed continuance of "mutual agency" underlines the rule which is subject to the exception provided in the proviso to Section 45. However, in case the creditor had notice of dissolution of the partnership that would not bind the other partner. **(Refer: Malayandi v. Narayanan4, and Muthuswami v. Sankaralingam5)**

17. Section 45, therefore, mandates that notwithstanding the dissolution of the firm, the partners continue to be liable to third party for any act done by any of the partners until notice is given of the dissolution. Public notice would include personal information or knowledge of such dissolution to the third party. The third party cannot take a plea of lack of information for want of public notice, where, the third party was informed or had knowledge of the dissolution.

18. In the given facts at hand, M/s Maa Gayatri Construction, a partnership firm came to be dissolved as agreed between the partners and a proprietorship firm with the same name was immediately thereafter reconstituted with Ranveer Singh as the sole partner. The second partner i.e. the second petitioner ceased to be the partner of of M/s Maa Gayatri Construction upon dissolution. Both the partners informed the respondent-Bank of the dissolution of the firm and its subsequent reconstitution in the same name. The

relevant documents have been brought on record. In view of Section 45 of the Act the second petitioner would not be liable for any act of the proprietorship firm after the dissolution of the earlier partnership firm from the date of notice/ information to the bank.

19. The stand of the respondent-bank in the counter affidavit is that the bank was not informed of the dissolution of the firm, consequently, the second petitioner would "jointly and severally' be liable for the fraud and loss caused to the bank by the first partner i.e. Ranveer Singh. The bank, therefore, was justified in seizing and freezing the bank account/F.D.Rs. of M/s Shiva Enterprises for the loss caused by the erstwhile partner of M/s Maa Gayatri Construction.

20. The term or phrase, "jointly and severally', is a legal term used to describe a partnership whereby each party or member holds equal responsibility for liability. A common term for "jointly and severally' is "joint and several liability'. In a legally binding document, the term jointly and severally clarifies the responsibility that is shared by each party to an agreement. Essentially, it states that all of those named are obligated to perform all of the actions required under the agreement. For example, if a bank lends Rs.100,000 to two people jointly and severally, both of those people are equally responsible for making sure that the total amount of the loan is repaid to the bank. If the loan is in default, the bank may choose to pursue either for repayment of the entire outstanding balance. In such cases, the person who is forced to repay the loan will have same legal recourse against the other person named in the agreement, but only after the bank is repaid in full.

21. In this backdrop, the question that arises for determination is as to whether the second petitioner would be held "jointly and severally' liable for the fraud committed by Ranveer Singh, sole partner of the reconstituted proprietorship firm or in the alternative as to whether the bank had notice/information of the dissolution of the firm.

22. The partnership firm i.e. M/s Maa Gayatri Constructions came to be reconstituted on 10 July 2011. On 11 July 2011, an application was filed before the fourth respondent informing that the second partner i.e. second petitioner is no longer the partner and Ranveer Singh is the sole proprietor of the reconstituted firm by the same name. The fraud was committed by Ranveer Singh, thereafter, on 21 July 2011 i.e. eleven days after the dissolution of the partnership firm. On 22 July 2011, an FIR came to be lodged by the bank against one Prashant Shukla. The second petitioner was not named in the F.I.R.

23. The respondent-Bank in para 25 and 26 of the counter affidavit, has categorically pleaded that dissolution of the partnership firm M/s Maa Gayatri Constructions was neither served upon the respondent-bank, nor, the same is on the bank's record. It has been denied that the alleged communication dated 11 July 2011 and 12 July 2011, written by Ranveer Singh, and the second petitioner respectively was received with the bank.

24. The "act of a firm' is an act omission of the partner and binds the other partner(s) of the firm. In other words, a partner commits fraud and thereby causes loss to the bank, the partners would be liable to make good the loss caused to the bank under the principle "jointly and severally'. The bank in that event would be justified in seizing the bank account/FDRs

of the other partners of the firm to satisfy its loss. But in the given facts of the case, it would be otherwise if the bank had notice/information of the dissolution of the firm. In that event the outgoing partner would not be liable for the fraud committed by the reconstituted proprietorship firm in view of Section 45 of the Act.

25. The petitioner has taken a categorical stand that the bank was informed of the dissolution of the partnership firm and the reconstitution of proprietorship firm with the same name and title. The second petitioner ceased to be the partner. The fraud was committed with the bank several days thereafter. It is not the case of the bank that after dissolution of the firm the second petitioner continued to act or present himself as a partner of the dissolved firm. Further, it is not denied by the bank that the then officers of the bank were not aware of the dissolution/reconstitution of the firm. A feeble stand taken by the bank is that they have no information of dissolution or reconstitution of the firm. The affidavit has been sworn by the present officer of the bank on personal knowledge. It is to be noted that it is not the affidavit of the then officer of the bank. Further, the stand of the bank cannot be taken on face value for the reason that fraud was committed immediately after dissolution of the firm. The balance in the bank account of the firm on the date of dissolution admittedly was "zero'. There was no occasion for the outgoing partner, not informing about his status that he ceased to be the partner. The involvement of the bank officials in commission of the fraud cannot be ruled out in view of the trial court judgment. All the accused came to be convicted in the criminal trial. It appears that the bank in order to protect and cover-up the acts of its officer seized the bank account and FDRs of the second petitioner in retaliation. It is not the case of the bank that the then officers (on date of dissolution of the firm) had no knowledge, and/or, were not aware of the dissolution of the firm and reconstitution of the proprietorship firm by the same name.

26. It is admitted by the learned counsel for the respondents that para-25, 26 of the counter affidavit has been sworn by the present Senior Manager, Punjab National Bank, Kanpur, on personal knowledge, and not on the basis of record.

27. In ***Ratanji Bhagwanji & Co. v. Prem Shanker6***, Court, recognized that a retiring/outgoing partner could escape liability in respect of transactions entered into by the continuing partners after his retirement if the third party was aware that the former had ceased to be a partner of the firm. In the opinion of the court the proviso to Section 32(3) and the corresponding provision in Section 45, with its proviso indicate beyond doubt, that only persons who were not aware of the retirement of a particular partner could take advantage of Section 32(3) or Section 45.

28. Public notice as contemplated under Section 63 and Section 72, is intended only to serve a purpose, namely, to bring home to the persons concerned the fact of retirement. That purpose will undoubtedly be served in a better way by personal or actual notice. To contend that actual notice cannot take the place of the public notice is to miss the substance of the matter and argue counter to the very principle on which the retiring/outgoing partner's liability is based.

29. The transactions pertaining to the partnership firm came to an end with its

dissolution. The forming of proprietorship firm was in the same name but was a different and distinct entity. There was neither the extension, nor, the renewal of the partnership. The proprietorship was a unilateral act on the part of its proprietor i.e. Ranveer Singh. The second petitioner had no role in the constitution of the proprietorship firm in the same name.

30. The public notice mandated under Section 45, as noted herein above, would include personal notice to the bank with regard to the dissolution of the partnership firm and reconstitution of proprietorship firm with the same name. The respondent-bank has not denied that their officers at the relevant time had no knowledge or information of the dissolution, rather, a vague stand has been taken that the documents with regard to constitution of the partnership firm and the notice served upon the bank is not available on record. This is not sufficient to bind the outgoing partner for the fraudulent act of the proprietorship firm. Petitioner cannot be bound for the loss for the reason that the fraudulent act was committed after dissolution of the firm and after due information to the respondent-bank. There is no reason to disbelieve that the second petitioner had not given information to the bank for the reason that he was the outgoing partner and would not entail any liability upon himself.

31. Further it cannot be ruled out that the officers of the bank were not involved in the fraud by clearing the fake cheque. Merely because they were not charge sheeted, would not mean that the then officials of the bank were not in complicity with Ranveer Singh in commission of the fraud. The trial court has made an observation that the officers of the bank were negligent in clearing the fake cheque. The second petitioner was neither named, nor, charge-sheeted. In any case, the trial court judgement would not have a bearing on the rights/liability of the parties for the loss, including, contract made with the bank. It is not in dispute that the fraud was committed after the dissolution of the partnership firm. The denial of the notice/information by the bank is not emphatic and not by the then officer. The present officers of the bank (and not the then officer) has sworn the paragraphs on personal knowledge. At the most, it can be inferred that the communications by the petitioner and Ranveer Singh is not available in record of the bank, but that would certainly not mean or imply that the then officers had no information/knowledge of the dissolution of the firm.

32. In writ jurisdiction, the wit petition is decided on pleadings, affidavits and material placed on record by the respective parties. Having regard to the admitted facts and the stand taken by the bank, the scale of justice considerably tilts in favour of the petitioners. In the circumstances the writ petition is allowed.

33. The impugned order/ communications are accordingly quashed.

34. The respondent-bank is directed to release the bank account, F.D.Rs. and any other security asset, seized of the petitioners forthwith from the date of service of this order.

35. The petitioners shall be entitled to interest as admissible on the deposits/F.D.Rs. due from time to time till the date of release of the bank account/F.D.Rs. etc.

36. It is clarified that no other point or ground was pressed by the learned counsel for the respective parties.

37. This order, however, shall not preclude the respondent bank from taking recourse before the appropriate forum/court for recovery of its loss as per law, if so advised.

(2023) 3 ILRA 1172
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.02.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Writ-C No.46905 of 2000

Shiv Gopal Gupta ...Petitioner
Versus
Additional Collector Finance & Revenue, Kanpur Nagar & Ors. ...Respondent

Counsel for the Petitioner:
Sri A.K. Sachan

Counsel for the Respondent:
C.S.C.

Civil Law - Illegal Occupation of Gaon Sabha Property - U.P. Zamindari Abolition and Land Reforms Act, 1950 - Section 122-B- there cannot be adverse possession of any Gaon Sabaha land - no one can be allowed to take illegal possession of the Gaon Sabha land and if any one makes such an attempt, the State should stop - recovery of the amount of compensation - U.P. Zamindari Abolition and Land Reforms Rules, 1952, 115F - All damages ordered to be recovered and expenses incurred in the execution of the orders of the Collector shall be realised as arrears of land revenue and credited to the Consolidated Gaon Fund - If the damage or loss caused through misappropriation is of such a nature as is not capable of being repaired or made good, the Collector shall assess the amount of damage or loss in terms of money at the prevailing market rate in the locality - In case of wrongful occupation of land, the damage caused to the Gaon Sabha, shall be assessed for each year of such wrongful occupation or any part thereof at 100 times the amount of rent computed at the sanctioned hereditary rates applicable to the plots concerned - In case the occupant of land continued to remain in such wrongful occupation, he shall be further liable to pay one-eighth of the damages so assessed for every month of the continued occupation after the date of the order - In the instant petitioner illegally occupied 0.019 hectare of Chak road and merged it with his plot number 461 – Revenue Authorties directed to impose the amount of compensation as per Rule 115 (E) and (F) of Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952, and the petitioner directed to pay it within thirty days

Dismissed. (E-5)

List of Cases cited:

1. St. of U.P. Vs Rajaram 1983 Revenue Decision 351

2. Chob Singh & anr. Vs St. Of U.P & ors. (2000) REVDEC 233

3. Suraj Bali Vs Gaon Sabha 1982 AWC (R) 149

4. Sripati Vs Gaon Sabha 1004(24) ALR

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

1. याचिकाकर्ता के विद्वान अधिवक्ता श्री ए. के. सचान एवम् राज्य की तरफ से विद्वान अतिरिक्त मुख्य स्थायी अधिवक्ता श्री जितेंद्र नारायण राय को ध्यानपूर्वक सुना गया तथा पत्रावली का परिशीलन किया गया।

2. यह दीवानी रिट याचिका उत्तरदाता सं० 2 अपर तहसीलदार कानपुर नगर के पास दिनांकः 10.1.2000 तथा

निगरानी न्यायालय अपर जिलाधिकारी वित्त एवं राजस्व कानपुर नगर उत्तरदाता सं० 1 के द्वारा पारित आदेश दिनांक 31 जुलाई 2000 के विरुद्ध प्रस्तुत की गयी है।

3. संक्षेप में प्रकरण के तथ्य यह है कि याचिकाकर्ता को नोटिस संलग्नक 1 फार्म 49 के दिनांक 6.4.1993 को यह आरोप लगाते हुए प्रेषित किया कि उसने गाटा सं0 461/1390 क्षेत्रफल 0.031 हेक्टेयर गांव सभा सोना की भूमि पर अतिक्रमण कर लिया है। याचिकाकर्ता ने उक्त नोटिस के विरुद्ध आपत्ति संलग्नक 2 प्रस्तुत किया कि अतिक्रमण उसने नहीं किया वरन् श्रीमती मुन्नी देवी पत्नी प्रताप सिंह ने किया है। तदुपरान्त याचिकाकर्ता द्वारा साक्ष्य प्रस्तुत किया गया कि विचारण न्यायालय ने एकपक्षीय सर्वे आख्या दिनांकित 3 जनवरी 1993 पर विश्वास किया जिसमें बिना निर्धारित बिन्दु लिए ही यह अवधारित किया गया कि विवादित भूमि गाटा सं0 461/1390 में पड़ती है। तहसीलदार ने याचिकाकर्ता के विरुद्ध बेदखली एवं 50 रुपये हर्जाने का आदेश पारित किया जो संलग्नक 3 है।

4. उक्त आदेश के विरुद्ध याचिकाकर्ता ने निगरानी सं० 31/1994 प्रस्तुत किया जिसमें उभय पक्षों की उपस्थिति में पुनः सर्वे करने का आदेश दिनांक 31 जनवरी 1995 को पारित किया गया। उक्त आदेश संलग्नक 4 है। याची के अनुसार उप-तहसीलदार ने 4 वर्ष के उपरान्त बिना सर्वे किये हुए दिनांक 9.12.1999 को आख्या प्रस्तुत किया। ऐसा प्रतीत होता है कि उक्त आख्या कमरे में बैठकर बिना नाप-जोख किये तथा निर्धारित बिन्दुओं को अवधारित किये बगैर तैयार किया गया है जो संलग्नक 5 है। निगरानी पत्र संलग्रक 8 में यह आधार लिये गये है कि संपूर्ण भूमि का क्षेत्रफल लगभग 3 बिस्वा है तथा तहसीलदार की आख्या झूठी है। उत्तरदाता सं० 1 ने अवैध एवं मनमाने तौर पर यह विचार में लिये बगैर कि आख्या दिनांकित 9.12.1999 प्रस्तुत द्वारा उप-तहसीलदार बिना पैमाइश किये तथा निर्धारित बिन्दुओं को अवधारित किये बगैर दिया है तथा यह अवैध है, निगरानी को निरस्त कर दिया। उत्तरदाता सं० 1 व 2 ने एक तरफ अतिक्रमित भूमि का क्षेत्रफल 0.031 हे० से घटाकर 0.019 हे० कर दिया, दूसरी तरफ क्षतिपूर्ति की धनराशि 10 गुना बढ़ाकर 500 रुपये वार्षिक कर दिया। अतः उनके द्वारा पारित आदेश अवैध मनमाना एवं गलत है। याची ने विवादित संपत्ति पर अपने कब्जे को इनकार किया है तथा याची के अनुसार सर्वे से यह स्थापित नहीं हुआ है कि याची ने विवादित भूमि पर अतिक्रमण किया है। प्रतिकर की धनराशि भी मनमाने तथा बाजार दर के विपरीत है जैसा कि नियम 115 द (II) के अंतर्गत आकलित किया जाना चाहिए। प्रश्नगत आदेश प्राकृतिक न्याय के सिद्धान्तों के विरुद्ध है। धारा 122-B में उपधारा 4 (ङ) के संयोजन के उपरान्त याची घोषणात्मक वाद प्रस्तुत करने से प्रतिबंधित है जो अधिकारातीत है। अतः प्रश्नगत आदेश निरस्त किया जाये।

5. याची ने याचिका में वर्णित अभिलेखों को संलग्रको के रूप में प्रस्तुत किया है।

6. विपक्षी की तरफ से प्रति शपथ पत्र दिनांकित 10 जुलाई 2001 प्रस्तुत किया गया तथा यह कथन किया गया कि संबंधित लेखपाल ने दिनांक 6.1.1993 को यह आख्या प्रस्तुत किया कि शिव गोपाल गुप्ता पुत्र रामलाल गुप्ता निवासी ग्राम सोना तहसील एवं जिला कानपुर नगर ने गांवसभा की चकरोड की भूमि गाटा सं0 461/1390 क्षेत्रफल 0.031 है० भूमि पर कब्जा कर लिया है तथा उसे अपने गाटा सं0-461 में सन् 1400 फसली में मिला लिया है, अतः 3000 रुपये की क्षति हुई है। लेखपाल ने अपनी आख्या के साथ मानचित्र खतौनी 1396 फसली ता 1401 फसली का खसरा 1400 फसली प्रस्तुत किया। उक्त रिपोर्ट पर धारा 122 बी० उत्तर प्रदेश जमींदारी उन्मूलन एवं भूमि सुधार अधिनियम के अंतर्गत कार्यवाही प्रारंभ करते हुए याचिकाकर्ता के विरुद्ध 49 क की सूचना जारी की गयी जिसमें उसने आपत्ति में यह कथन किया कि विवादित भूमि नाली एवं रास्ते की भूमि है तथा उसका उक्त भूमि से कोई संबंध सरोकार नहीं है न ही वह उसके कब्जे में है। विवादित भूमि के उत्तर में भूमि सं0 462 श्रीमती मुन्नी देवी हैं जिन्होंने नाली एवं रास्ते को क्षतिग्रस्त करते हुए अतिक्रमण किया है।

7. गांवसभा की तरफ से लेखपाल को परीक्षित किया गया जिसने अपने सशपथ साक्ष्य में अपनी आख्या को साबित किया तथा यह कथन किया कि याचिकाकर्ता ही विवादित भूमि पर अनधिकृत कब्जे में है जिससे गांवसभा को 3000 रुपये की क्षति कारित हुई है। याची ने भी स्वयं तथा 2 साक्षीगण शिवबरन सिंह एवं मोतीलाल को परीक्षित कराया।

8. एक कमीशन जारी किया गया तथा नायब तहसीलदार ने स्थल निरीक्षण किया तथा सर्वे कार्यवाही याची के विद्वान अधिवक्ता की उपस्थिति में करते हुए आख्या प्रस्तुत किया जिसके विरुद्ध याचिकाकर्ता ने आपत्ति प्रस्तुत किया तथा नायब तहसीलदार की आख्या निरस्त करने का निवेदन किया। खतौनी एवं खसरा में विवादित भूमि रास्ता दर्ज है तथा खसरा सं० 1400 फसली में एक टिप्पणी अंकित की गयी है कि शिव गोपाल गुप्ता ने विवादित भूमि पर अनधिकृत कब्जा कर लिया है जो नायब तहसीलदार की आख्या से भी स्पष्ट है।

9. अधीनस्थ न्यायालय ने समस्त मौखिक एवं अभिलेखीय साक्ष्यों का अवलोकन करने के उपरान्त यह अवधारित किया कि

याची ने गांवसभा की भूमि सं० 461/1390 क्षेत्रफल 0.0310 हे० पर अवैध अतिक्रमण किया है तथा गांवसभा को क्षति कारित किया है। अतः 100 रुपये हर्जा तथा 3 रुपये बेदखली व्यय का आदेश दिनांक 10.01.2000 को पारित किया गया। याचिकाकर्ता द्वारा प्रस्तुत निगरानी भी तदनुसार दिनांक 31 जुलाई 2000 को खारिज की गयी तथा विचारण न्यायालय के आदेश को पुष्ट किया गया।

10. नोटिस जारी होने के उपरान्त भी याचिकाकर्ता अनुपस्थित रहा जिस पर दिनांक 27.9.1997 को एकपक्षीय आदेश पारित किया गया, तदुपरान्त उसे उक्त आदेश को निरस्त करने के लिए निगरानीकर्ता ने प्रार्थना पत्र प्रस्तुत किया जो दिनांक 18.10.1997 को निरस्त किया गया। पुनः नायब तहसीलदार से आख्या मंगाई गयी, जो अंततः दिनांक 9.12.1999 को प्रस्तुत की गयी। उक्त कार्यवाही में याची भी उपस्थित था तथा जब पत्रावली 10 जनवरी 2000 को प्रस्तुत हुई तो भी याची उपस्थित नहीं था। अतः पत्रावली के अनुशीलन एवं परिशीलन करने के उपरान्त नायब तहसीलदार ने दिनांक 10 जनवरी 2000 को आदेश पारित किया। विवादित गाटे का संपूर्ण क्षेत्रफल 0.031 हे० है परन्तु संपूर्ण नाप-जोख करने के उपरान्त यह पाया गया कि याची ने गांवसभा के रास्ते की भूमि पर मात्र 0.019 हे० भूमि पर ही कब्जा किया है। अतः उसी के संबंध में बेदखली का आदेश पारित किया गया। दूसरा सर्वे आख्या भी संपूर्ण नाप-जोख को कार्यवाही याची की उपस्थिति में करने के उपरान्त प्रथम आख्या का सत्यापन करते हुए प्रस्तुत किया गया था। यह कहना गलत है कि नायब तहसीलदार ने स्थिर बिन्दुओं के आधार पर सर्वे की कार्यवाही नहीं किया है। क्षतिपूर्ति की धनराशि को अपर तहसीलदार ने सही पाया अतः उक्त क्षति पूर्ति को प्रदान करने का आदेश 7 वर्षों तक अवैध कब्जे में रहने के आधार पर पारित किया गया। क्षतिपूर्ति का निर्धारण बाजार दर के आधार पर किया गया है। अतः उसने संगणना में कोई अवैधता नहीं है। अतः याचिका खारिज किया जाये। ऐसी प्रति शपथ पत्र के साथ छाया प्रति कब्जा प्राप्ति अभिलेख दिनांकित 22.12.2000 भी संलग्न किया गया है जिसे अनुसार चकरोड भूमि सं0 461/1390 क्षेत्रफल 0.019 हे० ग्राम सोना का कब्जा मौके पर ग्राम प्रधान को शिव गोपाल गुप्ता (याची) को बेदखल करके प्रदान किया गया है।

11. उक्त प्रति शपथ पत्र के विरुद्ध याची द्वारा कोई रिज्वाइंडर शपथ पत्र प्रस्तुत नहीं किया गया है।

12. सुना तथा पत्रावली का अवलोकन किया।

13. याची ने मुख्य रूप से प्रथम आधार यह लिया है कि दुबारा जब उप- तहसीलदार ने दिनांक 09-12-1999 को आख्या प्रस्तुत किया तो ऐसा प्रतीत होता है कि कमरे में बैठकर बिना नाप जोख किये तथा स्थिर बिंदुओं को अवधारित किये बगैर तैयार किया।

14. याची ने द्वितीय आधार यह लिया है कि पूर्व में उत्तरदातागण के अनुसार याची द्वारा अतिक्रमित भूमि का क्षेत्रफल 0.031 हेक्टेयर था परन्तु दुबारा उसे घटाकर मात्र 0.016 हेक्टेयर पर अतिक्रमण करना बताया।

15. याची ने तृतीय आधार यह लिया है कि अतिक्रमित भूमि का क्षेत्रफल 0.031 हेक्टेयर से घटकर 0.019 हेक्टेयर हो गया तो क्योंकर क्षतिपूर्ति की धनराशि दस गुना बढ़ाकर पांच सौ रुपए वार्षिक कर दिया गया। प्रतिकर की धनराशि मनमाना तथा बाजार दर के विपरीत है। इसका आकलन नियम- 115, द(ii) के अंतर्गत किया जाना चाहिए था।

16. याची की तीनों आपत्तियों का निस्तारण करते हुए इस याचिका का निस्तारण किया जाता हैं।

17. प्रथम आपत्ति- याची की प्रथम आपत्ति यह है कि उप-तहसीलदार ने बिना सर्वे किये दिनांक 09-12-1999 को आख्या प्रस्तुत किया। पत्रावली के अवलोकन से ज्ञात होता है कि पूर्व में भी सर्वे दिनांकित 03-01-1993 को एक पक्षीय आख्या कहते हुए याची ने निगरानी संख्या 31/1994 प्रस्तुत किया था उसमें दिनांक 31-01-1995 को पुनः सर्वे करने का आदेश पारित किया गया, परन्तु पुनः उप-तहसीलदार द्वारा चार वर्ष के उपरान्त सर्वे की कार्यवाही की गई तथा याची के अनुसार बिना सर्वे किये हुए दिनांक 09-12-1999 को आख्या प्रस्तुत की गई। इस सर्वे आख्या को याची ने संलग्नक पाँच के रूप में याचिका के साथ संलग्न किया। संलग्नक संख्या-5 के अवलोकन से ज्ञात होता है कि पूर्व में नायब तहसीलदार श्री होरी लाल शाक्य ने विपक्षी के अधिवक्ता के समक्ष पैमाइश कर अपनी आख्या दिनांक 03-08-1993 को प्रस्तुत किया था। आदेश दिनांकित 31-01-1995 के अनुपालन में वर्तमान नायब-तहसीलदार द्वारा पुनः कानूनगो एवं लेखपाल के साथ मौके पर पहुंचकर याची विपक्षी की उपस्थिति में मौके की नाप की गई तथा स्थिर बिंदुओं की पुष्टि की गई। मौके पर स्थिर बिंदु सही मिले तथा पुनः नाप किया तो ज्ञात हुआ कि चक संख्या-661/1390, जो भूमि संख्या-461 के पूरब स्थित है, को विपक्षी ने अपने खेत संख्या-461 में मिला लिया है तथा चक संख्या 461 की मेड़ को ही 462 की मेड़ बना दिया है तथा चक संख्या -461 की पूर्वी मेड़ मौके पर विद्यमान नहीं है एवं 461 के पूरब की ओर के चकरोड को अपने खेत में मिला लिया है। माप करने पर 0.019 हेक्टेयर भूमि को सन् 1400 फसली से

अनधिकृत कब्जा करके विपक्षी याची द्वारा अपने खेत संख्या 461 में मिला लेने का तथ्य सर्वे से साबित पाया गया तथा यह पाया गया कि मौके पर चकरोड पूरी तरह समाप्त हो गया है। जिससे ग्रामसभा को क्षति हुई है।

18. उक्त आख्या के उपरान्त पुनः याची को सुना गया तथा दिनांक 10-01- 2000 को याची को भूमि संख्या-46/1390, क्षेत्रफल 0.019 हेक्टेयर से बेदखल करने का आदेश पारित किया गया।

19. इस न्यायालय के मतानुसार अपर तहसीलदार एवं निगरानी न्यायालय का निर्णय जो नायब तहसीलदार के सर्वे आख्या पर आधारित है, में तथ्यतः एवं विधितः कोई त्रुटि नहीं है। पैमाइश से यह निष्कर्ष नहीं निकला कि मुन्नी देवी ने भी गांवसभा की भूमि पर कोई अतिक्रमण किया है। मात्र इस आधार पर कि याची के पक्ष में निष्कर्ष नहीं निकला, यह नहीं कहा जा सकता कि सर्वे आख्या तथा इस संबंध में पारित प्रश्नगत दोनों आदेश त्रुटिपूर्ण हैं, अतः याची की प्रथम आपत्ति संधार्य नहीं है तथा निरस्त किया जाता है।

20. द्वितीय आपत्ति- याची ने द्वितीय आपत्ति यह की है कि पूर्व में अतिक्रमित भूमि का क्षेत्रफल 0.0131 हेक्टेयर बताया गया था परन्तु बाद में उसे घटाकर 0.019 हेक्टेयर मात्र बताया जा रहा है। इस न्यायालय के मतानुसार यदि सर्वे पैमाइश से यह निष्कर्ष निकलता है कि याची ने विवादित भूमि गाटा संख्या- 46/1390 के मात्र 0.019 हेक्टेयर पर अवैध कब्जा किया है तो उक्त क्षेत्रफल की भूमि के संबंध में ही आदेश पारित किया गया। यह संभव है कि धारा- 122 (बी.), की कार्यवाही को देखते हुए याची ने अपने अतिक्रमण का विस्तार कम कर दिया हो, अतः यह भिन्नता कोई आधार नहीं है कि प्रश्नगत आदेश त्रुटिपूर्ण मान लिया जाये। अतः यह आपत्ति भी याची के विरुद्ध निर्णीत की जाती है।

21. तृतीय आपत्ति- याची की तृतीय आपत्ति यह है कि यदि गाँवसभा की अतिक्रमित भूमि का क्षेत्रफल 0.031 हेक्टेयर के बजाय मात्र 0.019 हेक्टेयर ही पाया गया तथा पूर्व में मात्र पचास रुपए प्रति वर्ष की दर से वर्ष 1994 में जुर्माना आरोपित किया गया तो बाद में पाँच सौ रुपए प्रति माह क्षतिपूर्ति अदायगी का आदेश किस प्रकार कर दिया गया। इस संबंध में यह तर्क दिया जा सकता है कि वर्ष 1994 तथा वर्ष 2000 में छः वर्ष में मुद्रास्फीति की स्थिति को देखते हुए क्षतिपूर्ति की धनराशि को बढ़ाया जाना स्वाभाविक है तथा याची के लिए कोई कारण नहीं था कि अनायास गाँवसभा की चकरोड की भूमि पर कब्जा कर अपने खेत में मिलाकर आवागमन को अवरुद्ध कर दे तथा दोषपूर्ण अभिलाभ प्राप्त करे। यद्यपि यह अवश्य है कि प्रतिकर का आकलन तत्समय प्रचलित उत्तर प्रदेश जमींदारी उन्मूलन अधिनियम्/उत्तर प्रदेश जमींदारी एवम् भूमि सुधार उन्मूलन नियम, **1952** के अंतर्गत निर्मित नियमों के अनुसार किया जाना चाहिए। वस्तुतः निष्पादन व्यय तथा क्षतिपूर्ति की वसूली का विधान नियम **115** ङ एवं **115** च में किया गया है न कि नियम **115** द**(1)** में किया गया है।

22. नियम **115** ङ **(2)** में यह वर्णित है कि 49 च फार्म में निष्पादन व्यय के रूप में वसूल की जाने वाली धनराशि तथा नियुक्त कर्मियों का वेतन एवं भत्ता पैरा-405 रेवेन्यू कोर्ट मैनुअल में विहित दर से आकलित करके लिखा जाएगा।

23. धारा-**115** च **(1)** के अनुसार समस्त क्षतिपूर्ति एवं निष्पादन व्यय की धनराशि को जिलाधिकारी द्वारा मालगुजारी की वसूली की भांति वसूल कर गाँव फण्ड अथवा स्थानीय प्राधिकारी के फण्ड में जमा किया जाएगा तथा कर्मियों के वेतन एवम् टी. ए. की धनराशि को तहसील, उप-खजाना में शीर्षक "029 भू-राजस्व इ अन्य रसीद (5), कलेक्शन ऑफ पेमेंट फॉर सर्विसेज रेन्डर्ड **99'** में जमा किया जाएगा।

24. **115** च **(2)** के अनुसार यदि दुर्विनियोजन के कारण हुई क्षति या हानि इस प्रकृति की है कि उसको पूर्ववत् करना अथवा प्रतिपूर्ति करना संभव नहीं है तो जिलाधिकारी बाजार दर से धन के रूप में उसका आकलन करेंगे तथा यदि अवैध कब्जे से गाँवसभा अथवा स्थानीय प्राधिकारी को क्षति हुई है तो प्रत्येक वर्ष के लिए इस तरह के कब्जे या उसके किसी स्वीकृत वंशानुगत दरों के सौ गुना पर ह्रास का आकलन किया जाएगा। यदि ऐसा कब्जाधारी इस तरह के गलत कब्जे में बना रहता है तो वह आदेश की तारीख के बाद जारी कब्जे के संबंध में प्रत्येक माह के लिए इस तरह से निर्धारित नुकसान के 1/8 हिस्से का भुगतान करने के लिए और उत्तरदायी होगा। इस संबंध में उत्तर प्रदेश राज्य बनाम राजाराम **1983** आर.डी. **351** में भी सिद्धांत प्रतिपादित किये गये हैं।

25. याची ने सिवाय इस तथ्य के इनकार करने के कि उसने ग्राम पंचायत की भूमि गाटा संख्या-46/1390 में अतिक्रमण नहीं किया है, यह कथन नहीं किया है कि उसने स्वयं के द्वारा किये गये अतिक्रमण को हटा लिया है। इस संबंध में यह अवधारित किया जाता है कि क्षतिपूर्ति का आकलन उत्तर-प्रदेश जमींदारी उन्मूलन नियम- 115 द (ii) के अनुसार किया जाना चाहिए। अतः याची की यह आपत्ति उपरोक्तानुसार निस्तारित की जाती है।

26. धारा-**122** ख., उत्तर-प्रदेश जमींदारी उन्मूलन अधिनियम निम्नवत् है-

27. धारा-**122** ख., **(1)**, के अनुसार यदि ग्राम पंचायत में निहित किसी भूमि को किसी व्यक्ति द्वारा क्षति पहुँचायी जाती है अथवा दुर्विनियोग किया जाता है। तो ग्राम पंचायत उसको ग्रहण करने एवं उसके कब्जे को वापस प्राप्त करने के लिए अधिकारी है। ग्राम पंचायत की भूमि नियमानुसार ही किसी व्यक्ति को आवंटित की जा सकती है तथा चकरोड़ की भूमि किसी भी दशा में किसी भी व्यक्ति को आवंटित नहीं की जा सकती है। यदि ऐसा अवैध अदिक्रमण पाया जाता है तो सहायक कलेक्टर धारा-**122** ख. **(2)** के अंतर्गत ऐसे व्यक्ति को नोटिस जारी करेगा। धारा-**122** ख, **(3)** के अनुसार यदि स्पष्टीकरण अपर्याप्त पाया जाता है तो उसकी बेदखली तथा क्षतिपूर्ति प्रदान करने का आदेश पारित करेगा जो मालगुजारी की तरह वसूल योग्य होगी तथा धारा-**122** ख **(4)**, के अनुसार यदि ऐसे व्यक्ति को दोषी नहीं पाया जाता है तो नोटिस समाप्त कर दिया जाएगा।

28. धारा-**122** ख, **(4)** क के अनुसार सहायक कलेक्टर के आदेश से क्षुब्ध व्यक्ति तीन दिन के अंदर कलेक्टर के समक्ष निगरानी प्रस्तुत कर सकता है, तथा निगरानी सहायक कलेक्टर का आदेश उप-धारा-**4(**क), एवं **(4)** घ, के अंतर्गत अंतिम होगा, अर्थात् निगरानी अथवा उप-धारा-**4**(घ), के अंतर्गत प्रस्तुत वाद सक्षम न्यायालय के निर्णय के अध्यधीन होगा। उप-धारा-**4**(ङ). एक प्रतिबंध आरोपित करता है कि यदि उप-धारा-**4(**क), के अंतर्गत निगरानी प्रस्तुत की गई है तो उप-धारा-**4(**घ), के अंतर्गत वाद प्रस्तुत नहीं किया जा सकेगा।

29. उप-धारा-**4**(च), एक उपचार अनुसूचित जाति एवं अनुसूचित जनजाति के कृषि श्रमिकों को प्रदान करता है कि यदि वह धारा 132, जमींदारी उन्मूलन अधिनियम् के अंतर्गत ग्राम-पंचायत में निहित किसी भूमि पर 13-05-2007 के पूर्व से कब्जे में है तथा उसके पास 3.125 एकड़ से अधिक भूमि नहीं है, तो ऐसे व्यक्ति के विरुद्ध कोई कार्यवाही नहीं की जाएगी। निश्चित ही याची गुप्ता बिरादरी का होने के कारण इस लाभ को प्राप्त करने का अधिकारी नहीं है।

30. चोब सिंह विरुद्ध उत्तर प्रदेश राज्य **2000** आर.डी. **233**., सूरज बली विरुद्ध गाँवसभा 1982 ए.डब्ल्यू. सी.(आर.) **149** एवं श्रीपति विरुद्ध गाँवसभा **1994 (23)**, ए.एल.आर (आर.) **18** में यह अवधारित किया गया कि गाँवसभा की भूमि पर अवैध निर्माण, वृक्षारोपण तथा चकरोड़ के किसी भाग को अपनी भूमि में मिला लेना गाँवसभा की सम्पत्ति की क्षति करने एवं उसका दुर्विनियोग करने के उदाहरण हैं। प्रस्तुत वाद में ग्राम-पंचायत के चकरोड को याची द्वारा अपने चक में मिलाकर ग्राम पंचायत को क्षति एवं दुर्विनियोग कारित किया गया।

31. डालसिंह विरुद्ध अतिरिक्त कलेक्टर मेरठ **2006 (101)**, आर.डी.(एच.) **7**, हाईकोर्ट में अवधारित किया गया कि अवैध कब्जा संबंधी निर्णय तथ्य का निष्कर्ष है तथा यह उच्च न्यायालय द्वारा खण्डित किये जाने योग्य है। यह निर्णयज विधि भी याची के विरुद्ध प्रयुक्त होती है।

32. उपरोक्त आधारों पर यह निष्कर्ष निकलता है कि याची ने ग्राम पंचायत के चकरोड गाटा संख्या-461/1390 के 0.019 हेक्टेयर भूमि पर अवैध कब्जा कर ग्राम पंचायत को क्षति कारित किया है तथा ग्राम पंचायत की सम्पत्ति का दुर्विनियोग किया है, अतः उक्त 0.019 हेक्टेयर भूमि से याची बेदखल किये जाने योग्य है तथा इस संबंध में पारित प्रश्नगत आदेश तथ्यतः एवं विधितः सही एवं वैध है।

33. जहाँ तक क्षतिपूर्ति के आरोपण का प्रश्न है यह क्षतिपूर्ति का आरोपण नियम- **115** द **(ii),** के अनुसार आकलित कर आरोपित किया जाना चाहिए परन्तु इस संबंध में प्रभगत आदेशों में कोई विवरण प्रस्तुत नहीं किया गया है कि उक्त नियम का अनुपालन करते हुए पाँच सौ रुपए प्रति वर्ष की धनराशि की क्षतिपूर्ति की राशि का भुगतान का आरोपण किया गया है, अतएव यह याचिका अंशतः क्षतिपूर्ति की धनराशि के आरोपण के संबंध में स्वीकार किये जाने योग्य है।

आदेश

34. यह याचिका अंशतः अपर तहसीलदार, कानपुर नगर के आदेश दिनांकित 10-01-2000 तथा निगरानी न्यायालय के निर्णय दिनांकित 31-07-2000, बाबल बेदखली याची उपरोक्तानुसार खण्डित की जाती है तथा बाबत आरोपण क्षतिपूर्ति की धनराशि अंशतः इस प्रकार स्वीकार की जाती है कि विपक्षीगण उत्तर-प्रदेश जमींदारी उन्मूलन एवम् भूमि सुधार नियम, **1952** के नियम**115 (**ङ**)** एवम् (च), के अनुसार जितनी क्षतिपूर्ति की धनराशि बनती है, उतनी क्षतिपूर्ति की धनराशि का आरोपण एक माह में करे तथा उसे याची तदुपरान्त तीस दिवस के अंदर भुगतान करे। यह आदेश अनुपालनार्थ जिलाधिकारी कानपुर नगर को प्रेषित हो।

(2023) 3 ILRA 1176
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.03.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Criminal Appeal No. 1071 of 2010

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

Counsel for the Appellant:

Sri Arvind Agrawal, Sri Dileep Kumar, Sri M.A. Siddiqui

Counsel for the Respondent:
G.A., Sri Rahul Chaudhary, Sri S.P.S. Rathi

A. Criminal Law – Appeal- - Indian Penal Code, 1860 - Sections 304B & 498A - Against conviction under IPC read with Sections 3 and 4 of Dowry Prohibition Act, 1961- Accused married the deceased as per Muslim rites and rituals- deceased burnt alive by pouring kerosene oil on her body- dying declaration- intact- conviction by trial court on account of homicidal death- upheld. (Para 10)

HELD: The first dying declaration dated 22.02.2006 implicates the accused and there is no doubt in our mind that the said dying declaration fulfil all the requirements as enunciated by the 3 Hon'ble Apex Court in the case of Govindappa & ors. Vs St. of Karnataka, (2010) 6 SCC 533, and rightly acted upon by the learned Additional Sessions Judge. However, the second dying declaration even if it is brushed aside, the name of the husband is resurfaced also and post mortem report will permit us to concur with the learned Additional Sessions Judge that the death was homicidal death. (Para 10)

B. Harshness of sentence- reformative theory of punishment in India- proper sentence- sentence should not be either excessively harsh or- principle of proportionality to be followed- discretion of court in awarding sentence cannot be exercised arbitrarily or whimsically- sentence of life imprisonment substituted with imprisonment already gone- Appeal partly allowed. (Para 13, 14, 15 and 18)

HELD: 'Proper Sentence' was explained in Deo Narain Mandal Vs St. 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. (Para 14)

Appeal partly allowed. (E-14)

List of Cases cited:

1. Govindappa & ors. Vs St. of Karn., (2010) 6 SCC 533

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

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

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

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

8. St. of Punj. Vs Bawa Singh (2015) 3 SCC 441

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

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.& Hon'ble Arun Kumar Singh Deshwal, J.)

1. Heard Sri M.A. Siddiqui, learned counsel for the appellant and learned A.G.A. for the State.

2. Present criminal appeal challenges judgment and order dated 05.02.2010 passed by the Additional Sessions Judge, Fast Track Court No.4, District Firozabad in Sessions Trial No.424 of 2006 (State vs Hasmuddin) in connection with Case Crime No. 26 of 2006, Police Station- Ramgarh, District Firozabad, whereby the learned Additional Sessions Judge has convicted the accused-appellant, Hasmuddin for

commission of offence under Section 304B of Indian Penal Code, 1860 (for short 'IPC') and sentenced him to undergo imprisonment for life, under Section 498-A to undergo two years rigorous imprisonment with a fine of Rs.500/- and under Section 3/ 4 Dowry Prohibition Act to undergo rigorous imprisonment for one year with fine of Rs.500/- in default of payment of fine further one year's additional imprisonment. All the sentences shall run concurrently.

3. Brief facts as culled out from the record are that the accused-appellant was married to the deceased three and half month prior to the incident with Muslim rites and rituals and also gave one motorcycle and some house hold articles to the appellant as dowry. The In-laws were demanding rupees one lakh for bangles business. The deceased was done to death by setting her ablazed by pouring kerosene oil by her-in-laws in connection with non-fulfillment of rupees one lakh of demand of dowry. She was admitted in the hospital and her dying declaration was recorded in which she has specifically made allegation against the In-laws. During the treatment informant's daughter succumbed to her injuries.

4. On the basis of F.I.R., the investigation started and charge-sheet was laid. The learned Magistrate summoned the accused and committed the case to the Sessions Court as the offences alleged to have been committed were triable by the Sessions Court. The learned Sessions Judge framed charges under Section 304B, 498A IPC and 3/4 Dowry Prohibition Act.

5. On being summoned, the accused pleaded not guilty and wanted to be tried.

6. The Trial started and the prosecution examined 14 witnesses who are as follows:

1	Mohammad Saddiq	PW1
2	Wasim	PW2
3	Nasruddin	PW3
4	Dr. Sanjay Kumar Gupta	PW4
5	Dr. R.K. Garg	PW5
6	Brijpal Singh	PW6
7	Sub- Inspector, Jaidev Singh	PW7
8	Constable Gajraj Singh	PW8
9	Dr. N.P. Pandey	PW9
10	Sishya Pal Singh	PW10
11	Kripa Shankar Dubey	PW11
12	R.V. Singh	PW12
13	Subhas Chand	PW13
14	Dr. Vinay Kumar	PW14

7. In support of ocular version following documents were filed:

1	F.I.R.	Ex.Ka.10
2	Written Report	Ex.Ka.1
3	Dying Declaration	Ex. Ka.5
4	Recovery memo of clothes of Body	Ex.Ka.13
5	Injury Report	Ex. Ka. 4
6	Postmortem Report	Ex.Ka.3
7	Charge-sheet	Ex. Ka. 11
8	Site Plan	Ex.Ka.12
9	Second declaration	Ex. Ka 15

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. It is an admitted position of fact that death occurred due to setting ablaze of the deceased. There are two dying declarations however while going through the record, it is clear that the appellant is the author of the incident and therefore after arguing the matter at length, learned counsel for the appellant requested this Court to consider the sentence of the accused as he has been convicted under Section 304B IPC for life and septicaemial death is occurred after two and half month of medical treatment of the deceased.

10. The first dying declaration dated 22.02.2006 implicates the accused and there is no doubt in our mind that the said dying declaration fulfil all the requirements as enunciated by the Hon'ble Apex Court in the case of Govindappa and others vs. State of Karnataka, (2010) 6 SCC 533, and rightly acted upon by the learned Additional Sessions Judge. However, the second dying declaration even if it is brushed aside, the name of the husband is resurfaced also and post mortem report will permit us to concur with the learned Additional Sessions Judge that the death was homicidal death.

11. Per contra, learned A.G.A. for the State submits that looking to the gruesomeness of the offence and the evidence of prosecution witnesses, this Court should not show any leniency in the matter. It is further submitted by learned A.G.A. that ingredients of Section 304B of IPC are rightly held to be made out by the learned Sessions Judge who has applied the law to the facts in case.

12. We have considered the evidence of witnesses and the Post mortem report which states that the injuries on the body of the deceased would be the cause of death and that it was homicidal death, we concur with the finding of the Court below. However, it is to be seen whether the sentence awarded is too harsh. In this regard, we have to analyse the theory of punishment prevailing in India.

13. 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."

14. '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.

15. 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.

16. 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.

17. 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.

18. The punishment under Section 498A IPC and 3/4 D.P. Act are concerned the accused is in jail for more than 12 years and hence the said punishment and default punishment have also completed, therefore, we need not observe to them. As far as Section 304B IPC is concerned, the punishment would be substituted from life imprisonment to imprisonment already undergone.

19. Learned Additional Sessions Judge has not imposed any fine or any default sentence under Section 304 B IPC. We also do not propose the same. We concur with it and substitute the sentence that already undergone. The accused-appellant be set free forthwith, if not wanted in any other case.

20. In view of the above, the appeal is **partly allowed**. Judgment and order passed by the learned Sessions Judge shall stand modified to the aforesaid extent. Record be sent back to the Trial Court forthwith.

(2023) 3 ILRA 1181
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.02.2023
BEFORE

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

S.C.C. Revision No. 64 of 2022

Anoop Mehrishi & Anr. ...Revisionists
Versus
Ashok Kumar Mishra ...Respondent

Counsel for the Revisionists:
Sri Rahul Mishra, Sri Rishi Upadhyay

Counsel for the Respondent:
Ms. Vaishali Sahu, Sri Atul Dayal (Sr. Advocate)

Civil Law –Provincial Small Cause Courts Act, 1887 - Section 25 - Revision- Landlord filed SCC suit- eviction of tenants from the rented shop- Application under Order XV Rule 5 CPC by landlord- tenant's defence struck off by impugned order- plea of holding possession in part performance of an agreement to sell taken by tenant- suit for specific performance also pending between the parties- no monthly deposit due as mandated under Order XV Rule 5(1) made- payment made towards consideration in an agreement to sell not made in the capacity of a tenant- tenant's defence rightly struck off- Trial court's order upheld – Revision dismissed (Para – 10, 11, and 12)

HELD: A bare reading of the provisions of Rule 5 of Order XV make it clear that there are two parts of the tenant's obligation to deposit rent in Court in a case where the landlord sues the tenant for eviction, after determination of his lease, as also for recovery of rent and damages for use and occupation. The first part requires the tenant to deposit at or before the first hearing of the suit, the entire amount on account of rent, damage etc. admitted by him to be due together with interest thereon @ 9% per annum. The second part requires the tenant to deposit throughout the pendency of the suit, the monthly amount of rent within a week of its accrual, whether he admits it to be due or not. The Rule further provides that non-compliance of either of the two parts of sub-Rule (1) of Rule 5 of Order XV of the Code entitles the Court to strike off the tenant's defence. There is a distinction between the expression 'entire amount admitted by him to be due' in the first part of sub-Rule (1) of Rule 5 of Order XV of the Code and the expression 'monthly amount due', occurring in the second part of sub-Rule (1) of Rule 5 of Order XV. (Para 10)

So far as deposit to be made on the first date of hearing is concerned, there are three kinds of

adjustments that could be made. The first is of any sum of money paid by the tenant in taxes to a local authority in respect of the building on the lessor's account. The second is any amount paid to the lessor and acknowledged by him in writing and signed by him. The third class of money that can be adjusted is that deposited by the tenant in Court under Section 30 of U.P. Act No. 13 of 1972 (for short, 'the Act of 1972'). By contrast, in case of monthly deposits to be made, the only allowance that the Rule permits is with regard to taxes payable to the local authority in respect of the building on the landlord's account. No other sum of money can be adjusted against the tenant's obligation to deposit the monthly rent or damage for use and occupation during the course of the suit. (Para 11)

Revision dismissed. (E-14)

List of Cases cited:

1. Haider Abbas Vs Additional District Judge & ors., 2006 (1) ARC 341

2. Krishna Kumar Gupta Vs Manoj Kumar Sahu, (2017) 4 All LJ 127

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

1. This revision under Section 25 of the Provincial Small Cause Courts Act, 1887 is directed against an order of Mr. Devashish, Additional District Judge, Court No.10, Varanasi, sitting as the Judge, Small Cause Court dated 05.04.2022, striking off the tenants' defence under Order XV Rule 5 of the Civil Procedure Code, 1908 (for short, "the Code').

2. The plaintiff-respondent, Ashok Kumar Mishra, who shall hereinafter be referred to as "the landlord', instituted S.C.C. Suit No. 5 of 2022 in the Court of the District Judge, Varanasi (sitting as the Judge, Small Cause Court) against the defendant-revisionists (for short, "the tenants'), seeking a decree for eviction of the tenants from the shop detailed at the foot of the plaint. In addition, a decree for recovery of arrears of rent to the tune of Rs.2,69,237/- for the period 02.04.2017 to 12.03.2020 was sought. A further sum of Rs. 32,013/- was claimed as *mesne* profits for the period 13.03.2020 to 08.07.2020. These claims apart *mesne* profits at the rate of Rs.8545/- per month were claimed *pendente lite* and future till delivery of actual physical possession to the landlord. The aforesaid suit was instituted by the landlord, seeking the tenants' eviction from a shop admeasuring 350 square feet, situate in premises No. B-30/2A-3, Prafull Nagar Colony, Lanka, District Varanasi.

3. The tenants have put in their written statement dated 23.03.2021, denying the plaint allegations. In substance, the defence taken by the tenants is that though they entered the premises as tenants on a rent of Rs.5000/- per month and paid a sum of Rs.3,00,000/- as security in terms of a rent agreement dated 23.12.2008, but during the currency of the tenancy, parties have entered into a registered agreement to sell dated 22.06.2011, where the landlord has covenanted to sell the demised shop to the tenants for a total sale consideration of Rs.17,50,000/-. It is also the tenants' defence that a sum of Rs.7,50,000/- has been accepted as earnest. It is also pleaded that the tenants have been delivered possession in part performance of the registered agreement to sell. The landlord has of his own given up his right to receive rent after the month of January, 2011, when he received it last.

4. Pending the suit for eviction, the landlord moved an application under Order XV Rule 5 of the Code with a prayer that the tenants' defence be struck off for non-compliance of the aforesaid mandatory

provision of the law. The application was answered by the tenants through objections saying that there was an earlier unregistered agreement dated 22.02.2011, under which the landlord agreed to transfer the demised shop on the contracted price of Rs.17,50,000/-. It was also said by the tenants that a suit for specific performance being O.S. No. 1174 of 2014, Sarita Mehrishi vs. Ashok Kumar has been instituted, which is pending before the Court of competent jurisdiction. It was also raised as a defence to the plea for striking off the tenants' defence that the tenants were in possession of the demised shop in part performance of the agreement to sell and not as tenants qua the said premises.

5. The Trial Court did not accept any of the contentions put forth by the tenants and struck off their defence. The Trial Court was of opinion that even if some advance was paid towards part price of a contracted sale, no adjustment could be made with regard to any advance so far as rent required to be deposited month by month during the pendency of the suit was concerned.

6. Heard Mr. Rahul Mishra, learned Counsel for the tenants in support of the motion to admit this revision to hearing and Mr. Atul Dayal, learned Senior Advocate assisted by Ms. Vaishali Sahu, learned Counsel appearing on behalf of the landlord.

7. It is not in dispute that the tenants entered the demised shop as such on an eleven month lease paying a security in the sum of Rs.3,00,000/-. No doubt, there appears to be first an unregistered agreement to sell dated 22.02.2011 and then a registered agreement dated 22.06.2011 executed by the landlord in favour of the tenants, relating to the demised shop. The registered agreement dated 22.06.2011 mentions the various sums of money received by the landlord through bank instruments and in cash for receipts executed.

8. The registered agreement to sell settles the transaction for sale of the demised shop for a sale consideration of Rs.17,50,000/-. The agreement records the fact that a sum of Rs.7,50,000/- out of the agreed sale consideration has been received by the landlord from the tenants from time to time as per details mentioned in the document. There is, however, nothing in the registered agreement to sell that may show delivery of possession to the tenants in part performance, so as to alter character of the tenants' possession from tenancy possession into one held in part performance of the registered agreement to sell. Rather, in Paragraph No. 5 of the registered agreement, there is a recital to the following effect:

"5. यह कि हम प्रथम पक्ष ने कुल मजमून सट्टा इकरार-नामा बिला कब्जा हाजा को खुब अच्छी तरह से पढ़ व पढ़वाकर सुन व समझ कर उसके असरातो से वखूबी वाकिफ होकर यह चन्द कलमा बतरीक सट्टा इकरारनामा बिला कब्जा मोआहिदा बय बहक द्वितीय पक्ष तहरीर कर दिया कि सनद रहे व वक्त जरूरत पर काम आवे।"

(emphasis by Court)

9. The aforesaid recital shows that the agreement to sell expressly made it one which did not deliver possession to the tenants in part performance. Now, in the present suit, it is not for this Court to go into the rights of parties to seek specific performance of the registered agreement. The purpose of looking into this agreement is to find out as to what was the nature of the tenants' possession in the demised shop.

The terms of the registered agreement unmistakably point to the fact that the tenants continue to occupy the demised shop in their character as tenants and do not hold possession in part performance of the registered agreement, delivered to them by the landlord, as they claim. The provisions of Order XV Rule 5 CPC as amended in their application to the State of Uttar Pradesh *vide* U.P. Act No. 57 of 1976 and Notification dated 10th February, 1981, read:

"5. *Striking off defence on failure to deposit admitted rent,* etc.--(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 centum per *annum* and whether or not he admits any amount to be due, he shall throughout the continuation of the suit regularly deposit the monthly amount due within a week from the date of its accrual, and in the event of any default in making, the deposit of the entire amount admitted by him to be due or the monthly amount due as aforesaid, the Court may, subject to the provisions of sub-rule (2), strike off his defence.

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, paid to the lessor acknowledged by the lessor in writing signed by him] and the amount, if any, deposited in any Court under Section 30 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972.

Explanation 3.--(1) The expression "monthly amount due' means the amount due every month, whether as rent or compensation for use and occupation at the admitted rate of rent, after making no other deduction except the taxes, if any, paid to a local authority in respect of the building on lessor's account.

(2) Before making an order for striking off defence, the Court may consider any representation made by the defendant in that behalf pro*vide*d 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:

Pro*vide*d that such withdrawal shall not have the effect of prejudicing any claim by the plaintiff disputing the correctness of the amount deposited:

Pro*vide*d further that if the amount deposited includes any sums claimed by the depositor to be deductible on any account, the Court may require the plaintiff to furnish the security for such sum before he is allowed to withdraw the same."

10. A bare reading of the provisions of Rule 5 of Order XV make it clear that there are two parts of the tenant's obligation to deposit rent in Court in a case where the

landlord sues the tenant for eviction, after determination of his lease, as also for recovery of rent and damages for use and occupation. The first part requires the tenant to deposit at or before the first hearing of the suit, the entire amount on account of rent, damage etc. admitted by him to be due together with interest thereon @ 9% per *annum*. The second part requires the tenant to deposit throughout the pendency of the suit, the monthly amount of rent within a week of its accrual, whether he admits it to be due or not. The Rule further pro*vide*s that non-compliance of either of the two parts of sub-Rule (1) of Rule 5 of Order XV of the Code entitles the Court to strike off the tenant's defence. There is a distinction between the expression 'entire amount admitted by him to be due' in the first part of sub-Rule (1) of Rule 5 of Order XV of the Code and the expression 'monthly amount due', occurring in the second part of sub-Rule (1) of Rule 5 of Order XV.

11. So far as deposit to be made on the first date of hearing is concerned, there are three kinds of adjustments that could be made. The first is of any sum of money paid by the tenant in taxes to a local authority in respect of the building on the lessor's account. The second is any amount paid to the lessor and acknowledged by him in writing and signed by him. The third class of money that can be adjusted is that deposited by the tenant in Court under Section 30 of U.P. Act No. 13 of 1972 (for short, 'the Act of 1972'). By contrast, in case of monthly deposits to be made, the only allowance that the Rule permits is with regard to taxes payable to the local authority in respect of the building on the landlord's account. No other sum of money can be adjusted against the tenant's obligation to deposit the monthly rent or damage for use and occupation during the course of the suit.

12. A Division Bench of this Court in **Haider Abbas v. Additional District Judge and others, 2006 (1) ARC 341** considered the obligation of the tenant under the two parts of sub-Rule (1) of Rule 5 of Order XV of the Code and the issue whether adjustment of rent deposited under Section 30 of the Act of 1972 could be sought by the tenant. It has been held in **Haider Abbas** *(supra)*, thus:

"13. On a careful analysis of the provisions of Order XV, Rule 5, C.P.C. we find that it is di*vide*d in two parts. The first part deals with the deposit of the "entire amount admitted by him to be due" together with interest at or before the first hearing of the suit. The second part deals with the deposit of "monthly amount due" which has to be made throughout the continuation of the suit.

14. Explanation 2 to Order XV, Rule 5(1), C.P.C. stipulates that "entire amount admitted by him to be due" means the entire gross amount, whether as rent or compensation for use and occupation after making no other deduction except the taxes, if any, paid to the local authority in respect of the building on lessor's account and the amount, if any, deposited in any Court under section 30 of the Act. The expression "monthly amount due" has been defined in Explanation 3 to Rule 5(1) of Order XV, Rule 5, C.P.C. to mean the amount due every month, whether as rent or compensation for use and occupation at the admitted rate of rent, after making no other deduction except the taxes, if any, paid to a local authority, in respect of the building on lessor's account.

15. What has to be noticed in Order XV, Rule 5, C.P.C. is that the

Legislature while defining "monthly amount due" which has to be deposited during the continuation of the suit has deliberately excluded the deduction of any amount deposited under section 30 of the Act. We are, therefore, faced with a situation where the same Rule defines "entire amount admitted by him to be due" and "monthly income due" occurring in the first part and second part respectively of the Rules and while the former phrase stipulates the deduction of the amount deposited under section 30 of the Act, the second part omits to mention such a deduction. It has, therefore, to be inferred that the Legislature has, in its wisdom, deliberately made a provision for deduction of the deposit of the amount under section 30 of the Act only in respect of the amount to be deposited at or before the first date of hearing and not in respect of the monthly amount to be deposited throughout the continuation of the suit. This, coupled with the fact that both Explanation 2 and Explanation 3, referred to above pro*vide* "after making no other deduction except....." clearly leads us to no other conclusion except that only such deductions are to be made which have been specifically pro*vide*d. The "monthly amount due" has to be construed in the manner pro*vide*d for in Explanation 3 to Rule 5(1) of Order XV, C.P.C. and in no other manner.

37. We, therefore, upon an analysis of the provisions of Rule 5(1) of Order XV, C.P.C., hold that while depositing the amount at or before the first hearing of the suit, the tenant can deduct the amount deposited under section 30 of the Act but the deposits of the monthly amount thereafter throughout the continuation of the suit must be made in the Court where the suit is filed for eviction and recovery of rent or compensation for use and occupation and the amount, if any, deposited under section 30 of the Act cannot be deducted."

13. The question was examined again by this Court more recently in **Krishna Kumar Gupta v. Manoj Kumar Sahu, (2017) 4 All LJ 127**, a decision to which the Revisional Court has also alluded to. In **Krishna Kumar Gupta** *(supra)*, it has been held:

"11. The difference between the two categories discussed herein above, apart from the stage at which they apply, is two fold : (a) in the first category the defendant is required to make deposit of the admitted dues whereas in the second category, which relates to monthly deposits, whether he admits it to be due or not, the deposit has to be made on monthly basis, at the admitted rate of rent, throughout the continuance of the suit; and (b) in the first category the tenant can seek adjustment of the amount deposited under section 30 of UP Act No. 13 of 1972 as well as the amount, if any, paid to the lessor acknowledged by the lessor in writing signed by him, whereas in the second category, which relates to monthly deposits, no such adjustment is permissible as would be clear from the difference between Explanation and Explanation 3.

12. One of the common features in the two categories, which is reflected by the use of words "admitted rate of rent" in both Explanation and Explanation of Order XV, Rule 5, C.P.C., is that there has to be an admitted jural relationship of lessor and lessee (landlord and tenant) between the plaintiff and defendant fortiori, if the relationship of landlord and tenant or lessor and lessee is not admitted by the defendant between the plaintiff and him, the provisions of Order XV, Rule 5, C.P.C.

would not be applicable. In the case of *Chandan Singh v. Shyam Sunder Agrawal*, (2006) 64 ALR 673, this Court while dealing with the object of enacting the provisions of Order XV, Rule 5, C.P.C., observed as follows:

"The idea of enactment of Order XV, Rule 5, C.P.C. is to compel the tenant to pay the rent at least at the rate he was paying earlier to the landlord notwithstanding the pendency of the litigation. Order XV, Rule 5, C.P.C. was enacted with view that the landlord may not have to wait till the final decision of the case to recover his rent. He should at least get the rent at the rate he was getting before the start of litigation and tenant may not enjoy the tenanted property without paying rent. The purport and object of Order XV, Rule 5, C.P.C. is to see that tenant does not get undue advantage by withholding the payment of rent or pay it at lesser rate than the one at which he was paying earlier on some lame excuse. Looking to the object which Order XV, Rule 5, C.P.C. seeks to achieve, literal interpretation to the word "admitted" would not serve the purpose and this Court is of the view that purposive approach of interpretation should be resorted to."

14. Here, this Court finds that whatever sum of money was paid by the tenants to the landlord, was in respect of a completely different transaction relating to sale of the demised shop. It had nothing to do with the contract of tenancy. Even if it be assumed that the earnest of Rs. 7.50 lacs recorded in the agreement to sell was to be adjusted against the arrears of rent, it could be adjusted against the tenants' obligation to deposit the outstandings on the first date of hearing only, if the tenants produced an acknowledgment in writing from the landlord accepting appropriation of the money received in respect of a different transaction towards the entire amount admitted by the tenants to be due, which the tenants were obliged to deposit on the first date of hearing.

15. So far as monthly deposit of rent within seven days of accrual is concerned, there could be no adjustment of any advance. Quite apart, it has figured in the order impugned that the tenants are pursuing their suit for specific performance against the landlord being Suit No. 1174 of 2014, which would hardly make allowance for any kind of adjustment, even against the entire amount admitted by the tenants to be due on account of rent etc. that had to be deposited on or before the first date of hearing. The Trial Court has opined that since there is no deposit made during the pendency of the suit on a monthly basis, there could be no escape from the consequences or the rigour of the Rule carried in sub-Rule (1) of Rule 5 of Order XV.

16. So far as the Court's discretion in accepting the tenants' representation, if made within ten days of the first date of hearing or the expiry of the week, as regard the monthly deposit of rent, the period of time would long be gone under both heads of liability for the Court to condone. Therefore, the action of the Court in holding the tenants' defence liable to be struck off, if not under the first part, decidedly under the second part, cannot be faulted.

17. Here, this Court must add that the much emphasized transformation of the character of the tenants' possession from that of a tenant into one of a man holding it in part performance of the registered agreement, has been noticed and rejected

hereinbefore, with reference to the recitals carried in the registered agreement to sell. Any explanation, therefore, based upon ceasure of the tenants' liability to pay rent or to comply with the terms of Order XV Rule 5 of the Code cannot be accepted.

18. In the considered opinion of this Court, there is no force in this revision. It fails and is, accordingly, **dismissed.**

(2023) 3 ILRA 1188
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.03.2023

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Appeal No. 1109 of 1988

Khandar Singh & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Shashank Shekhar, Sri Deepak Rana

Counsel for the Opposite Party:
G.A.

A. Criminal Law – Indian Penal Code, 1860 - Sections 147, 323/149, 324/149 & 325/149 - Appeal Against conviction under of IPC- appellants inflicted injuries by lathi, bulli, tabal and garasa- Section 324 IPC- Voluntary causing hurt by dangerous weapons or means- Fracture of bone- not necessary that bone should be cut through and through- cutting, splintering, rupture or fissure in bone is sufficient- injury inflicted by the appellants on the victims proved- conviction by trial court upheld. (Paras 19, 20, 21, 22, 32, 40)

HELD: In Hori Lal & anr. Vs St. of U.P., (1970) 1 SCC 8 the Apex Court has held that for the application of clause 7 of Section 325 it is not necessary that a bone should be cut through and through or that the crack must extend from the outer to the inner surface or that there should be displacement of any fragment of the bone. If there is a brake by a cutting or splintering of the bone or there is a rupture or fissure in it, it would amount to fracture within the meaning of Clause 7 of Section 320 I.P.C. (Para22)

B. Benefit of Probation of Offenders Act, 1958- Section 4- Code of Criminal Procedure- Section 360- 40 years since the date of incident- appellants and informant are living in peace together- no criminal history- reformatory and correctional object of sentencing- trial and appellate courts to give benefit of probation in fit cases- appellants released on probation under supervision of the trial court for one year- compensation of Rs. 5,000 awarded- Appeal partly allowed. (Paras 36 to 39, 40and 41)

HELD: These statutory provisions very emphatically lay down the reformatory and correctional object of sentencing and obligates the trial court as well as appellate courts to give benefit of probation in fit cases as provided under law. Unfortunately, this branch of law has not been much 14 utilized by the courts. It becomes more relevant and important in our system of administration of justice where trial is often concluded after a long time and by the time decision assumes finality, the very purpose of sentencing looses its efficacy as with the passage of time the penological and social priorities change and there remains no need to inflict punishment of imprisonment, particularly when the offence involved is not serious and there is no criminal antecedent of the accused persons. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. (Para 36)

Appeal partly allowed. (E-14)

List of Cases cited:

1. Hori Lal & anr. Vs St. of U.P., (1970) 1 SCC 8

2. Subhash Chand & ors. Vs St. of U.P., 2015 Lawsuit (Alld) 1343

3. St. of Mah. Vs Jagmohan Singh Kuldip Singh Anand & ors. (2004) 7 SCC 659

4. Jagat Pal Singh & ors. Vs St. of Har., AIR 2000 SC 3622

(Delivered by Hon'ble Surendra Singh-I, J.)

1. Heard Sri Deepak Rana, learned counsel for the appellants and Sri Sunil Kumar Tripathi, learned A.G.A. for the State.

2. This criminal appeal has been filed against the judgement and order dated 26.04.1988 passed by VIth Additional District and Sessions Judge, Ghaziabad, in Sessions Trial No. 94 of 1986, State of U.P. Vs. Khandar Singh and others, arising out of Case Crime No. 19A of 1982, under Sections 147, 323, 324, 325, Police Station- Babugarh, District- Ghaziabad.

3. By the impugned order, the appellants Khandar Singh, Bir Singh, Sukhbir Singh, Rishi Pal Singh, Shri Pal Singh and Smt. Phoolwati were convicted under Sections 147, 323/149, 324/149 and 325/149 IPC and sentenced under Section 147 IPC for one year's rigorous imprisonment, under Section 325/149 IPC for two years' rigorous imprisonment and Rs. 2000/- as fine, in default of payment of fine six months' rigorous imprisonment, under Section 324/149 one year's rigorous imprisonment and under Section 323/149 three months' rigorous imprisonment. The period of sentence in each sections will run concurrently.

4. During pendency of appeal accused Khandar Singh, Rishi Pal Singh and Smt. Phoolwati died and appeal qua them has been abated. This criminal appeal is being disposed of only against accused-appellants Bir Singh, Sukhvir Singh and Shri Pal Singh.

5. The prosecution case in brief is that informant Kartar Singh son of Dev Raj Singh resident of village Dadayara, Police Station Babugarh, District Ghaziabad submitted written report (Exhibit Ka-1) to the effect that on 19.01.1982 between 8 and 9 a.m., accused-appellants Khandar Singh son of Nathu Singh, Bir Singh, Sukhbir Singh, Rishi Pal Singh, Shri Pal Singh, all sons of Khandar Singh and Smt. Phoolwati wife of Khandar Singh assaulted Janam Singh son of Bhulwa, Manveer son of Janam Singh, Lakhpat son of Umrao, Devi Sharan, Sardar Singh and Kartar Singh all sons of Dev Raj, with lathi, Bulli, Tabal and Garasa due to dispute about agricultural land. The witnesses Shyam Singh son of Deeva, Netra Pal son of Kale, Hoshiyaar Singh son of Sallarh, Ramvilas son of Arjun, Har Narayana son of Inder, who were present on the spot, protected the injured from being assaulted. On the basis of written report of Kartar Singh, Case Crime No. 19-A of 1982 under Sections 147, 323/149, 324/149 and 325/149 IPC was registered on 19.01.1982 at 10.50 p.m. The Chik FIR (Exhibit Ka-11) and G.D. relating to institution of the criminal case are on record. The medical examination of injured Kartar Singh, Sardar Singh, Lalloo, Janam Singh and Manveer Singh was done at PHC Hapur. Their injury reports are Ext.Ka 5, Ext.Ka 6, Ext.Ka 7, Ext.Ka 8, Ext.Ka 9, respectively. The injuries were found on various parts of their body. The x-ray of injured Kartar Singh, Sardar Singh, Janam Singh and Laloo was done at MMG

Hospital Ghaziabad by Dr. Gyanendra Kumar, Radiologist. He prepared x-ray report of the injured. According to X-ray report of Sardar Singh, Ext.Ka 2, fracture in acromion process of scapula was seen. According to x-ray report of Janam Singh Ext.Ka 3, fracture in his nasal bone was found and according to x-ray report of Lallu, Ext.Ka 4, fracture in shaft of ulna bone was seen. The fractures were found in the body of injured Sardar Singh, Janam Singh and Lallu. Section 325 was added with the Case Crime No. 19A of 1982.

6. The investigation was done by the Sub-Inspector Hardwari Lal and later on by the Sub-Inspector Gajraj Singh. The Sub-inspector Hardwari Lal visited the place of occurrence and prepared the site plan, Ext.Ka 10. Subsequently, the Sub-Inspector Gajraj Singh recorded the statement of witnesses and after investigation filed charge-sheet under Sections 147, 323/149, 324/149 and 325/149 IPC against the accused appellants Khandar Singh, Bir Singh, Sukhbir Singh, Rishi Pal Singh, Shri Pal Singh and Smt. Phoolwati.

7. On the criminal case being committed by Judicial Magistrate-I, Hapur, the Sessions Court framed charge under Sections 147, 323/149, 324/149 and 325/149 against the accused Khandar Singh, Bir Singh, Sukhbir Singh, Rishi Pal Singh, Shri Pal Singh and Smt. Phoolwati. The accused-appellants denied the charge and claimed trial.

8. To prove the charge, the prosecution examined PW-1 Janam Singh, PW-2 Kartar Singh and PW-3 Shyam Singh as witnesses of facts. The prosecution also examined formal witnesses PW-4 Dr. Gyanendra Kumar, Radiologist, PW-5 Dr. K.P. Sarabhai, Investigating Officers PW-6 Sub-Inspector Haridwari Lal and PW-7 Gajraj Singh.

9. PW-1 Janam Singh, PW-2 Kartar Singh and PW-3 Shyam Singh gave evidence about the occurrence.

10. PW-4 Dr. Gyanendra Kumar Radiologist proved x-ray report of injured Sardar Singh, Janam Singh and Lallu, Exhibit Ka-2, Exhibit Ka-3 and Exhibit Ka-4, respectively.

11. Dr. K.P. Sarabhai proved injury reports of Kartar Singh, Sardar Singh, Lallu, Janam Singh and Manveer Singh which are Ext.Ka.5, Ext.Ka-6, Ext.Ka.-7, Ext.Ka-8 and Ext.Ka-9, respectively. He has also proved the injury reports of Khandar Singh, Ext.Kha-1, Smt. Phoolwati Ext.Kha-2, Sukhvir Singh Ext.Kha-3, Bir Singh Ext. Kha-4 and Rishi Pal, Ext.Kha-5. P.W.-5, Dr. K.P. Sarabhai stated that the injuries received by persons on the side of informant and accused persons could be caused on 19.1.1982 at about 8-9 p.m. by lathi, bulli, Tabbal and Garasa.

12. PW-6 also proves the site plan relating to cross case, S.T. No. 66 of 1986 (State Vs. Lakhpat and others).

13. The Sub-Inspector Gajraj Singh gave evidence about the investigation done by him. He proved charge-sheet filed against accused appellants Khandar Singh, Bir Singh, Sukhbir Singh, Rishi Pal Singh, Shri Pal Singh and Smt. Phoolwati. He also proved charge-sheet relating to cross case, S.T. No. 66 of 1986, Ext.Ka-7 and stated that the cross case was also related to cognizable offence.

14. The court recorded statement under Section 313 CrPC of accused

appellants Khandar Singh, Bir Singh, Sukhbir Singh, Rishi Pal Singh, Shri Pal Singh and Smt. Phoolwati. They denied the prosecution case. They also denied that the informants have not caused any injury. They also stated that false FIR and x-ray report was prepared by the informant. They also submitted that false charge-sheet was filed against them.

15. The appellants accused also stated that they were constructing house situated at old Abadi. The informant and his persons came there and assaulted them and registered false case against them.

16. It has been submitted by the learned counsel for the appellant that the Trial Court has convicted the appellants against the weight of evidence on record. It is further submitted that conviction of the appellants are bad in eye of law. It has also been submitted that the sentences awarded to the appellants are too severe. It has been prayed that the appeal may be allowed and the judgement and order dated 26.04.1988 be set aside and they may be acquitted of the offences.

17. Per contra, learned A.G.A. for the State has supported the Trial Court's judgement and order and submitted that the Trial Court has passed the impugned judgement and order after proper appreciation of the facts witnesses on record as well as the law applicable and that there is no scope for interference in the impugned judgement and order.

18. Heard learned counsel for the appellants, learned A.G.A. and perused the material available on record.

19. The definition of Section 324 I.P.C. is as follows:

324. Voluntarily causing hurt by dangerous weapons or means.--Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

In order to sustain a conviction under this Section prosecution has to prove that the accused voluntarily caused hurt and that such hurt was caused by means of an instrument referred to in the section. Nothing short of that will suffice.

20. In **Mukati Prasad Rai @ Mikti Rai and others vs. State of Bihar, (2004) 13 SCC 144** the Apex Court has upheld the conviction under Section 324 I.P.C. for injuries caused by Lathi.

21 . The offence punishable under Section 325 I.P.C. has been defined under Section 320 I.P.C. Section 320 I.P.C. reads as follows:

320. Grievous hurt.--The following kinds of hurt only are designated as "grievous":--

First -- Emasculation.

Secondly --Permanent privation of the sight of either eye.

Thirdly -- Permanent privation of the hearing of either ear,

Fourthly --Privation of any member or joint.

Fifthly -- Destruction or permanent impairing of the powers of any member or joint.

Sixthly -- Permanent disfiguration of the head or face.

Seventhly --Fracture or dislocation of a bone or tooth.

Eighthly --Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

A person cannot be said to have caused grievous hurt unless the hurt caused is one of the kinds of hurts specified under Section 320 I.P.C. It is the duty of the Court to give a finding of his own whether the hurt was simple or grievous. The Doctor has to describe the facts in respect of nature of injuries and the Court is to decide whether the nature of the injury described by the Doctor comes within any of the clauses of Section 320 I.P.C.

22. In **Hori Lal and another vs. State of U.P., (1970) 1 SCC 8** the Apex Court has held that for the application of clause 7 of Section 325 it is not necessary that a bone should be cut through and through or that the crack must extend from the outer to the inner surface or that there should be displacement of any fragment of the bone. If there is a brake by a cutting or splintering of the bone or there is a rupture or fissure in it, it would amount to fracture within the meaning of Clause 7 of Section 320 I.P.C.

23. In the light of the aforesaid provisions relating to Sections 324 and 325 I.P.C., the evidence of witnesses of facts is to be examined.

24. P.W.-1, injured Janam Singh has stated in his evidence dated 22.04.1987 that the incident took place about five years three months ago. It was about 8 to 9 o'clock morning. Janam Singh and his companions were on their land having Khasra No. 123. Besides Janam Singh, Kartar Singh, Lakhpat, Devi Singh, Sardar Singh, Manveer Singh and Lalloo were also present there. Rishipal, Veer Singh, Sukhveer and Shripal came there. Rishipal had Tabbal, Veer Singh spade (Ganasa) and Sukhveer Singh had *Budi*. Remaining accused had *Lathi*. Phoolwati wife of Khadadar Singh was also present there having a *Danda* in her hand. These accused wanted to capture the house of the informant. The accused persons attacked on the informant and his companions with Ganasa, Tabbal, Budi and Lathi. PW-1, Janam Singh, Sardar Singh, Kartar Singh, Lallu and Manveer Singh received injuries in the occurrence. The incident was seen by Shyama, Netrapal, Harnarayan and Rambilas etc. who saved the injured. The injured and persons of his side snatched the weapon of the accused-appellant and defended themselves. The case of the land, in which the accused persons wanted to take possession, is pending in the Court of District Judge. Informant and his side has won the case in the Court of Hapur. The witness Hoshiyar has died. In the occurrence, there was fracture in the upper forearm of Lallu. P.W.-1 Janam Singh received fracture in the bone of the nose. Five other injured persons on the side of the informant had also received injuries and were examined in the District Hospital. Due to the injuries received in the occurrence there was fracture on the head of Sardar Singh. PW-1, Janam Singh has stated in his cross examination that his house is situated about 10-15 Gaj distance from his house.

25. P.W.-2, the informant/injured Kartar Singh has stated in his evidence dated 27.04.1987 that about five years three

months ago between 8 am to 9 am, informant and his companions Lakhpat, Devi Singh, Janam Singh, Manveer, Sardar Singh and Lallu were at their house situated at *Khasra* No. 123. Suddenly, Veer Singh, Rishipal, Sukhveer Singh, Shreepal Singh, Smt. Phoolwati came there holding Ganasa, Burari, Tabbal and Lathi in their hands. They started beating the informant and his companions. Kartar Singh, Janam Singh, Lallu Singh, Sardar Singh and Devi Singh sustained injuries in the occurrence. Veer Singh attached by Ganasa, Rishipal with Tabbal and Sukhveer with Burari. Other accused assaulted by Lathies. The incident was witnessed by Shyam Singh, Harnarayan, Netrapal, Rambilas and others. The informant Kartar Singh and persons of his side snatched the weapons of assault of the accused and used it in their private defence. PW-2 Kartar Singh proved the written report (Exhibit Ka-2) which he had given in the police station concerned and on the basis of which the FIR was registered. Accused wanted to forcibly occupy their land. PW-2 Kartar Singh and his companions won the case relating to the land in Hapur Civil Court. The medical examination of the injured was done in the District Hospital Ghaziabad. In the occurrence, there was fracture in the upper forearm of Lallu and that of the nose of Janam Singh. There was a crack in the head of Sardar Singh. PW-2 Kartar Singh admitted in his cross examination that he reached the place of occurrence about half hour before the occurrence has taken place. There is a distance about three hundred yards between the place of occurrence and the house of Kartar Singh. Sardar Singh, Janam Singh and Kartar Singh have separate houses in the village. PW-2 has admitted that he and the persons belonging to his side have inflicted injuries to the accused in their self-defence. PW-2 Kartar Singh also admitted that accused have also registered a cross case against the informant and his companions regarding the incident. PW-2 Kartar Singh has denied that he has lodged the FIR as a counterblast of the cross case lodged by the accused.

26. PW-3 Shyam Singh has stated in his evidence dated 15.05.1987 that the occurrence took place about five years four months earlier. It was about 8 am. He was present at his house. The place of occurrence is near to his house. Accused Rishipal holding Tabbal, Sukhveer Singh holding Budi, Veer Singh, Ganasa and remaining accused holding lathi in their hands. At that time, Lakhpat, Sardar Singh, Janam Singh and Kartar Singh were sitting in their hut and smoking Hukka. The accused suddenly started quarrelling and assaulting them. On hue and cry being made PW-3 Shaym Singh, Netrapal, Rambilas reached on the spot and accused leaving their weapons fled from the spot. In the incident Sardar Singh, Janam Singh and Lallu received serious injuries and other injured received simple injuries. PW-3 Shyam Singh has denied the suggestion that there is no house or hut on the place of occurrence. He has also denied that the accused assaulted the informant and his companions in self-defence. PW-3 denied that Kartar Singh, Sardar Singh and Lakhpat has also started beating the accused.

27. Injured Janam Singh and the eye witness PW-3 Shyam Singh has proved the date, place and time of incident. They have also proved the role of appellants Veer Singh, Sukhveer and Shripal Singh in the assault on injured from the side of the informant, Kartar Singh. They have proved that appellants-accused Veer Singh with Burara, Sukhveer with Ganasa and Shripal

with Lathi assaulted PW-1 Janam Singh, injured Sardar Singh and Lallu with dangerous weapon causing them grievous hurt. They have also proved that Kartar Singh submitted written report of the incident in the police station concerned on the basis of which first information report was registered against appellants Veer Singh, Sukhveer Singh and other accused, who have died. They have proved that after the incident the medical examination and x-ray of their injuries were done and fracture was found in the body of injured Sardar Singh, Janam Singh and Lallu.

28. PW-4 Dr. Gyanendra Kumar, Radiologist has proved the x-ray report dated 25.01.1982 of Sardar Singh, Janam Singh and Lallu, Exhibit Ka-2, ka-3 and ka-4, respectively. He has stated that in the acromion process of the scapula bone of injured Kartar Singh, fracture was found. He has also proved the fracture in the nasal bone of injured Janam Singh. PW-4 Dr. Gyanendra Kumar has also proved that in the x-ray report of Lallu, ulna bone of his left forearm was found to be fractured.

29. The oral evidence of PW-1 and PW-2 is corroborated by x-ray report of Sardar Singh, Janam Singh and Lallu Singh and injury report of Kartar Singh, Sardar Singh, Lallu, Janam Singh and Manveer Singh which are Exhibits Ka-5, ka-6, Ka-7, ka-8 and ka-9, respectively. The oral evidence of witnesses of facts, PW-1 Janam Singh, PW-2 Kartar Singh and PW-3 Shyam Singh is cogent, trustworthy, reliable and truthful. Nothing emerges from their cross examination which may prove them unreliable or false.

30. Oral evidence of aforesaid witnesses of facts, namely, PW-1, PW-2 and PW-3 is also corroborated by the written report (Exhibit Ka-1), Chick FIR (Exhibit Ka-11), the entry of GD institution of case in G.D. (Exhibit Ka-12) which is as report No. 12, dated 19.01.1982 time 10:50 o'clock.

31. PW-5 Dr. K.P. Sarabhai has proved that on the day of incident i.e. 19.01.1982 he had also examined the injuries of accused Phoolwati, Khandar Singh, Sukhveer Singh and Veer Singh. He had found injuries on the person of these accused. About the injuries received by the accused, the prosecution witnesses have stated that it was accused persons who first assaulted the informant and his companions and caused injuries to them and, thereafter, informant and his companions snatched the weapons from the accused persons and caused injuries in the exercise of right of self defence. It is clear that informant and his companions were in possession of the disputed land where they were sitting and smoking Hukka in the hut situated in their land. Thus, it is proved that informant and his companions inflicted injuries to accused persons and persons of his side in the right of private defence.

32. From the analysis of the oral and documentary evidence on record it is proved that on the date, time and place of occurrence appellants Veer Singh, Sukhveer, Shripal Singh and other three co-accused persons who have died, made an unlawful assembly and with dangerous weapon assaulted the injured Sardar Singh, Janam Singh and Lallu and other companions with Lathi, Tabbal and Farsa causing simple and grievous injuries to them. Thus, the prosecution has proved charge under Section 147, 323/149, 324/149, 325/149 against appellants-accused Veer Singh, Sukhveer Singh and Shripal Singh.

33. Learned counsel for the appellants has submitted that the incident had taken place on 19.01.1982 and 40 years have passed since then. Appellants and informant both are living in peace together. No criminal history has been produced against the accused-appellants by the State. Appellants be given the benefit of Probation of Offenders Act 1958 and release on probation.

34. Section 4 of the Probation of Offenders Act, 1958 reads as follows :

"4. Power of court to release certain offenders on probation of good conduct.-(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2) Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order, impose such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned.

35. A similar provision finds place in the Code of Criminal Procedure. Section 360 Cr.P.C. provides:

360. Order to release on probation of good conduct or after admonition.

(1) When any person not under twenty- one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty- one years of age or any woman is- convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour:

Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in the manner provided by sub- section (2).

(2) Where proceedings are submitted to a Magistrate of the first class as provided by sub- section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation cheating or any offence under the Indian Penal Code (45 of 1860), punishable with not more than two years' imprisonment or any offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

(4) An order under this section may be made by any Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) When an order has been made under this section in respect of any offender, the High Court or Court of Session may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law: Provided that the High Court or Court of Session shall not under this sub- section inflict a greater punishment than might

have been inflicted by the Court by which the offender was convicted.

(6) The provisions of sections 121, 124 and 373 shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.

(7) The Court, before directing the release of an offender under sub- section (1), shall be satisfied that an offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(8) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(9) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with sufficient surety conditioned on his appearing for sentence and such Court may, after hearing the case, pass sentence.

(10) Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders.

36. These statutory provisions very emphatically lay down the reformatory and correctional object of sentencing and obligates the trial court as well as appellate courts to give benefit of probation in fit cases as provided under law. Unfortunately, this branch of law has not been much utilized by the courts. It becomes more relevant and important in our system of administration of justice where trial is often concluded after a long time and by the time decision assumes finality, the very purpose of sentencing looses its efficacy as with the passage of time the penological and social priorities change and there remains no need to inflict punishment of imprisonment, particularly when the offence involved is not serious and there is no criminal antecedent of the accused persons. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed.

37. In the case of **Subhash Chand and others vs. State of U.P., 2015 Lawsuit (Alld) 1343**, this court has emphatically laid down the need to apply the law of probation and give benefit of the beneficial legislation to accused persons in appropriate cases. This court issued following directions to all trial courts and appellate courts:

"It appears that the aforesaid beneficial legislation has been lost sight of and even the Judges have practically forgotten this provision of law. Thus, before parting with the case, this Court

feels that I will be failing in discharge of my duties, if a word of caution is not written for the trial courts and the appellate courts. The Registrar General of this Court is directed to circulate copy of this Judgment to all the District Judges of U.P., who shall in turn ensure circulation of the copy of this order amongst all the judicial officers working under him and shall ensure strict compliance of this Judgment. The District Judges in the State are also directed to call for reports every months from all the courts, i.e. trial courts and appellate courts dealing with such matters and to state as to in how many cases the benefit of the aforesaid provisions have been granted to the accused. The District Judges are also directed to monitor such cases personally in each monthly meeting. The District Judges concerned shall send monthly statement to the Registrar General as to in how many cases the trial court/appellate court has granted the benefit of the aforesaid beneficial legislation to the accused. A copy of this order be placed before the Registrar General for immediate compliance."

38. In addition to the above judgment of this Court, this Court finds that the Hon'ble Apex Court in the case of **State of Maharashtra Vs. Jagmohan Singh Kuldip Singh Anand & others (2004) 7 SCC 659**, giving the benefit of Probation of Offenders Act, 1958 to the accused has observed as below:

"The learned counsel appearing for the accused submitted that the incident is of the year 1990. The parties are educated and neighbors. The learned counsel, therefore, prayed that benefit of the Probation of Offenders Act, 1958 may be granted to the accused. The prayer made on behalf of the accused seems to be reasonable. The accident is more than ten years old. The dispute was between the neighbors over a trivial issue of claiming of drainage. The accident took place in a fit of anger. All the parties educated and also distantly related. The incident is not such as to direct the accused to undergo sentence of imprisonment. In our opinion, it is a fit case in which the accused should be released on probation by directing them to execute a bond of one year for good behaviour."

39. Similarly, in **Jagat Pal Singh & others Vs. State of Haryana, AIR 2000 SC 3622,** the Hon'ble Apex Court has given the benefit of probation while upholding the conviction of accused persons under Sections 323, 452, 506 IPC and has released the accused persons on executing a bond before the Magistrate for maintaining good behaviour and peace for the period of six months.

40. In the light of above discussion, I find no illegality, irregularity or impropriety nor any jurisdictional error in the impugned judgment and order of the court below. The conviction recorded by the court below under Sections 147, 325/149, 324/149, 323/149 I.P.C. is upheld and is not required to be disturbed.

41. However, instead of sending the appellants to jail, they shall get the benefit of Section 4(1) of the Probation of Offenders Act, 1958 and shall be released on probation under the supervision of the Trial Court for one year on filing two sureties to the tune of Rs. 25,000/- coupled with personal bonds and undertaking to the effect that they shall not commit any offence and shall observe good behaviour and shall maintain peace during this period. If there is breach of any of the conditions, they will subject themselves to undergo

sentence before the court below. It is also desirable that accused-appellants may be directed to deposit Rs.5,000/- each as compensation in this case within two months. The amount of Rs. 5000/- deposited by the each accused-appellants, Rs.5,000/- shall be paid to injured having received grievous injuries, namely, Janam Singh, Sardar Singh and Lallu, or in case of their death to their legal representatives. The appellants-accused shall file the aforesaid bonds and sureties and shall deposit the compensation amount within two months from the date of the judgment in the court concerned as per law. In case surety bonds and compensation is not deposited, appellants shall have to undergo the sentence awarded by the Trial Court.

43. Accordingly, this appeal is **partly allowed r**egarding sentences of the appellants.

44. Let a certified copy of this order along with record be sent to the court concerned for compliance.

(2023) 3 ILRA 1199
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.02.2023

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Appeal No. 1387 of 2009
With
Criminal Appeal No. 1648 of 2009
With
Criminal Appeal No. 1685 of 2009

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

Counsel for the Appellant:
Sri Virendra Singh, Sri Apul Misra, Sri Kuldeep Singh Chahar, Sri R.S. Saroj, Sri Sheshadri Trivedi, Sru Surendra Singh

Counsel for the Opposite Party:
G.A., Sri Mithilesh Kumar Shukla, Sri R.P. Dwivedi, Sri Sheshadri Trivedi, Sri Avanish Kumar Shukla

A. Criminal Law – Indian Penal Code, 1860 - Sections 147, 148 & 302/149 IPC - Arms Act, 1959 - Section 25 – appellants sentenced to life imprisonment- informant is son of the deceased-father shot by appellant- motive- avenging the defeat in Gram Pradhan election-St.ments of witnesses of fact- Sections 161 and 162 of CrPC- quality of evidence during trial- establishment of motive- St.ment under Section 164 CrPC- corroborative evidence- important improvement in FIR version and St.ment under Section 161 CrPC- such evidence has no significance. (Paras 18, 19, 20, 21,23 and 24)

HELD: However, the motive acts as a double-edged sword which cuts both ways. The motive instigates a person to commit the offence as well as it also drives a person to falsely implicate the other person in a crime and it depends on the fact and circumstances as well as quality of the evidence adduced during trial as to what inference is to be discerned on account of establishment of motive in a criminal case. (Para 18)

This case is based on direct witness of witnesses. Therefore, it is to be seen as to what is the degree of reliability of their sworn testimony before the Court in the light of their previous St.ment recorded by the Investigating Officer under Section 161 Cr.P.C. (Para 19)

Hon'ble Apex Court in the case of Dhanabal And Anr vs St. Of Tamil Nadu, AIR 1980 SC 628, has held that the St.ment under Section 164 Cr.P.C. can be used as corroborative evidence. (Para 21)

Hon'ble Apex Court in Ram Briksh @ Jalim Vs St. of Chhatisgarh, AIR 2016 SC 2381, Tomso Bruno

& anr. Vs St. of U.P., (2015) 7 SCC 178 (SC), held that where the improvement was made by the witness in his St.ment before the Court than that what was made to the Investigating Officer under Section 161 Cr.P.C. same could not be relied on. In Vimal Suresh Kamble Vs Chaluvera Pinake (2003) 3 SCC 175, Hon'ble Apex Court held that the prosecution cannot seek to prove a fact during trial through a witness, which such witness has not St.d to police during investigation. The evidence of that witness regarding the said improved fact is of no significance. (Para 24)

B. Section 25 of Arms Act- recovery of country made pistol- pointing out of each appellant- disclosure St.ment under Section 27 of the Indian Evidence Act- no recovery from immediate possession after arrest- FSL reports did not match- no public witness of recovery- charges not proved- appellants acquitted of all charges- Appeal allowed. (Paras 30 to 33)

HELD: Similar is the position for charges under Section 25 of Arms Act, with regard to the present appellants which has also been tried by learned trial court along with charge under Section 147, 148, 302/149 IPC as the one country-made pistol is said to have been recovered from the pointing out of each of the present appellants, which are said to have been used in the commission of offence as per the prosecution version on the basis of their disclosure St.ment after their arrest under Section 27 of Evidence Act in police custody. (Para 30)

These firearms are not recovered from their immediate possession after their arrest. One firearm has been allegedly recovered from the pointing out of the Pramod Kumar @ Pappu after getting his police custody by the orders of learned CJM. Out of three firearms, one empty cartridge shell recovered near the place of incident, is found to have been fired by the firearm allegedly recovered from the pointing out of accused Tejvir as per FSL report. The other empty cartridge shell was not found to be fired by any of the firearms recovered on the pointing out of accused persons. No public witness has been enjoined in the recovery of these firearms alleged recovered on the pointing out of the accused persons in respect of their presence. Therefore, the recovery of firearms allegedly used in the offence is also not proved in the present case beyond reasonable doubt, keeping in view the consideration, tenure and nature of the evidence adduced during trial. (Para 31)

In view of the discussions made above, we have found that there is no cogent and reliable evidence on record to prove the charges against accused appellants, for which they have tried, convicted and sentenced by learned trial Court. The case of the prosecution with regard to charges, for which the accused appellants are tried and convicted by trial court are not found to have been proved beyond reasonable doubt. Therefore, we have no hesitation in allowing these appeals. (Para 32)

Appeal allowed. (E-14)

List of Cases cited:

1. Hemraj Vs Rajaram, 2004 (1) CRIMES 317 (SC)

2. Gayasuddin Vs St. of Bihar, 2004 (1) CRIMES 90 (SC)

3. Dhananjay @ Shera Vs St. of Punj ., 2004 (2) CRIMES 2 (SC)

4. A.K. Mansoori Vs St. of Guj., 2002 (2) SCJ 38

5. St. of Orisha Vs D. Naik, 2002 (2) CRIMES 286 (SC)

6. Girish Chandra Mahato, 2006 (1) CAR 125 (SC)

7. Mohd. Khalid Vs St. of W. B., 2002 (7) SCC 334

8. Prithvi Singh Vs Mamraj, 2004 (2) CRIMES 170 (SC)

9. Dhanabal & anr. Vs St. Of T. N., AIR 1980 SC 628

10. Ram Briksh @ Jalim Vs St. of Chhatisgarh, AIR 2016 SC 2381

11. Tomso Bruno & anr. Vs St. of U.P., (2015) 7 SCC 178 (SC)

12. In Vimal Suresh Kamble Vs Chaluvera Pinake (2003) 3 SCC 175

(Delivered by Hon'ble Ram Manohar Narayan Mishra, J.)

1. These Criminal Appeals have been preferred by the appellants against the impugned judgment and order dated 6.2.2009 passed by the Additional District and Sessions Judge, Firozabad, in S.T. No.235/2006, arising out of Case Crime No. 96 of 2005, under Sections 147, 148, 149, 307 and 302 IPC and in S.T. Nos. 235A/2006, 235B/2006 and 235C/2006 (State of U.P. Vs. Tejvir and 2 others), arising out of Case Crime Nos.95 of 2005, 99 of 2005 and 9 of 2006, under Section 25 of Arms Act, Police Station Pachokhara, District Firozabad, whereby the accused-appellants Tejvir, Hariom and Pramod Kumar @ Pappu have been convicted under Sections 147, 148, 302/149 IPC and 25 of Arms Act and sentenced them as under:-

(I) Under Section 302/149 IPC they have to undergo imprisonment for life, with a fine of Rs.5,000/-each, with default stipulation;

(II) Under Section 148 IPC, they have to undergo one year imprisonment; No sentence was awarded under Section 147 IPC as Section 148 is aggravated form of offence of Section 147 IPC;

(III) Under Section 25 of Arms Act, they have to undergo one year imprisonment, with a fine of Rs.1,000/-each with default stipulation in their respective case. All the sentences are directed to run concurrently.

2 . The main case under Section 147, 148, 307, 302 was registered vide Crime No. 96 of 2005, Police Station Pachokhara, District Firozabad, in which appellants and co-accused persons were named as accused. Other cases were registered under Section 25 of Arms Act against each of the appellants on the basis of recovery of firearm allegedly used in the offence, on their pointing out, and all the four cases were tried together by learned trial Court.

3. Heard learned counsel for the appellants, learned AGA for the State and perused the material placed on record. The appellants are held in jail custody as convict.

4. The prosecution case is based on a written report dated 11.11.2005 (Ex.Ka-1) submitted by the PW-1 the informant Vinod Kumar Dixit and son of deceased Brahm Dutt Dixit. The informant Vinod Kumar lodged the first information report at Police Station Pachokhara (Tundla) District Firozabad and Chik FIR was registered by Constable Muharrir Hari Nandan Singh, vide Crime No.96 of 2005, under Sections 147, 148, 149, 307, 302 IPC on 11.11.2005 at 12:05 hours. The chik FIR is marked as Ex.Ka-3. In the FIR, it is alleged that on 11.11.2005 at 9:30 hours, deceased Brahm Dutt Dixit, who is father of the informant, was moving towards Pachokhara Paith (local village market) riding his motorcycle bearing Registration No.DL75R7268 and the informant was also following him along with his cousin Neeraj riding over his motorcycle bearing Registration No. UP73J1326. On the way to Pachokhara Paith from his native village Chhikau, the informant noticed that a Maruti Car was parked on the turn of orchard of Prem Singh near Gadhi Thakuran village and as soon as the father

of informant reached near the car, his co-villagers Pramod @ Pappu and Tejvir, son of Sardar Singh, Vikas s\o Pramod and Hari Om Singh s\o Tejvir Singh and brother-in-law of Yogesh (name not known) disembarked from the Maruti car and Pramod abused the deceased stating that he had defeated him in Gram Pradhan election and he will not spare him and kill him and at that time accused Pramod, Tejvir, Vikas and Brother-in-law of Yogesh were armed with tamanchas (country made pistols). They had surrounded the deceased and before he could understand the matter, Pramod opened the FIR by tamancha, which he had taken in his hand. The fire shot by Pramod hit him and he fell down in the nearby field after walking some distance. Thereafter, accused persons namely, Vikas, Tejvir and Hariom had opened fire on him by their respective firearms. The deceased got seriously injured in the firing incident. The brother-in-law of Yogesh suddenly fired at informant, however, from which he got narrow escape. The witnesses Omprakash and Rajpal, who were working in nearby field, had seen the incident and came to the place of occurrence. On arrival of witnesses, the accused persons fled away from the place by their Maruti car. The deceased Brahm Dutt Dixit was laid in a tempo driven by Satya Prakash, a co-villager of the informant and was transported up to Srinagar and from there, he was shifted in a car, which belonged to some person from market (Paith) and they took him to Kamayani Hosptal of Agra, where he was declared dead. No treatment could be given to him in the hospital. The informant brought back the dead body and lodged the FIR at police station concerned on same date. After registration of the FIR, the Investigating Officer recovered two empty cartridges from two places near the place of incident and prepared its recovery memo (Ex.Ka-12) in presence of witnesses Nand Kishore and Virendra Kumar. On the same day, the Investigating Officer collected the plain and blood stained soil from the field, where the deceased fell down after receiving injuries and prepared recovery memo in presence of some witnesses which is marked as Ex.Ka-11. The inquest on the dead body of the deceased was conducted by the first Investigating Officer- S.I. Ramendra Pal Singh (PW-5) on the date of incident between 12:50 to 13:50 hours and inquest report was prepared by him which is Ex.Ka-5. The dead body was sent for post mortem in order to ascertain the real cause of death of deceased by the Officer who conducted inquest alongwith police papers and post mortem on the dead body of the deceased was conducted on the date of incident at 10:10 P.M. In post mortem report, cause of death was found by the Doctor due to coma, shock and hemorrhage, as a result of antemortem injuries. The post mortem report is marked as Ex.Ka-2. During investigation, accused Tejvir Singh was arrested on 14.11.2005 by S.O. Krishna Baldeo and his colleagues and at 10:00 A.M. on his pointing out a country made pistol of 0.315 bore used in the offence of murder of deceased Brahm Dutt Dixit was recovered, which is marked as Ex.Ka-13. Another accused Hariom was arrested by police on 21.11.2005 at 10:30 hours and a country made pistol of 0.315 bore was recovered at 10:05 hours on his pointing out, which was used in the offence. The recovery memo is marked as Ex.Ka-14 and on 21.1.2006, S.O. and his team, during police custody remand of accused Pramod Kumar @ Pappu ordered by the CJM concerned, a country made pistol used in the offence was recovered on his pointing out at 17:40 hours and

recovery memo thereof is marked as Ex.Ka17. The Investigating Officer prepared site plan of the place of incident, where deceased was shot by accused persons, at the instance of the informant, which is marked as Ex.Ka-10. The Investigating Officer, who investigated the cases of Arms Act to accused persons separately had also prepared the site plan for offence of recovery of firearm, which are marked as Ex.Ka-20 in respect of accused Pramod Kumar @ Pappu and Ex.Ka-27 in respect of accused Hariom. The Investigating Officer produced the firearms recovered at the pointing out of the accused persons before the District Magistrate and obtained his sanction order under Section 39 of Arms Act for prosecution of three accused persons under Section 25 Arms Act, which are placed on record as Ex.Ka-21, Ka-23 and Ka-28 in respect of Tejvir, Pramod @ Pappu and Hariom, respectively. During investigation, one accused, who is shown in FIR as brother-in-law of Yogesh was not traced and one named accused Vikas was declared juvenile and after filing of charge-sheet his case was separated and referred to Juvenile Court. Chargesheet was filed against accused Tejvir, Pramod and Hariom, after investigation, by the police after arriving at a finding regarding their complicity in the offence. The Investigating Officer sent the wearing apparels of the deceased worn by him at the time of incident, along with blood stained and plain soil recovered from the place of incident and the countrymade pistols, two empty cartridges recovered from the spot and a disfigured bullet recovered from the brain area of deceased during his post mortem examination for expert examination to FSL, Agra. One empty cartridge was found to be fired by the countrymade pistol allegedly recovered from the possession of accused Tejvir and in chemical examination report of blood stained soil, human blood was found therein. The fouling matter lead, copper and nitrate were found from the barrel of countrymade pistols sent for ballistic examination.

5. Learned Chief Judicial Magistrate, Firozabad committed the case for trial to Court of Sessions as the same was exclusively triable by the Court of Session. The accused persons were not released on bail during investigation and trial and they faced the trial as under trial prisoner.

6. The accused persons Tejvir, Hariom and Pramod Kumar @ Pappu were charged by Court below in S.T. No. 235 2006 under Sections 147, 148, 149, 302/149, 307/149 IPC and in Connected S.T. Nos. 235A/2006, 235B/2006 and 235C/2006, the accused persons namely, Tejvir, Pramod Kumar @ Pappu and Hariom were charged under Section 25 of Arms Act, respectively.

7. During the course of trial, prosecution examined as many as 14 witnesses in support of its case. **PW1**- Vinod Kumar Dixit is the informant and son of the deceased, who has been produced as eye-witness, **PW-2** Rajpal Singh is produced as an independent witness, was present in the locality, when the incident of murder took place, **PW3** Neeraj is also examined as eye-witness, who is cousin of informant, **PW-4** Dr.R.K. Garg is author of the postmortem report, who has proved the postmortem report as Ex.Ka-2. He also proved the wearing apparels and articles worn by the deceased at the time of incident during his examination as Material Ex.1 to 12, PW-5- Head Constable Dharampal has proved the chik FIR and entries of G.D. regarding

registration of case under Sections 302, 307, 147, 148, 149 IPC as Ka-3 and Ex.Ka-4 as at police station concerned on 11.11.2005 at 12:05 hours and ravangi and returning of G.D. entries of S.O. on the date of incident by his evidence during trial as Ex.Kha-1 and Kha-4. PW-6 Rajendra Pal Singh, retired Sub Inspector is produced as Investigating Officer of the case under Section 302 IPC and has proved the inquest report as Ex.Ka-5, police papers sent alongwith dead body for postmortem as Ex.Ka-6 to Ka-9, site plan of the place of incident as Ka-10, recovery memo of two empty cartridges and blood stained and plain soil as Ex.Ka-11, Ka-12 as well as recovery memo of a countrymade pistol from accused Tejvir as Ex.Ka-13 and recovery memo of a countrymade pistol from accused Hariom as Ex.Ka-14. PW-7 S.O. Krishna Baldeo the second I.O. proved the statements of accused persons leading to recovery and recovery memo of firearm recovered at the pointing out of accused Pramod Kumar @ Pappu as Ex.Ka-17. PW-8- S.I. Suresh Chand was Investigating Officer of Crime No. 97 of 2005, State vs. Tejvir, under Section 25 Arms Act, proved the investigation proceeding, site plan of said case as Ex.Ka-20. PW-9 HCP (Rtd) Kripal Singh has proved the remaining investigation proceeding in the case No.97 of 2005 against accused Tejvir Singh chargesheet in the case as Ex.Ka21. PW-1-0 HCP Badan Singh has proved the investigation proceeding, site plan, prosecution sanction and filed under Crime No.9 of 2006, against Pramod @ Pappu Singh as Ex.Ka22, 23 and 24. PW-11- Constable Clerk Harinandan Singh has proved chik FIR of Case Crime No.97 of 2005, under Section 25 Arms Act and G.D. entries thereof as Ex.Ka-25, Ka-26. PW-12 S.I. Pratap Singh Solanki is a witness of recovery of firearm from accused Tejvir and Investigating Officer of Case Crime No.99 of 2005, under Section 25 Arms Act (State vs. Hariom) and he has proved the recovery of a countrymade pistol from accused Tejvir during investigation as material exhibit as well as site plan, prosecution sanction and chargesheet filed against accused Hariom in the Case Crime No. 99 of 2005, under Section 25 Arms Act as Ex.Ka-27, 28, 29 being Investigating Officer. He has also produced pistol recovered in Crime No.97 of 2005 as material exhibit. PW-13 Constable Rajveer Singh has proved chik FIR of Crime No.99 of 2005, under Section 25 Arms Act and G.D. entries thereof as Ex.Ka-30 and Ka-31 as its author. PW-14 Constable Ranveer Singh has proved the chik FIR of Crime No.9 of 2006, under Section 25 Arms Act and G.D. entries thereof as its author and same were exhibited as Ex.Ka-32 and Ka-33, during his evidence. PW-7 also produced the firearm recovered at pointing out of accused Pramod Kumar @ Pappu as ME.15 and clothing and slip as ME.16 and 17. He proved site plan of pistol recovery place as Ex.Ka-18 and charge-sheet in murder case as Ex.Ka-19.

8. The prosecution has examined three witnesses of fact in support of its case. The case is based on direct evidence of alleged eye-witness **PW-1** Vinod Kumar Dixit, who is informant and son of deceased and has supported FIR version in his statement being author of the written report Ex.Ka-1 on the basis of which FIR has been lodged in the murder case. It is stated that on 11.11.2005 at around 9:00 A.M. his father was going towards Pachokhara Paith from his native village Chhikau by his Hero Honda motorcycle whereas he and his cousin Neeraj (PW-2) were also going towards Pachokhara Paith

by another motorcycle. As soon as his father reached near Orchard of Prem Singh, which situated on the way, a Maruti car was found to be parked on the road, the accused Pramod @ Pappu, Tejvir, Hariom, Vikas and one unknown person, who was residing at the residence of accused persons at that time, got down from the car and Pramod @ Pappu abused his father and stated that he had defeated him in Gram Pradhan election and today he will not be spared and killed. All the accused persons were armed with *tamancha* and first of all accused Pramod @ Pappu shot at his father by his *tamancha* which hit him and he fell down in the field lying in the corner of the road. Thereafter, four accused persons fired shots at him by their respective firearms indiscriminately. The witness cried for help but in the meanwhile the fifth person, whose name is not known, shot at him and his cousin with intention to kill, in which they got narrow escape. The incident was seen by Omprakash and Rajpal, witnesses who are residents of Gadhi Takhuran, who were working in their field. Many persons also appeared on the spot apart from these witnesses. The accused persons ran towards Pachokhara by their car. His co-villager Satyapal reached on the spot taking his auto-rickshaw, in which his father was laid in the injured position and driven towards Srinagar Paith (market) and from there, he was shifted to a vehicle of the people of Paith and transported to Kamayani Hospital Agra, where he was declared dead. Thereafter, they came back with dead body of his father and laid the dead body in front of petrol pump at Pachokhara and dictated the written report to his cousin Ram Naresh Dixit and filed it at police station Pachokhara, on the basis of which, FIR was lodged. The witness verified his signature on written report, which was exhibited as Ex.Ka-1 during his statement. In cross-examination, the witness stated that the accused are his co-villagers and for that reason, the witness and accused persons are known to localites. His father started for Pachokhara Paith at around 9:20 A.M. from home. He was wearing slippers (chappals) in his feet. The place of incident lies one kilometer away from his home. It takes 2 to 3 minutes to reach the place of incident from his home. There are many turns in between his home and the place of incident. When he reached at the place of occurrence he saw his father sitting on his motorcycle, which was in start position. After receiving a shot, he fell down from the motorcycle and ran few steps after getting up and fell down in the adjoining field. He had pointed out the place of incident to the Investigating Officer. He has been produced from jail for recording of his statement in this case as he was held in jail custody in a criminal case under Section 307 IPC and out of two cases, one case was lodged at the instance of Devaki Nandan and the other by Godan Singh. In case lodged by Godan Singh, his cousin Neeraj is also accused along with co-accused. The accused persons were not masked at the time of incident. His father had not told him the purpose for which he was going to *Paith* (local market), when he started from home. The *Paith* was held on every Friday. His father moved 2 to 3 minutes before him from the home. When Pramod shot at him his father was sitting on motorcycle and Pramod was standing. No blood stain was found by the Investigating Officer on road but it was found in the field because his father fell down he is not aware as to who took the motorcycle of his father and his and brought it back to home after the incident. At the time of spot inspection by Investigating Officer, motorcycles were not there. He also had not found the slippers (chappals) of his father worn by him in his

feet. The witnesses were not present at the time of preparation of site plan. No field of Rajpal lies near the place of incident. Rajpal works at the place of Omprakash. He could not disclose the name of brother-in-law of Yogesh, who was residing at his place two months prior to the incident. He is not in a position to disclose the number of Maruti car used in the offence. It was seen for two months at the place of accused persons prior to the incident. It was white colored Maruti 800 and no number plate was displayed thereon. The field in which his father fell down was cultivated. The Investigating Officer collected blood stained soil from the field. No bullet or pellets were found by him in his presence. The accused persons shot at his father, when his father fell down in the field. The barrels of their pistols were 2:5 feet away from him. His father received no treatment at Kamayani Hosptial and he was declared 'dead' by the doctor as soon as he got inside. The Investigating Officer has recorded his statement at the place of incident on the same day.

9. PW-2 Rajpal Singh also supported the FIR version and statement of PW-1, in his sworn testimony and stated that at the time of incident, he and Pandit Omprakash had gone to work in the field of potato in Gadhi Thakuran. They had seen the white colored Maruti car which came towards Chhikau at around 9:00 A.M. and was parked by the side of Orchard of Prem Singh. The deceased Brahm Dutt Dixit came towards Chhikau at the same time by motorcycle and his son and nephew Neearj were also going by their motorcycle behind him. The accused persons disembarked from the car as soon as they noticed the deceased and Pappu fired first shot by his pistol (tamancha) at deceased who fell down and again ran but fell down in the field of Thakur Bachhu Singh, thereafter, the accused persons fired at him by their respective weapons with intention to kill. The deceased had received three shots of bullets and unknown person fired a shot on witness Vinod, in which he got narrow escape. The mother of accused Pramod @ Pappu stood as a candidate in Gram Pradhan Election in which deceased Brahm Dutt Dixit was elected and to take revenge of the defeat, the accused persons had done away the deceased, who was Gram Pradhan at that time. In cross-examination, the witness has stated that he is resident of Village- Chaturpurawhich is 1-1/4 kms. far from the place of incident. This is not true to say that the place of incident is not visible from the field of Omprakash. In fact the field of Omprakash lies southwards to the road whereas the Orchard of Prem Singh and temple are towards the west of the road. First shot was fired by Pramod @ Pappu and the deceased fell down and again arose and ran but fell down in the field. The accused persons fired at him when he fell down in the field of Bachchu Singh. He is not taken the slippers (chappals) worn by the deceased.

10. **PW-3** Neeraj is nephew of the deceased who has stated that at the time of incident he was pillion rider of motorcycle driven by his cousin Vinod who is son of the deceased and he had witnessed the incident. He has also supported the FIR/prosecution version in his sworn testimony and has stated that election of Gram Pradhan was conducted in the year 2005, in which Vaijanti Devi, the mother of accused Pramod @ Pappu had also stood as a candidate. Pramod @ Pappu has also filled his candidature as a dummy candidate but deceased won that election, which was the reason of his murder. The first shot was fired by Pramod @ Pappu

and when he fell down in the field, Hariom, Vikas and Tejvir had fired at him. After receiving first shot he ran 4 to 5 steps and fell down in the field. He is not apprised of the number of Maruti car by which accused persons had reached on the spot. The witnesses had brought the deceased in the injured condition from the place of incident laying him in a auto-rickshaw of his co-villager Satya Prakash to Pachokhara Paith and thereafter took him to Kamayani Hospital, Agra by car of some person of Paith.

11. The incriminating circumstances appearing from the prosecution evidence were put to the accused appellants while recording their statements under Section 313 Cr.P.C., who claimed that they are innocent and not guilty. They also stated that the false evidence has been adduced against them by prosecution witnesses. False FIR was lodged against them. Investigating was not fair and impartial. The evidence regarding their complicity and murder of deceased is false. The defence, however, tendered no evidence in defence. Their defence is that of denial.

12. The postmortem report of the deceased Brahm Dutt Dixit has been authored by Dr. R.K. Garg, who was examined as **PW-4** during trial and he stated that he has conducted the postmortem on the body of the deceased on 11.11.2005 at 10:10 P.M. with permission of Incharge- District Magistrate and CMO- Firozabad. Deceased was aged about 68 years old. He compared the specimen seal with the seal affixed on clothes by which the dead body was wrapped and found it intact. At the time of postmortem examination following ante mortem injuries were found on his person:

(1) firearm wound of entry of size 2.5cm X 1.5cm cranial cavity deep on right side, back of head, 3cm behind left ear, margins are inverted and lacerated, blackening and tattooing present;

(2) firearm wound of entry of size 2cm X1.5cm X chest cavity deep on left side of chest, 14cm below and lateral to left nipple at 5'O clock position, margins are inverted and lacerated, blackening and tattooing present;

(3) firearm wound of exit of size 3.5cm X 2.5cm on back of chest, which was communicating to injury No.2. This injury was lying on back of chest downwards and on spinal cord, margins were averted and lacerated;

(4) firearm wound of entry of size 1.5cm X 1.5 cm on left side of chest and abdominal cavity deep at outer space over the costa border, margins were inverted and lacerated, blackening and tattooing present;

(5) firearm wound of exit 2.5cm X 2.0cm into abdominal cavity deep and chest cavity deep on right side of outer aspect of lower part of chest and above left costa border, margins are averted and lacerated; This injury was communicating to injury No.4.

(6) abrasion of 6cm X 3.5cm on lower part of right knee.

13. In the opinion of Doctor, the death of deceased was due to coma, shock and hemorrhage as a result of above antemortem injuries, as described. It is also stated in the postmortem report (Ex.Ka-2) that the time of death was of half day back and one metallic piece of bullet was recovered from the cranial cavity. Riger-mortis was present in both lower and upper extremities. In internal examination, the

temporal and occipital bones of skull were found fractured. T8 to T10 vertebra of neck were fractured. Spinal cord was fractured. Small intestine was lacerated and semi digested food was present. Large intestine was lacerated and faecal matter was present. The Doctor proved the clothes and belongings removed from the dead body at the time of postmortem as material Ex.1 to 12 during his examination as PW-4.

14. Learned counsel for the appellants submitted that prosecution examined three witnesses of fact, out of whom PW-1 Vinod Kumar Dixit is son of the deceased, PW-2 Rajpal Singh has been examined as independent and eye-witness and PW-3 Neeraj has also been examined as eye-witness, who is nephew of the deceased. The public witnesses of recovery of empty cartridge shells and blood stained soil were not examined by prosecution during trial, which casts doubt on the factum of recovery of empty cartridge shells and blood stained soil. The state of firearm injuries found on the person of the deceased in postmortem report is not in consonance with the eye-witness account, which casts doubt on trajectory of firearm shots stated in eye-witness account of the incident given by PW-1, PW-2 and PW-3. The nature of injuries are to be considered minutely along with the way in which they are alleged to be caused to the deceased as per the deposition of the witnesses but same is not found in the present case. To appreciate the nature of injuries, it is necessary to appreciate minutely the statement of PW-4 Dr. R.K. Garg, who conducted the postmortem examination on the dead body of the deceased. Further, the postmortem examination report proved by PW-4 has to be minutely appreciated along with the description of the injuries made in the deposition. It is also necessary to estimate as to how the gunshots would have been caused to the deceased and the actual seriatim, in which the injuries would have been caused to the deceased. He further submitted that the dead body of the deceased was not brought to the police station concerned by the informant and witnesses from Agra but was kept on the road near the petrol pump situated opposite a school. This conduct of the witnesses also creates a good deal of doubt about their presence on the spot when the incident occurred. He next submitted that on appreciation of witnesses of fact, there is a great deal of contradictions therein, which clearly establish the fact that they had in fact not seen the incident and they appeared on the spot after the occurrence. The eye-witnesses propounded by the prosecution are infact not eye-witness. Deceased might have been killed by some other unknown miscreants and due to rivalry and animosity prevailed during Gram Pradhan election, the accused persons were falsely named. The Maruti car, in which accused persons are said to have appeared at the time of incident and seen on the place of incident by the witnesses could not be traced during investigation. Even the slippers (chappals) worn by the deceased were not found or recovered by the Investigating Officer or witnesses from the place of incident. He further submitted that the Investigating Officer said to have conducted the local inspection of place of occurrence in the evening of the date of incident on pointing out of the informant (PW-1) but the motorcycles of the deceased and witness could not be found there and the witness could not explain as to who and when brought them to his house after the incident. Lastly, he submitted that it was not physically possible for the deceased to run or walk few paces after receiving gunshot injury on his head, keeping in view

the enormity of his head injury allegedly caused by gunshot. Thus, the statement of witnesses on this point is also not possible or believable. PW-2 Rajpal is said to have working in nearby field alongwith Om Prakash and is made eye-witness on that count but from his evidence itself no such field could be located nearby the place of incident. In site plan also, the field where witnesses Om Prakash and Rajpal are said to have been working has not been indicated by the Investigating Officer in site plan. Thus, his presence on the spot is also highly doubtful. The appellants are languishing in jail for more than 17 years.

15. Per contra, learned AGA submitted that this is a case based on direct evidence and eye-witness account of the witnesses. The occurrence took place in the day light and minor discrepancies and contradictions pointed out in the cross-examination of witnesses cannot be taken as a ground to disbelieve their testimony. There is no factual or legal error in impugned judgment passed by the learned trial Court in appreciation of evidence and same is liable to be affirmed in present appeal.

16. A perusal of impugned judgment of learned trial court, which is under challenge in present appeal, reveals that the learned Additional Sessions Judge has observed therein that it is true that investigation was defective in some respect such as motorcycles, which was being ridden by the deceased and the other ridden by PW-3 and informant and slippers (chappals) worn by the deceased at the time of incident were not recovered. These things were not searched out by the Investigating Officer during investigation. The tempo, on which the deceased was laid firstly from the place of incident, was not inspected by the Investigating Officer. He also did not inspect the car through which the deceased was sent to Kamayani Hospital, Agra. He did not indicate the place the in site plan from where the witnesses had seen the occurrence. He did not show the agricultural field of the named witness Omprakash and he did not collect blood stained clothes of witnesses. He also failed to locate the Maruti car used by the accused persons in the offence but in view of all these factors which are components of defective investigation, the prosecution case cannot be treated as doubtful, if the same has been otherwise proved by the prosecution. He cited **Hemraj vs. Rajaram, 2004 (1) CRIMES 317 (SC), Gayasuddin vs. State of Bihar, 2004 (1) CRIMES 90 (SC), Dhananjay @ Shera vs. State of Punjab, 2004 (2) CRIMES 2 (SC), A.K. Mansoori vs. State of Gujarat, 2002 (2) SCJ 38, State of Orisha vs. D. Naik, 2002 (2) CRIMES 286 (SC)** in support of his finding.

17. Learned trial judge also observed that the prosecution case cannot be doubted due to the fact that informant Vinod Kumar Dixit has stated in his written report as well as in his sworn testimony before the Court as PW-1 that 5th accused, who is not named in the FIR who was known as brother-in-law (sala) of the co-villager Yogesh, could not be traced during investigation and the allegation of opening of FIR by said 5th accused at PW-1 Vinod Kumar Dixit with intention to kill could not be proved and the accused persons were acquitted of the charge under Section 307/149 IPC, accordingly. As prosecution case has been proved by eye-witness account given by the witnesses of fact and same has been corroborated by the evidence of Dr. R.K. Garg, who conducted post mortem examination on dead body of

the deceased. Therefore, if there is any difference in ballistic experts report and eye-witnesses account that will also not result in affecting the reliability of prosecution case. The motive entrusted by prosecution has been duly proved in evidence although the same is treated as double edged sword which cuts both way and accused persons can be falsely implicated on account of motive as well as motive also acts as a motivational factor on the part of the accused persons to commit the offence. Therefore, on the basis of eye-witness account of prosecution witnesses and medical evidence, this fact is proved without any doubt that the accused are the persons who are author of the crime and defence case that the accused persons were falsely implicated in the case on the account of enmity of Gram Pradhan election has got no force. The prosecution case can also not be disbelieved on account of the fact that in present case FIR was not sent to jurisdictional Magistrate promptly as provided under Section 157 Cr.P.C. and he cited a judgment of Hon'ble Apex Court in the case of **Girish Chandra Mahato, 2006 (1) CAR 125 (SC)** in support of this finding. He also dispelled the contention of defense that some delay was caused in recording the statement of witness Neeraj. Therefore, his statement cannot be relied upon. He cited a judgmenet of Apex court in **Mohd. Khalid vs. State of West Bengal, 2002 (7) SCC 334 and Prithvi Singh vs. Mamraj, 2004 (2) CRIMES 170 (SC),** wherein it is held that the delayed examination of a witness by Investigating Officer cannot be a ground to disbelieve the prosecution version, as there may be several reasons of such delay. However, in such cases, the Court should examine the statement of such witness carefully and minutely. The FIR in present case has been lodged promptly on the same day within three hours of the incident. Therefore, if any delay is there, the same is self explained, keeping in view the sequence of events unfolded in prosecution evidence, after the incident. The learned trial court has also dispelled the defence contention that keeping the body of the deceased near the petrol pump in front of a school after taking it back from Agra, does not sound natural and prosecution failed to prove the place where the dead body was recovered. Learned trial court has stated that the inquest has been conducted on the place where dead body was kept after taking it back from Agra as per evidence of prosecution. The plain and blood stained earth was taken into possession by police and the same was also chemically examined in FSL. Learned trial court has also turned down the contention of the defense as PW-1 and PW-3 are interested witnesses being family member of the deceased, their evidence cannot be believed in absence of witnesses of locality inasmuch as PW-2 Rajpal is an independent witness and witness of locality. Trial court has concluded that the eye-witness account given by the witnesses of fact is corroborated by medical evidence and report of ballistic experts and this fact is proved beyond all reasonable doubts that the accused persons armed with deadly weapons created an unlawful assembly and committed riot and murder of the deceased Brahm Dutt Dixit on the date, time and place of incident as mentioned in FIR and proved in prosecution evidence. The prosecution has successfully proved its case beyond all reasonable doubt for charge under Section 147, 148, 149, 302 IPC as well as separate charges under Section 25 Arms Act against accused Tejvir, Hariom and Pramod Kumar @ Pappu as well as they were convicted and sentenced for said offences.

18. The question that requires determination in present appeal is whether the prosecution has been able to establish the guilt of accused appellants beyond reasonable doubt on the basis of evidence adduced in support of its case that accused appellants have committed the offence. In present case, the factum of murder of deceased Brahm Dutt Dixit is not disputed by defence. PW-4 Dr. R.K. Garg, who has conducted postmortem examination on the person of deceased, has stated in his evidence that the postmortem examination of the deceased was conducted on 11.11.2005 at about 10:00 A.M. and approximate time of death was half day noon. The cause of death was hemorrhage and shock due to antemortem injuries shown in postmortem report. He also stated in his evidence that the firearm injuries found on the person of the deceased were sufficient to cause death and this fact is also not disputed by the defence. The defence side has disputed the allegation that the present appellants are the author of the crime and defense version is that the death of the deceased was caused by some other persons at some other place and time on the date of incident and accused appellants were roped in, by the witnesses due to enmity developed due to Gram Pradhan Election. In present case, motive attributed by the prosecution in FIR version against appellants has been proved in evidence on the basis of statements of witnesses of fact PW-1 Vinod Kumar Dixit, PW-2 Rajpal Singh and PW-3 Neeraj Kumar. However, the motive acts as a double edged sword which cuts both way. The motive instigates a person to commit the offence as well as it also drives a person to falsely implicate the other person in a crime and it depends on the fact and circumstances as well as quality of the evidence adduced during trial as to what inference is to be discerned on account of establishment of motive in a criminal case.

19. This case is based on direct witness of witnesses. Therefore, it is to be seen as to what is the degree of reliability of their sworn testimony before the Court in the light of their previous statement recorded by the Investigating Officer under Section 161 Cr.P.C.

20. Section 162 Cr.P.C. is reproduced as under:-

"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 inquiry 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.

21. Hon'ble Apex Court in the case of **Dhanabal And Anr vs State Of Tamil Nadu, AIR 1980 SC 628,** has held that the statement under Section 164 Cr.P.C. can be used as corroborative evidence.

22. In the present case, the incident is said to have taken place on 11.11.2005 at 9:30 A.M. at the turn of groove of Prem Singh near village Ghadhi Thakuran and near the paved road leading to Ram Nagar and Chchikau. Chchikau is the native place of the deceased, witnesses and accused persons. The case of the prosecution is that the deceased was firstly shot at by accused Pramod Kumar @ Pappu by his firearm while he was sitting on motorcycle and he was stopped by accused persons when he was on they way of local market (paith) and witnesses Vinod and Neeraj were behind him on their separate motorcycles. After receiving first gunshot injury while sitting on motorcycle, he fell down and thereafter he was again shot by other accused persons by their respective firearms, when he fell down in the nearby cultivated field of Bachchu Singh. The site plan is proved as Ex.Ka-10 by the Investigating Officer (PW-6). The blood stained soil was found in the said field by the Rajendra Pal Singh(PW-6), who is first Investigating Officer of the case. Two empty cartridge shells are also shown to be on dirt road adjacent to paved road in site plan. PW-6 Investigating Officer has admitted that the empty cartridge shells were not found in the field or paved road where deceased was said to have received firearms injuries. However, the FSL report of blood stained earth collected from the field of Bachchu Singh on the date of incident human blood was found therein and on that basis it appears that the dead body was lying in the field of Bachchu Sing, which lies nearby the paved road.

23. If we meticulously examine the statement of said eye-witnesses, which is sheet anchor of prosecution case, we find therein that there is inherent infirmities and improvements are made therein as stated in statements under Section 161 Cr.P.C. The PW-1, Vinod Kumar Dixit is star witness of the case and he is also informant of the case and in his written report, he has stated that at the time of incident, he was coming behind his father along with his cousin, riding his motorcycle. However, his father was going to paith and he was also going to paith on that date in Pachokhara. He was not aware of the purpose for which his father was going to paith but he was moving to paith with a view to purchase vegetables. The time of incident is shown as around 9:30 A.M. on 11.11.2005. He stated in his written report that firstly accused persons stopped his father and Pramod threatened to kill him. All the accused persons were armed with firearms (countrymade pistols). As soon as his father came to understand the situation, Pramod fired a shot on his father which hit him and he fell down in the nearby field and thereafter Tejvir, Vikas and Hariom also fired shots on him, whereas informant and witnesses had made improvement in their sworn testimony and stated that after having suffered first gunshot injury, his father fell down on the ground from motorcycle and thereafter he ran some paces and fell down in the nearby cultivated field of Bachchu Singh where accused persons fired shots at him by their respective countrymade pistols. In FIR, PW-1 has stated that after the first shot fired by Pramod on his father, all the three

accused persons Tejvir, Vikas and Hariom fired shots at him when he fell down in the field but as PW-1 he stated in his examination-in-chief, when his father fell down in the field after being hit by firearm shot of Pramod, all the four accused persons opened indiscriminate fire on him. When he cried for help, the fifth person whose name was not known to him fired a shot towards him in which he got a narrow escape. PW-2 Rajpal Singh, PW-3 Neeraj also stated that four accused persons fired shot on the deceased when he fell down in the agricultural field after being hit by first shot. This is an important improvement in the prosecution evidence from FIR version and statement of witnesses under Section 161 Cr.P.C.

24. Hon'ble Apex Court in **Ram Briksh @ Jalim Vs. State of Chhatisgarh, AIR 2016 SC 2381, Tomso Bruno and Another vs. State of U.P., (2015) 7 SCC 178 (SC),** held that where the improvement was made by the witness in his statement before the Court than that what was made to the Investigating Officer under Section 161 Cr.P.C. same could not be relied on. In **Vimal Suresh Kamble vs. Chaluvera Pinake (2003) 3 SCC 175,** Hon'ble Apex Court held that the prosecution cannot seek to prove a fact during trial through a witness, which such witness has not stated to police during investigation. The evidence of that witness regarding the said improved fact is of no significance.

25. PW-1, PW-2 and PW-3 could not state during cross-examination as to, in which position the deceased was lying in the agricultural field whether he was in "supine" position or in "prone" position. PW-1 could not state whether the deceased was squirming after being shot or not. This fact has emerged in the statement of these witnesses of fact that the accused Pramod fired a shot at the deceased when he was sitting on his motorcycle and was confronted by the accused persons on the road near Gadhi Thakuran but no blood stain was found by the Investigating Officer when he visited the spot even in the evening of the incident at the instance of PW-1. Even PW-1 stated that in his statement that there was no blood stain on the road. According to the Investigating Officer, two empty cartridge shells were recovered from the spot when he visited the spot at the date of incident on the pointing out of PW-1. The cartridge shells are neither recovered from the road on which the deceased received first shot nor from the field where he received other two firearm shots as apparent from the postmortem report and statement of witnesses. The investigating Officer has stated that two cartridge shells were recovered from the paved road and dirt road near the spot. PW-1 has also admitted in his evidence that no empty cartridge shell was recovered from the field where deceased was lying in injured condition. The public witnesses of recovery Naval Kishore Pachori and Virendra Kumar Pachori were not produced in evidence during trial. The witnesses of fact have also not stated in their statement regarding statement that which part of the dead body was firstly hit by firearm shot allegedly caused by accused Pramod. PW-1 stated that the accused had shot at his father by leaning towards him when he was lying in the field. In site plan (Ex.Ka-10), the paved road on which the deceased was fired first shot allegedly by accused Pramod Kumar @ Pappu is not straight road but it is curved and the place of incident is marked as 'B'. Therefore, the statement of PW-1 and PW-3 that they were coming behind

the deceased on their motorcycle and heard the threatening words used by the accused Pramod Kumar @ Pappu to the deceased and had seen the accused Pramod Kumar @ Pappu to open first fire on deceased while he was sitting on his motorcycle does not inspire confidence, as the road is shown to be curved, where the incident is said to have commenced, a person coming from behind will not be in a position to see and hear whatever occurred on the said curved road. This site plan is admittedly prepared by the Investigating Officer at the pointing of PW-1.

26. On perusal of the injuries of the deceased scribed in the postmortem report and the statement of the witnesses, it appears that the first shot was caused in the head of the deceased and that too from point blank range as this firearm injury was surrounded by blackening and tattooing. A piece of bullet was found to be stucked in the cranial cavity and in internal examination, the temporal and occipital bones were found broken. T8 to T10 vertebra of neck were found to be fractured. Keeping in view the grave nature of these skull injuries, it is very difficult to comprehend that after having fallen from motorcycle after receiving these injuries, the deceased would have got up and tried to run few paces and ultimately fall down in the nearby field where he was again hit by accused persons and received two firearm injuries on his chest.

27. The witnesses have stated that one accused whose name was not known subsequently it was found that he was brother-in-law of Yogesh had opened his firearm with intention to kill oon PW-1, to which he got narrow escape but that person could not be traced during investigation and no role has been assigned to him in evidence. This fact has established in evidence of fact as well as on the basis of medical evidence that the deceased had suffered three gunshot injuries in the incident and he was in a very critical position but the conduct of the witnesses PW-1 and PW-2 who are his son and nephew moving him from the place of incident to all along Agra, to get him examined in Kamayani Hospital does not sound natural. They neither got examined him in Firozabad nor in Tundla and straightway rushed to Agra as per their own version. However, no documentary evidence has emerged regarding their movement to Kamayani Hosptial Agra alongwith the body of the deceased and back to the place where inquest has been conducted. The conduct of the witnesses, as per their own version that after being declared the injured as "dead' by the doctors of Kamayani Hospital, Agra they came back to Pachokhara and place the dead body in front of a school near petrol pump instead of producing the same at police station, which was lying in the vicinity of said place. This conduct shows that the sequence of the events had not taken place in the manner as narrated in the FIR as well as in the statement of witnesses of fact. PW-2 Rajpal is produced as an eye-witness and he alongwith Omprakash are named as witnesses in the FIR itself. This fact has emerged in the FIR that at the time of incident Rajpal and Omprakash were working nearby fields and they rushed to the spot and had seen the incident. PW-2 has tried to give graphic account of the incident in his evidence but has admitted that no field belonging to him was lying nearby. He is a resident of village Chaturpura. He was working in the field of Omprakash and he alongwith Omprakash was engaged in chchapai (covering of potato plants by soil) and rushed to the

spot. In site plan of the place of incident of murder, no field of Omprakash has been indicated by the Investigating Officer.

28. In site plan of the place of murder i.e. the incident is shown to have caused on the paved road near village Gadhi Thakuran. The place where the deceased was said to have fallen after receiving first shot and thereafter received two other shots is shown in the field of Bachchu Singh. This road communicates to Taragarh and Chchikau, the village of deceased and two witnesses, which is southwards to the groove of Prem Singh, resident of Gadhi Thakuran and its eastwards a khadanja road is shown which communicates with paved road in west side of this khadanja road, a temple is indicated. PW-2 has stated in his evidence that he was near the temple when the incident took place and from their he rushed to the spot. He had seen that in the field of Bachchu Singh, all the accused persons had fired shots on deceased, he could not tell as to how many bullets hit him. The accused persons had reached the spot by a white colored Maruti car. His own village Chaturpura situates 1 to 1-1/2 kms away from the place of incident. The field in which he and Omprakash were working at the time of incident belongs to nephew of Omprakash. This field is around 200 paces far from the place of incident and from that field the place of incident is visible clearly. The field of Omprakash lies to southwards of the road on which the incident occurred. This field was not situated in westwards of the road. The groove of Prem Singh and temple are situated in west of the main road. The maruti car was parked near groove of Prem Singh. He had not removed the slippers *(chappals)* worn by the deceased. He had not helped in lying the deceased in tempo on the place of incident. PW-1 has also stated in his cross-examination that when his father fell down in the field, witness Rajpal and Omprakash appeared at the place of occurrence. He had got the written report scribed by his cousin Ram Naresh Dixit. The field in which Omprakash and Rajpal were working lies 50 to 60 meters far from the place of incident and he had indicated that place to the Investigating Officer. PW-1 has admitted that Rajpal is co-accused in a case under Section 307 IPC alongwith him. He also stated that the inquest on dead body of the deceased was carried out in front of petrol pump where dead body was placed from taking it back from Agra. However, the Investigating Officer has stated that in inquest report that it was carried out near police station. From the statement of Investigating Officer, PW-1 and 2, this fact is apparent that no field of Omprakash lies in the vicinity of the place of incident where PW-2 and Omprakash were said to be working. The field of Omprakash is located in the statement of witnesses on some distance from the road where incident occurred and groove and temple lie southwards of paved road and not westwards of the main road as told by PW-2. Therefore, the presence of PW-2 is highly doubtful at the time of incident. The other witness Ompraksh has not been produced during trial.

29. The improvement in sworn testimony before the Court from FIR version in the statement of PW-1 and the improvement made by the PW-3 Neeraj from his statement under Section 161 Cr.P.C. appear to have been made with a view to fill in the lacunae in their previous version as recorded under Section 161 Cr.P.C. The non tractability of the Maruti car, by which the accused persons emerged on the spot, the failure of PW-1 and PW-3 to explain as to when and by whom the

motorcycles of the witnesses and deceased was brought to home, the improvement in sequence of events on the spot, non explanation of the position in which the deceased was lying after being hit by three bullets, non explanation of the reason by PW-1 and PW-3 as to why the deceased was carried to Agra straightway instead of producing him in nearby hospitals situated in Firozabad and Tundla, laying of dead body of the deceased in front of the petrol pump nearby the police station instead of producing the same at police station, speaks volume and make the sworn testimony of these witnesses of fact not only suspicious but their very presence on the spot at the time of incident appears to be doubtful, irrespective of the fact that they have tried to give an eye-witness account of the incident and their presence on the spot at the time of incident and their eye-witness account also becomes highly suspicious and not found worthy of credence. Therefore, the prosecution case in present case for charge under Section 302, 147, 148 IPC is not proved beyond reasonable doubt in respect of accused appellants and they deserve to be acquitted from all these charges by extending them benefit of doubt.

30. Similar is the position for charges under Section 25 of Arms Act, with regard to the present appellants which has also been tried by learned trial court alongwith charge under Section 147, 148, 302/149 IPC as the one countrymade pistol is said to have been recovered from the pointing out of each of the present appellants, which are said to have been used in the commission of offence as per the prosecution version on the basis of their disclosure statement after their arrest under Section 27 of Evidence Act in police custody.

31. These firearms are not recovered from their immediate possession after their arrest. One firearm has been allegedly recovered from the pointing out of the Pramod Kumar @ Pappu after getting his police custody by the orders of learned CJM. Out of three firearms, one empty cartridge shell recovered near the place of incident, is found to have been fired by the firearm allegedly recovered from the pointing out of accused Tejvir as per FSL report. The other empty cartridge shell was not found to be fired by any of the firearms recovered on the pointing out of accused persons. No public witness has been enjoined in the recovery of these firearms alleged recovered on the pointing out of the accused persons in respect of their presence. Therefore, the recovery of firearms allegedly used in the offence is also not proved in the present case beyond reasonable doubt, keeping in view the consideration, tenure and nature of the evidence adduced during trial.

32. In view of the discussions made above, we have found that there is no cogent and reliable evidence on record to prove the charges against accused appellants, for which they have tried, convicted and sentenced by learned trial Court. The case of the prosecution with regard to charges, for which the accused appellants are tried and convicted by trial court are not found to have been proved beyond reasonable doubt. Therefore, we have no hesitation in allowing these appeals.

33. Accordingly, the present appeals are **allowed**.

34. The impugned judgment and order of the trial court, as aforesaid, is set aside.

35. The appellants namely, **Tejvir, Hari Om and Pramod Kumar @ Pappu** are acquitted of all the charges, for which they have been tried. They shall be released forthwith from jail custody unless wanted in any other case, subject to compliance of Section 437 Cr.P.C. to the satisfaction of the trial court, concerned. The material exhibits shall be disposed of after lapse of period of appeal and in case any appeal or petition is filed against the judgement, after disposal of said appeal or petition by the Court.

36. The trial court shall issue release order to Jail concerned in compliance of this judgement.

37. Let the lower court record alongwith the certified copy of this order be sent to trial court concerned for compliance.

(2023) 3 ILRA 1217
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.03.2023

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Appeal No. 1441 of 1994

Bablu ...Appellant
Versus
The State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri G.S. Joshi. Sri Madan Mohan Chaurasia, Sri Sarvesh Kumar Dubey

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

Criminal Law — Indian Penal Code, 1860 - Section 325 - Appeal Against conviction under Section IPC- sentenced to the period already undergone imprisonment- Fine of Rs. 2,000/- Allegations- post altercation appellant fired from country-made pistol- pellets injured Mamta and father of informant- Section 320 IPC- grievous hurt- fracture or dislocation of bone or tooth- endangering life, severe bodily pain also included-culpable homicide not amounting to murder and grievous hurt- a thin line- testimony of single eye witness- quality not quantity determines adequacy of evidence- held to be sufficient for conviction under Section 325 IPC- fine imposed enhanced- Appeal disposed of with this modification. (Paras 18, 19 and 33)

HELD: In Clause 7 of Section 320 I.P.C., a fracture or dislocation of bone or tooth is included in the definition of grievous hurt. In Hori Lal & anr. Vs St. of U.P., AIR 1970 SC 1969, the Hon'ble Apex Court has held that for the application of Clause 7 of Section 320 I.P.C., it is not necessary that a bone should be cut through and through or that the crack must extend from the outer to the inner surface or that there should be displacement of any fragment of the bone. If there is a brake by a cutting or splintering of the bone or there is a rupture or fissure in it, it would amount to fracture within the meaning of Clause 7 of Section 320 I.P.C. (Para 18)

In Clause 8 of Section 320 I.P.C., endangering life, severe bodily pain is included in the definition of grievous hurt. In St. of Karnataka Vs Parashram Kallappa Ghevade, 2007 CrLJ 479 (Kar), it has been held that the aforesaid clause speaks of two things : (1) any hurt which endangers life and (2) any hurt which causes the sufferer to be during the space of 20 days (a) in severe bodily pain, or (b) unable to follow his ordinary pursuits. Some hurts which are not like those hurts which are mentioned in the first seven clauses, are obviously distinguished from a slight hurt, may nevertheless be more serious. Thus, a wound may cause intense pain, prolonged disease or lasting injury to the victim, although it does not fall within any of the first seven clauses. Before a conviction for the sentence of grievous hurt can be passed, one of the injuries defined in Section 320 must be strictly proved, and the eighth clause is no

exception to the general rule of law that a penal statute must be construed strictly. The line between culpable homicide not amounting to murder and grievous hurt is a very thin line. In the one case the injuries must be such as are likely to cause death; in the other, the injuries must be such as to endanger life. (Para 19)

The Hon'ble Apex Court enunciated the law relating to conviction on the basis of the testimony of single eye witness in the case of Laxmibai (Dead) through LRs Vs Bhagwantbura (Dead) through LRs, AIR 2013 SC 1204 that in the matter of appreciation of evidence of witnesses, it is not number of witnesses, but quality of their evidence which is important, as there is no requirement in law of evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time-honoured principle, that evidence must be weighed and not counted. The test is whether the evidence has a ring of trust, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Act. (Para 33)

Appeal disposed of. (E-14)

List of Cases cited:

1. Hori Lal & anr. Vs St. of U.P., AIR 1970 SC 1969

2. St. of Karn. Vs Parashram Kallappa Ghevade, 2007 CrLJ 479 (Kar)

3. Laxmibai (Dead) through LRs Vs Bhagwantbura (Dead) through LRs, AIR 2013 SC 1204

(Delivered by Hon'ble Surendra Singh-I, J.)

Heard Sri Sarvesh Kumar Dubey, Advocate holding brief of Sri Madan Mohan Chaurasia, learned counsel for the appellant as well as learned A.G.A. for the State.

2. This criminal appeal has been instituted against the judgement and order dated 24.08.1994 passed by IXth Additional District and Sessions Judge, Meerut, in Sessions Trial No. 698 of 1992, Bablu Vs. State of U.P., arising out of Case Crime No. 46 of 1992 u/s 307 I.P.C. & Section 27 (3) of Arms Act, P.S.- Mavana, District- Meerut. There is no criminal appeal filed by the State or informant/injured against acquittal of appellant-accused u/s 307 I.P.C. Thus, the trial court's order acquitting the accused u/s 307 I.P.C. has become final.

3. By the impugned order, the trial court has convicted the appellant, Bablu u/s 325 I.P.C. and sentenced him for 7 months 20 days imprisonment, the period which he had undergone in judicial custody during investigation and trial and a fine of Rs.2,000/- with default stipulation.

4. According to prosecution case as mentioned in the written report (Ext.Ka.1) presented by the informant, Bablu Giri at P.S.- Mavana, District- Meerut on 30.01.1992, he was going to the shop of Saket to purchase the bundle of bidis. In the way, Raghuvir Singh was beating Amar Singh. The informant stopped there to see the assault made by Raghuvir Singh. Thereupon, Raghuvir landed left fist blow on Bablu Giri. At 4 p.m. while Bablu Giri was returning after purchasing bundle of bidis from the shop, when he reached near the house of Shakir, Raghuvir scolding him, said that you have come here again. Meanwhile, informant's father, Jaipal Giri reached there. Bablu complained to his father about beating given by Raghuvir. When informant's father, Jaipal Giri asked Raghuvir the reason for beating his son, Raghuvir started abusing his father. Meanwhile, Raghuvir's sons, Bablu and

Shiv Kumar reached there with country-made pistol (katta) in their hands. With the intention of causing death, they fired on them. The pellets from the country-made pistol hit on the chest of the informant's father causing injury to him. The pellets also hit Mamta, daughter of Satyapal, who was standing on the roof of her house, causing her injury. Meanwhile, Rajpal, Santa and other persons of the village reached there. They saw appellant firing on the informant and his father. Informant, Bablu Giri, presented written report (Ext.Ka.1) in the police station concerned on the basis of which first information report u/s 307 I.P.C. and Section 27 (3) Arms Act was registered against Raghuvir, Shiv Kumar and Bablu. Its chik report is (Ext.Ka.3). The investigation was done by S.I. Fakire Lal Verma. He prepared the recovery memo (Ext.Ka.2) relating to taking the blood-stained cloth in his possession.

5. The injured Km. Mamta was carried to P.H.C., Mavana where during medical examination, it was found that she had received firearm injury on the right side of her chest. Since her condition was deteriorating fast, no detailed medical examination was done and she was referred to Medical College, Meerut for examination and expert treatment. She was admitted to Medical College, Meerut on 30.01.1992 where her operation was done. Her Bed Head Ticket is (Ext.Ka.5). Injured Jaipal Singh, was medically examined on 30.01.1992 at 8.00 hours at P.H.C. Mavana (Ext.Ka.10). One gunshot wound 1 cm round was found on the left side of outer aspect of chest, 8 cm away from nipple. Charring seen, bleeding present. X-ray was advised.

6. The Investigating Officer, S.I. Fakire Lal Verma, collected plain and blood-stained clothes from the place of occurrence of the injured Km. Mamta and Jaipal, wrapped these clothes in white cloth stitched and sealed it and prepared the memo regarding taking the same in possession (Ext.Ka.2). He then prepared the site plan of the place of occurrence (Ext.Ka.8) and recorded the statements of witnesses and on the basis of evidence collected during investigation, submitted charge-sheet u/s 307 I.P.C. against Raghuvir Singh, appellant Bablu and Shiv Kumar.

7. On 04.01.1993, the court framed charge u/s 307 r/w 34 I.P.C. against accused, Raghuvir Singh, Bablu and Shiv Kumar. Accused denied the charge and claimed trial.

8. To prove the charge, the prosecution examined injured P.W.1 Km. Mamta, P.W.2 informant Bablu Giri, injured P.W.3 Jaipal Giri, P.W.4 Rajpal, P.W.5 Santa Giri as witnesses of fact while P.W.6 Head Constable Abdul Salam, P.W.7 Constable Vinod Kumar, P.W.8 Record Keeper, Dwarkeshpuri, Record Section, Medical College, Meerut, P.W.9 Dr. S.A.S. Mathur, P.W.10 Investigating Officer, S.I. Fakire Lal Verma, P.W.11 Dr. M.D. Tripathi and P.W.12 Dr. N.K. Verma, C.M.O., Medical College, Meerut were examined as formal witnesses.

9. On 28.01.1994, the court recorded the statement under Section 313 Cr.P.C. of accused. They denied the prosecution case. They said that witnesses are giving false evidence and the police prepared a false case against them. They also stated that false case was registered against them. The accused did not adduce any evidence in their defence.

10. It has been submitted by learned counsel for the appellant that the trial court

has convicted the appellant against the weight of evidence on record. It has also been submitted that all witnesses of fact except Km. Mamta have turned hostile. There is contradiction in her evidence. Therefore, conviction merely on the evidence of P.W.1 Km. Mamta is bad in the eye of law.

11. Learned A.G.A. for the State has supported the impugned judgement and order. He has submitted that the trial court has convicted the accused-appellant on the basis of duly proved legal evidence and there is no illegality or infirmity in the impugned judgement and order and the appeal may be rejected.

12. Heard learned counsel for the appellant and learned A.G.A. for the State and perused the record.

13. The witnesses of fact produced by the prosecution namely, P.W.1 Km. Mamta, P.W.2 informant Bablu Giri, P.W.3 Jaipal Giri, P.W.4 Rajpal and P.W.5 Santa Giri have given evidence regarding the occurrence. P.W.6 Head Constable Abdul Salam has proved the chik F.I.R. (Ext.Ka.3) and copy of G.D. regarding institution of case (Ext.Ka.4). P.W.7 Constable Vinod Kumar has deposed in his evidence regarding taking injured Km. Mamta and Jaipal to the hospital and getting them medically examined there. P.W.8 Record Keeper Dwarkeshpuri, has deposed that injured Km. Mamta was admitted in the hospital on 30.01.1992 and discharged therefrom on 16.02.1992. He has also stated that her Bed Head ticket was prepared by Dr. M.D. Tripathi. He has given formal evidence about her medical examination report (Ext.Ka.6). P.W.10 Investigating Officer/S.I. Fakire Lal Verma has proved site plan (Ext.Ka.8) and charge-sheet (Ext.Ka.9) submitted by him in the court. P.W.10 also proved the recovery memo relating to the taking possession of the blood-stained clothes of the injured Mamta and Jaipal (material Exts.9 to 13) and has stated that these material exhibits were sealed in a white cloth (Ext.Ka.11). P.W.11 Dr. M.D. Tripathi, who was posted as Surgeon on duty in Medical College, Meerut has deposed that after being referred, injured Km. Mamta was admitted on 30.01.1992 at 10.30 p.m. in emergency ward of Medical College, Meerut. Her medical examination was earlier done in P.H.C., Mavana. On 31.01.1992 in the morning, her operation was done. On the left side of the stomach (abdomen) and chest and on the left side of thigh and left leg and in the glutal region, injuries caused by firearm pellets were found. P.W.11 also stated that he had done the operation on the injured part of her stomach.

14. On the opening of the stomach, 500 ml blood was found in the peritoneum. There was through and through puncture in the left lobe of liver. There was puncture in the interior wall of the stomach. There was one small rent (tear) of 2 cm size found on the anterior border. There was 1 penetrating wound of 1 cm size on the left side of diaphragm. 250 ml blood was taken out from the chest by inserting a tube.

15. In the opinion of the Medical Officer, the injuries may have been caused by gunshot wound. He has also given the opinion if the injured was not given medical aid in time and timely operation was not done, she could have died due to the injuries received by her. The injuries could have been caused on 30.01.1992. P.W.11 Dr. M.D. Tripathi has also proved the Bed Head ticket (Ext.C1) which was prepared by Dr. Sandeep Malik. P.W.11

has also stated that on the injury nos. 3 and 5, blackening was found and charring was caused by gunshots.

16. P.W.12 Dr. Amlesh Kumar Verma, who was posted as Medical Officer at P.H.C., Mavana, and who has done the medical examination of Km. Mamta proved that he had done the medical examination of injuries of Km. Mamta on 30.01.1992 at 8.25 p.m. At the time of examination, following injury was found on her person :

(i) Gunshot wound of 1 cm entry of one round probing not done, on the front of right side chest 15.5 cm above and at 11.30 o'clock position for umbilicus. Charring seen, bleeding present.

Since condition of the patient was deteriorating, detailed examination could not be noted. The patient was referred to P.L. Sharma, Hospital for detailed examination of other injuries. Adv. Admission, further treatment and x-ray. Injury no. (i) was caused by firearm. Kept under observation.

17. Under Section 320 I.P.C., grievous hurt is defined which is as follows :-

Section 320 I.P.C. - The following kinds of hurt only are designated as "grievous":

First- Emasculation.

Secondly- Permanent privation of the sight of either eye.

Thirdly- Permanent privation of the hearing of either ear.

Fourthly- Privation of any member of joint.

Fifthly- Destruction or permanent impairing of the powers of any member or joint.

Sixthly- Permanent disfiguration of the head or face.

Seventhly- Fracture or dislocation of a bone or tooth.

Eighthly- Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

A person cannot be said to have caused grievous hurt unless the hurt caused is one of the kinds of hurt specified under Section 320 I.P.C., 1860. Therefore, it is the duty of the Court to give a finding on its own whether the hurt was simple or grievous. The Court is not concerned with the classification made by a doctor as to whether the hurt was simple or grievous. A doctor is to describe the facts in respect of the nature of injury and the Court is to decide whether the nature of the injury described by the doctor comes within any of the clauses of Section 320 I.P.C., 1860.

18. In Clause 7 of Section 320 I.P.C., a fracture or dislocation of bone or tooth is included in the definition of grievous hurt. In **Hori Lal and another Vs. State of U.P., AIR 1970 SC 1969,** the Hon'ble Apex Court has held that for the application of Clause 7 of Section 320 I.P.C., it is not necessary that a bone should be cut through and through or that the crack must extend from the outer to the inner surface or that there should be displacement of any fragment of the bone. If there is a brake by a cutting or splintering of the bone or there is a rupture or fissure in it, it would amount to fracture within the meaning of Clause 7 of Section 320 I.P.C.

19. In Clause 8 of Section 320 I.P.C., endangering life, severe bodily pain is included in the definition of grievous hurt.

In **State of Karnataka Vs. Parashram Kallappa Ghevade, 2007 CrLJ 479 (Kar),** it has been held that the aforesaid clause speaks of two things : (1) any hurt which endangers life and (2) any hurt which causes the sufferer to be during the space of 20 days (a) in severe bodily pain, or (b) unable to follow his ordinary pursuits. Some hurts which are not like those hurts which are mentioned in the first seven clauses, are obviously distinguished from a slight hurt, may nevertheless be more serious. Thus, a wound may cause intense pain, prolonged disease or lasting injury to the victim, although it does not fall within any of the first seven clauses. Before a conviction for the sentence of grievous hurt can be passed, one of the injuries defined in Section 320 must be strictly proved, and the eighth clause is no exception to the general rule of law that a penal statute must be construed strictly.

The line between culpable homicide not amounting to murder and grievous hurt is a very thin line. In the one case the injuries must be such as are likely to cause death; in the other, the injuries must be such as to endanger life.

20. Injured P.W.1 Km. Mamta has deposed in her evidence on 26.03.1993 that the incident took place about two months earlier. There was quarrelling between Jaipal and Raghuvir. Hearing the noise of their quarrelling, she went on the terrace of her house from where she saw that accused, Shiv Kumar (since deceased) and appellant, Bablu were holding country-made pistol (katta) in their hands. Accused-appellant, Bablu and accused, Shiv Kumar fired with the country-made pistol in their hands. The bullet from the country-made pistol (katta) of the accused-appellant, Bablu hit her and that of accused, Shiv Kumar hit Jaipal. The witness stated that accused-appellant raised his hand and fired with the country-made pistol (katta) which hit her while she was standing on the terrace. Accused had intentionally fired by country-made pistol (katta) on her and Jaipal. Her medical examination was done. She remained admitted in the hospital for 18 days.

21. P.W.1 stated in her cross-examination that at the time of incident, informant, Bablu and his father, Jaipal, were standing in front of Shakir's shop. The distance between Jaipal and his son, Bablu was 2 ft. The accused were standing about 3 ft. away from her. The accused, Bablu, fired while holding the country-made pistol (katta) in his raised hand. P.W.1 Mamta has further stated in her cross-examination that blood was coming out from her body which spread on her clothes. The Investigating Officer/Daroga had taken her blood-stained clothes in his possession. P.W.1 has further stated in her cross-examination that accused, Bablu is the resident of her village and she knew him from before. She has denied naming the accused on the direction of others. She stated that she has seen the accused from the terrace of her house. In this way, injured P.W.1 by her deposition has proved the date, time and place of occurrence. She has also deposed that with the intention to kill, accused Bablu was firing, holding country-made pistol (katta) in his raised hand. The bullet fired from the country-made pistol (katta) hit her causing injury from which blood oozed spreading on her clothes. P.W.1 has also proved that after the incident, her uncle and brother took her to the police station from where she was taken to Meerut Medical College where she was admitted and underwent treatment for 18 days.

22. P.W.2 Bablu Giri, who is the son of injured Jaipal Giri has deposed in his evidence dated 09.07.1993 that about 1½

years ago, the occurrence took place at 4 o'clock in the afternoon. He had gone to purchase bundle of bidi from the shop of Shakir. In the way, noise was being raised and quarrel was going on. The persons quarrelling asked him to leave that place. They hit him on his stomach with their fists. Meanwhile his father also came at the place where quarrel was going on. He asked persons quarrelling that why they assaulted his son. In the ongoing jostling, his father received gunshot wound. He lodged the report regarding the incident in the police station concerned. P.W.2 denied that he had not seen the occurrence himself. P.W.1 proved the written report (Ext.Ka.1). He further stated that he could not see who fired by country-made pistol (katta), causing injury to his father. P.W.2 has further deposed that the Investigating Officer/Sub-Inspector had taken his father's blood-stained clothes and prepared recovery memo thereof which was signed by P.W.2 which he proved as (Ext.Ka.2). Thus, P.W.2 Bablu Giri by his deposition proved the date, time and place of occurrence in which his father received firearm injury but he has not proved the involvement of appellant in the firing incident.

23. Similarly, P.W.3 injured Jaipal Giri has deposed in his evidence about the date, time and place of occurrence in which he received injury caused by country-made pistol (katta) and his medical examination by the doctor but he denied the involvement of appellant, Bablu in the firing incident. Similarly, P.W.4 eye witness Rajpal and P.W.5 Santa Giri have also proved by their deposition the date, time and place of occurrence but they have deposed that due to darkness, they could not see who fired and on whom.

24. P.W.6 Head Constable Abdul Salam, who was posted as Head Moharrir on 30.01.1992 at P.S.- Mavana proved the chik F.I.R. relating to Case Crime No. 46 of 1992 which was lodged at 19.00 o'clock against accused Bablu and others. He proved the chik report (Ext.Ka.3) and G.D. entry relating to the case crime number as (Ext.Ka.4).

25. P.W.7 Constable Vinod Kumar, who was posted on 30.01.1992 as Constable in P.S.- Mavana has proved by his evidence that he carried the injured Jaipal Giri to Mavana Hospital from where he was referred to Pyare Lal Hospital, Meerut where his x-ray was done. P.W.7 also proved by his evidence that on 30.01.1992 at night, he took injured Km. Mamta, daughter of Satyapal to Mavana Hospital from where the doctor referred her to Medical College, Meerut.

26. P.W.8 Dwarkeshpuri, Record Officer, Record Section, Medical College, Meerut has identified the signature of Dr. M.D. Tripathi on the Bed Head Ticket prepared by Dr. M.D. Tripathi.

27. P.W.9 Dr. S.A.S. Mathur, who was posted as professor in the Department of Radiology, has proved the x-ray report of Km. Mamta as (Ext.Ka.7). He has stated in his evidence that there was no injury in the chest or abdomen of injured Mamta. He has deposed that two gunshots (pellets) were found in the behind of her right leg. There was fracture in right febula bone. Callus formation had not taken place. He has stated that the injury was caused within 10 days.

28. P.W.10 Investigating Officer, Fakire Lal Verma, proved the site plan of the place of occurrence (Ext.Ka.8). He has

also proved the charge-sheet in the present criminal case filed against the accused as (Ext.Ka.9). P.W.10 proved the memo prepared by him relating to taking in possession blood-stained clothes of injured Jaipal and Mamta (material Ext.2). He has proved the blood-stained clothes of the injured as (material Exts.9 to 13) and the plain clothes in which they were stitched and sealed as (material Exts.14).

29. P.W.11 Dr. M.D. Tripathi, who was posted on 30.01.1992 in Emergency Ward of Medical College, Meerut and had examined injured Km. Mamta, has stated in his evidence that Mamta had received firearm injury in the left side of stomach, chest, left thigh, left leg and left side of gluttal region.

30. P.W.12 Dr. Amlesh Kumar Verma, who was posted on 30.01.1992 in P.H.C., Mavana and has done medical examination of injured Km. Mamta at 8.25 p.m. and has proved the medical examination report as (Ext.Ka.9). P.W.12 has also deposed that he had on the same day medically examined, injured Jaipal Giri. He proved the medical examination report of injured Jaipal Giri. He has stated that the injuries received by Km. Mamta and Jaipal Giri could have been caused at 4 p.m.

31. The evidence of injured P.W.1 Mamta is cogent and reliable. Nothing emerges in her cross-examination which could shake the credibility of her evidence and prove that her evidence is false and unreliable. P.W.2 informant Bablu Giri, P.W.3 Jaipal Giri, P.W.4 Rajpal and P.W.5 Santa Giri have also by their deposition proved the date, time and place of occurrence and that in the occurrence, firearm injury was received by P.W.1 Mamta and P.W.3 Jaipal and to that extent they have corroborated the testimony of P.W.1 Mamta but have not proved the involvement of accused, Bablu in the crime. The facts mentioned in the oral testimony of P.W.1 Mamta, P.W.2 Bablu, P.W.3 Jaipal, P.W.4 Rajpal and P.W.5 Santa Giri is corroborated by the documentary evidence, written report (Ext.Ka.1), recovery memo relating to taking the blood-stained clothes in possession by the Investigating Officer, Fakire Lal Verma. The evidence of P.W.1 Mamta is also corroborated by the statement/evidence of P.W.6 Head Constable, Abdul Salam, P.W.7 Constable Vinod Kumar, P.W.8 Record Keeper, Dwarkeshpuri, Record Section, Meerut Medical College, P.W.9 Dr. S.A.S. Mathur, P.W.10 Investigating Officer, Fakire Lal Verma and P.W.11 Dr. M.D. Tripathi.

32. It has been argued by the learned counsel for the appellant that only one injured eye witness P.W.1 Km. Mamta has deposed regarding the involvement of appellant in the occurrence. The remaining eye witnesses, namely, P.W.2 Bablu, P.W.3 Jaipal, P.W.4 Rajpal and P.W.5 Santa Giri have denied accused's involvement in the crime. Therefore, P.W.2 to P.W.5 have been declared hostile by the prosecution and they were cross-examined by the prosecution. Thus, accused-appellants cannot be held guilty merely on the basis of testimony of single eye-witness i.e. P.W.1 Km. Mamta. There is no force on the submission advanced on behalf of the appellant in this regard as under the Indian Evidence Act, no particular number of witnesses is required for proving a fact. The statutory provisions relating to single eye witness is provided in Section 134 of Indian Evidence Act.

Section 134 of Indian Evidence Act : *No particular number of witnesses*

shall in any case be required for the proof of any fact.

33. The Hon'ble Apex Court enunciated the law relating to conviction on the basis of the testimony of single eye witness in the case of ***Laxmibai (Dead) through LRs Vs. Bhagwantbura (Dead) through LRs, AIR 2013 SC 1204*** that in the matter of appreciation of evidence of witnesses, it is not number of witnesses, but quality of their evidence which is important, as there is no requirement in law of evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time-honoured principle, that evidence must be weighed and not counted. The test is whether the evidence has a ring of trust, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Act.

34. From the aforesaid discussion of the oral and documentary evidence produced by the prosecution against the appellant, charge u/s 325 I.P.C. against the appellant, Bablu, is proved beyond reasonable doubt. The trial court has convicted the appellant, Bablu, only u/s 325 I.P.C. and sentenced him to the period of 7 months and 20 days imprisonment which he has undergone during investigation and trial and a fine of Rs.2,000/-. The injured P.W.1 Km. Mamta has received firearm or gunshot wound on the front of right side chest 15.5 cm above and at 11.30 o'clock position for umbilicus, she remained admitted in Medical College, Meerut for 18 days. Since no State appeal has been filed against acquitting the appellant u/s 307 I.P.C. and that 31 years have lapsed since the date of incident and learned A.G.A. for the State has not produced any subsequent criminal antecedents of the appellant, it is not justified to intervene with his conviction u/s 325 I.P.C. and convict him u/s 307 I.P.C.

35. Considering the facts and circumstances of the case and nature and gravity of injury received by injured Km. Mamta, the ends of justice will be met out if the fine imposed is enhanced to Rs.20,000/- (Twenty thousand rupees) to be paid as compensation to the injured Km. Mamta within three months from the date of this judgement. In default of payment of fine, the appellant shall undergo simple imprisonment of 4 months. The appeal is disposed of with above mentioned modification.

36. Let a copy of the judgement along with the record of the case be sent to the court concerned for execution of punishment as modified by the order passed in this criminal appeal.

(2023) 3 ILRA 1225
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.02.2023

BEFORE

THE HON'BLE MAYANK KUMAR JAIN, J.

Criminal Appeal No. 7159 of 2019

Azam ...Appellant

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
Mohd. Shoeb Khan

Counsel for the Opposite Party:

G.A.

Criminal Law – Indian Penal Code, 1860 – Section 376 - POCSO Act, 2012 – Section 5(m)/6 - sentenced to 10 years rigorous imprisonment- allegation- accused appellant raped 11-year-old daughter victim of the informant- contradiction in the evidence of the witnesses of fact- held no material contradiction- victim's St.ment under Section 164 Cr.P.C. corroborated the case of prosecution- evidence of prosecutrix does not require corroboration if it inspires confidence- conviction upheld in light of the robust solitary evidence of the victim- Appeal dismissed. (Paragraphs 26, 38 to 42)

HELD: In view of the above observations made by the Hon'ble Apex Court, in the case in hand it is relevant to note that the victim in her St.ment under Section 164 Cr.P.C., which she proved as Ex. KA3, corroborated the case of the prosecution. Further, in her deposition before the court, the victim was consistent in her evidence about the prosecution story. There are no material contradictions in the St.ments of the victim and other witnesses of fact which can adversely affect the case of the prosecution. The evidence of the witnesses of fact is found to be trustworthy. (Para 26)

On the basis of the observation made by the Hon'ble Apex Court, it is to be noted that the victim has remained consistent in her St.ment throughout before the trial Court and also when her St.ment under 164 Cr.P.C. was recorded. (Para 38)

Learned counsel for the appellant argued that the ocular evidence and the medical evidence is not consistent with each other. PW-4 Dr. Shubhra Singh observed during the medical examination of the prosecutrix that no spermatozoa was found and no definite opinion about sexual assault was also given. (Para 39)

Considering the argument of the learned counsel for the appellant it is to be noted here that the victim by her reliable and trustworthy evidence has proved the incident happened with her. She specifically St.d that the appellant forcibly raped her. PW-4 Dr. Shubhra Singh found abrasion on the private part of the victim and also opined that in view of the aforesaid abrasions there was a possibility of rape of the victim. Moreover, the FSL report exhibit Ka-13 also corroborates the incident as human semen was found on the underwear of the appellant. Therefore, it cannot be observed that there is inconsistency between the ocular and the medical evidence. (Para 40)

On the basis of the above discussions, the observation made by the Hon'ble Apex Court as referred and on the appreciation of the documentary and oral evidence available on record, it is concluded that on 07.12.2013 at around 8.00 pm the appellant forcibly raped the victim. The evidence of PW-1 informant, PW-2 the sister of the victim and above all PW-3 the victim are found to be trustworthy and their evidence inspire confidence. A conclusion is drawn that the witnesses of fact have fully corroborated the case of prosecution. Therefore, the prosecution has succeeded to bring home the charge framed against the appellant. (Para 41)

Appeal dismissed. (E-14)

List of Cases cited:

1. Sachin Kumar Singhraha Vs St. of M.P., (2019) 3 SCC (Cri) 575

2. Rohtas Vs St. of Hary., (2020) 1 SCC (Cri) 47

3. Khurshid Ahmed Vs St. of J&K, (2018) 3 SCC (Cri) 61

4. Rakesh Vs St. of U.P., (2021) 3 SCC (Cri) 149

5. Rai Sandeep Vs State, (NCT of Delhi) (2012) 8 SCC 21

6. Hemraj Vs St. of Har., 2014 (2) SCC 395

7. Sadashiv Ramrao Hadbe Vs St. of Mah., (2006) 10 SCC 92

8. St. of Punjab Vs Gurmeet Singh, (1996) 2 SCC 384

9. St. of H.P. Vs Raghubir Singh (1993) 2 SCC 622

(Delivered by Hon'ble Mayank Kumar Jain, J.)

1. Feeling aggrieved with the impugned judgement dated 05.11.2019 passed by the Additional Session Judge/Special Judge (POCSO Act), Court No. 01, Gorakhpur in Special Session Trial No. 19/2014 (State of U. P. Vs Azam) arising out of Case Crime No. 652 / 2013, under Section 376 IPC and Section 5 (m)/6 of POCSO Act, Police Station-Khorabar, District-Gorakhpur whereby the accused-appellant was convicted under Section 376 I.P.C. and sentenced to undergo rigorous imprisonment for 10 years along with fine of Rs. 25,000 and in case of default in depositing the amount of fine additional rigorous imprisonment for six months was also awarded, the present appeal has been preferred.

2. As per the case of the prosecution, Savitri Maurya, wife of Raj Kumar, submitted a report to the police station concerned that on 07.12.2013, she was in the market. Her daughter victim X, aged 11 years was at home. At around 8:00 pm, her neighbor Azam came to her house, shut the mouth of her daughter and took her to the adjacent under-construction house. He forcibly raped her. Upon hearing the alarm raised by the victim, villagers and her family members reached there, having torches in their hands and saw Azam fleeing away while wearing his pant. Her daughter narrated the whole incident when she returned from the market.

3. On the basis of the aforesaid written report, case crime No. 652 of 2013, under Sections 376 (2) (1) I.P.C. and Section 5 (m)/6 of POSCO Act, 2012 was registered against the accused-appellant.

4. The investigation was set into motion. After completing preliminary formalities, the investigating officer took the blood-stained underwear of the victim worn by her at the time of the incident into their possession and sent the same for forensic examination. The applicant Azam was apprehended and his underwear, which he was wearing at the time of the incident, was also taken into possession and sent for forensic examination. The recovery memo was prepared accordingly.

5. The victim was medically examined. Her statement under Section 164 Cr.P.C. was recorded. The site plan of the place of occurrence was prepared. The statements of the victim and other witnesses were recorded and after the conclusion of the investigation a charge sheet under Section 376 (2) (i) I.P.C. and 5 (m)/6 of POSCO Act against the appellant.

6. Charge under Section 376 I.P.C. and Section 5 (m)/6 POCSO Act was framed against the accused-appellant. He pleaded not guilty and claimed to be tried.

7. In order to prove its case, the prosecution produced three witnesses of fact as PW1 Savitri Maurya (informant), PW2 Km. Priya (sister of the victim), PW3 the victim and formal witnesses as PW4 Dr. Subhra Singh, PW5 Sri Prakash Yadav (Investigating Officer) and PW6 Head Constable Deena Nath Pal.

8. After the close of prosecution evidence, the statement under Section 313 Cr.P.C. of the accused-appellant was recorded. He denied the commission of the offence as alleged by the prosecution. He

stated that the witnesses of fact have given false statements against him. The victim was tutored thus she deposed against him. On the basis of the medical evidence, the commission of rape was not confirmed. The charge sheet was filed on the basis of an unfair investigation. The witnesses are inimical to him. In his additional statement, he stated that the victim was in love with his younger brother, letters were exchanged between them and a demand for a gift was also made by the victim. His younger brother was not giving money to his family members. On the day of the incident, he saw both of them together. He scolded them and asked them not to meet again and due to that reason, he has been falsely implicated in the present case.

9. After weighing the evidence available on record and considering the rival contentions, the learned trial court convicted and sentenced the accused-appellant as referred to above.

10. I have heard Sri Mohd. Shoeb Khan, the learned counsel for the accused-appellant and Sri Om Prakash, learned A.G.A. for the State. I have carefully perused the record.

11. In the present appeal, on the basis of the facts and circumstances of the case, it is to be noted as to whether on 07.12.2013 at around 8 pm, the accused-appellant raped the daughter, aged about 11 years, of the informant.

12. Learned counsel for the appellant argued that the informant is not the eyewitness of the incident. In her first information report, she admitted that when she returned from the market, she was informed about the incident by the victim. PW2 Priya who happens to be the sister of the victim is also not the eyewitness of the incident. There are material contradictions in the testimonies of the informant, PW2 Priya and the victim, create serious doubt about the prosecution story. The sister of the victim, in her statement, made a contradictory version that when she reached the place of occurrence, the accused fled away from the spot while PW1, the informant, stated in her evidence that the accused was apprehended on the spot and he abused them. The medical evidence also does not corroborate the prosecution version. The torch, which the people who rushed towards the place of occurrence after hearing the alarm were allegedly carrying, was not taken into the possession by the investigating officer. He further submitted that the doctor opined that on the basis of swelling, she could not say definitely that the victim was sexually assaulted. No sperm was found on the private part or around it on the victim. Moreover, in the F.S.L. report, no sperm was found on the underwear of the victim. Therefore, the medical evidence does not corroborate the prosecution version. The prosecution failed to prove charge against the appellant and therefore the appellant is liable to be aquitted. The appeal should be allowed.

13. Per contra learned A.G.A. argued that the oral evidence and medical evidence available on record proved the charges against the accused-appellant. The age of victim was 13 years at the time of the incident and she was forcibly raped by the accused-appellant. On the basis of the medical examination, the radiologist determined the age of the victim at the time of the incident to be 14 years, therefore, the victim was minor at the time of the incident. He also submitted that during a forensic examination, the sperm was found

on the underwear of the accused-appellant which was worn by him at the time of the incident. He further submitted that there are no material contradictions in the statements of PW1 the informant, PW2 the sister of the victim and the victim herself. He further submitted that minor contradictions are bound to occur since the witnesses belong to a rural background and such types of contradictions do not adversely affect the case of the prosecution. He further submitted that the victim has supported the manner of crime committed by the accused-appellant in her statement recorded under Section 164 Cr.P.C. She also corroborated this statement during deposition before the trial Court. The victim by her evidence has corroborated the prosecution version that on the date and time of occurrence, the accused-appellant forcefully committed rape on her and the entire incident was narrated by her to her mother.

14. PW1 Savitri Maurya who is the informant of this case has stated in her evidence that the age of her daughter was around 11 year and 1/2 month. On 07.12.2013, at around 8:00 pm, when her daughter was alone in the house, the accused-appellant entered her house and after shutting her mouth, took her to the nearby under-construction house and raped her. On hearing the alarm, several people reached there and lightening the torch, they chased the appellant-accused and caught him. She was told about the incident when she returned from the market. She submitted a report to the police. The underwear which was worn by her daughter at the time of the incident was taken into possession before her.

15. PW2 Priya is the sister of the victim who has narrated the same version as stated by the informant. She submitted that when her sister did not return, she went to trace her and saw that accused-appellant was coming out from an under-construction house while wearing his pant. She reached the spot and found that her daughter was lying on the floor. The whole incident was narrated by her sister stating that the appellant-accused committed rape on her and threatened if she would inform anyone, he will repeat the same act with her sister also. The underwear of her sister was soaked with blood.

16. PW3 victim has stated that the incident occurred on 07.12.2013 at around 08:00 pm when her mother had gone to the market, the accused-appellant called her but she refused. The accused-appellant told her that her mother was calling so she came out but did not find her mother there. The accused-appellant shut her mouth and took her to an under-construction house. He made her lay on the floor and forcefully committed rape on her. He penetrated his penis into her private parts. She was crying and felt severe pain. Upon hearing her cries, her sister came there. The accused-appellant ran from the spot. Her sister saw the accused-appellant in the torch light. Her underwear was blood stained. The entire incident was narrated by her to her mother. She was medically examined. She knows the accused appellant very well, him being her neighbour. She proved the statement given by her before the Magistrate under section 164 Cr.P.C.

17. PW4 Dr. Subhra Singh stated in her statement that on 08.12.2013 in the capacity of Senior Consultant District Women Hospital, Gorakhpur, at 2.30 pm, she examined the victim which was brought by C.P. No. 1223, Bhagwati Verma, PS. Khorabar, District Gorakhpur. The height of the victim was 137 cm.,

Weight 30 kg, teeth 13/13, thin built, mentally alert, breast not developed, axillary/pubic hair not present. No sign of injury on external body parts, vagina does not admit tip of finger. Slides made by vaginal swab and sent for pathological examination. No tear seen. Slide abrasion in forchette seen.

In supplementary report few R.B.C. seen. No spermatozoa was found. On the basis of the injury on the private part of the victim, it is possible that she was raped.

18. PW5 Inspector Sri Prakash Yadav stated that he received the investigation and after preliminary formalities, took the statement of the informant, the victim and the witnesses. He prepared the site plan. The undergarments worn by the victim and the accused at the time of the incident were taken into possession and were sent for chemical examination. The victim was sent for medical examination. Her statement under Section 164 Cr.P.C. was recorded and after the conclusion of the investigation, he submitted charge sheet against the accused-appellant.

19. PW6 is the Head Constable Deena Nath Pal who has stated that on the basis of written report submitted by the informant Savitri Maurya, he prepared the F.I.R. No. 379 of 2013 on 07.12.2013 at 22.45 hour which was registered as Case Crime No. 652 of 2013, under Sections 376 (2) (1) I.P.C. and 5 (m)/6 POCSO Act at PS Khorabar, District Gorakhpur against the applicant. This witness has proved the first information report as Ex. Ka 11. The endorsement of the F.I.R. was made in the general diary of the concerned police station at Rapat No. 46 at 22.45 hour which is exhibited as Ex. Ka 12.

20. Learned counsel for the appellant vehemently argued that there are material contradictions in the evidence of PW1 and PW2. The informant PW1 in her statement stated that at the time of occurrence the victim was all alone at her house and the appellant was apprehended by the villagers on the spot while in her cross-examination she stated that the accused-appellant was apprehended at her house on the date of occurrence and she herself apprehended the accused-appellant. Learned counsel for the appellant referred the statement of PW2 Km. Priya, the sister of the victim that when she rushed towards the place of occurrence, her sister was lying alone there and the accused-appellant was not present there. Learned counsel for the appellant argued that PW1 Savitri Maurya and PW2 are not the eyewitnesses of the incident, therefore, their testimonies cannot be relied upon.

21. So far as the argument of learned counsel for the appellant is concerned about the contradictions in the evidence of witnesses of fact, it is worth to be noted that the perusal of record goes to show that examination-in-chief of PW1 Savitri Maurya was recorded on 04.08.2014 and her cross-examination was recorded on 15.10.2014. The examination-in-chief of PW2 Km. Priya was recorded on 06.11.2014 while her cross-examination was recorded on 24.11.2014. Likewise the examination-in-chief of the victim was recorded on 03.01.2015 and since the cross-examination was not concluded, therefore, her further cross-examination was recorded on 01.06.2015.

22. The Hon'ble Apex Court in the case of ***Sachin Kumar Singhraha v. State of M.P.*, (2019) 3 SCC (Cri) 575** : has held as under:-

"12.The Court will have to evaluate the evidence before it keeping in mind the rustic nature of the depositions of the villagers, who may not depose about exact geographical locations with mathematical precision. Discrepancies of this nature which do not go to the root of the matter do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be taken into consideration while assessing the reliability of witness testimony and the consistency of the prosecution version as a whole. In this view of the matter, in our considered opinion, the evidence of PW 5 fully supports the evidence of PW 4 and the case of the prosecution."

23. The Hon'ble Apex Court in the case of ***Rohtas v. State of Haryana*, (2020) 1 SCC (Cri) 47** has held as under:-

"26.In a recent decision in Dilawar Singh v.State of Haryana [Dilawar Singh v.State of Haryana, (2015) 1 SCC 737 : (2015) 1 SCC (Cri) 759] , the Court restated that while analysing the evidence of eye witnesses, it must be borne in mind that there is bound to be variations and difference in the behaviour of the witnesses or their reactions from situation to situation and individual to individual. There cannot be uniformity in the reaction of witnesses. The Court must not decipher the evidence on unrealistic basis. There can be no hard-and-fast rule about the uniformity in human reaction. "

24. The Hon'ble Apex Court in the case of ***Khurshid Ahmed v. State of J&K*, (2018) 3 SCC (Cri) 61** has held as under-

"35.When analysing the evidence available on record, the court should not adopt hyper technical approach but should look at the broader probabilities of the case. Basing on the minor contradictions, the court should not reject the evidence in its entirety. Sometimes, even in the evidence of truthful witness, there may appear certain contradictions basing on their capacity to remember and reproduce the minute details. Particularly in the criminal cases, from the date of incident till the day they give evidence in the court, there may be gap of years. Hence, the courts have to take all these aspects into consideration and weigh the evidence. The discrepancies and contradictions which do not go to the root of the matter, credence shall not be given to them. In any event, the paramount consideration of the court must be to do substantial justice."

25. The Hon'ble Apex Court in the case of ***Rakesh v. State of U.P.*, (2021) 3 SCC (Cri) 149** has held as under:-

"14. One is required to consider the entire evidence as a whole with the other evidence on record. Mere one sentence here or there and that too to the question asked by the defence in the cross-examination cannot be considered stand alone."

26. In view of the above observations made by the Hon'ble Apex Court, in the case in hand it is relevant to note that the victim in her statement under Section 164 Cr.P.C., which she proved as Ex. KA3, corroborated the case of the prosecution. Further, in her deposition before the court, the victim was consistent in her evidence about the prosecution story. There are no material contradictions in the statements of the victim and other witnesses of fact

which can adversely affect the case of the prosecution. The evidence of the witnesses of fact is found to be trustworthy.

27. So far as the argument of learned counsel for the appellant that the victim stated in her statement that at the time of occurrence, the appellant made her lay down on the floor but no injury was found on her body at the time of her medical examination is concerned, it is pertinent to note that the victim in her testimony has corroborated the facts of the prosecution version in entirety. Therefore, mere fact that she stated that the accused-appellant compelled her to lay down but she did not suffer any injury, does not create any doubt about her testimony.

28. The statements of PW1 Savitri Maurya, PW2 Km. Priya and PW3 victim made before the court are reliable and inspire confidence All the three witnesses of fact have stated that the underwear of the victim was soaked as a result incident, which was handed over to the investigating officer. The informant in her testimony also proved the site plan prepared by the investigating officer and all the three witnesses of fact categorically denied that the victim had a love affair with the brother of the appellant Azad and the victim was caught by the accused-appellant and for that reason the appellant had been falsely implicated.

29. So far as the letters which were filed before the trial court on behalf of the appellant in his defence, claiming that victim was in love with his younger brother are concerned, suffice to mention here that these letters were not proved by the defence by any cogent evidence. It appears that during trial no effort was made by the appellant to examine the handwriting of the victim by an expert which could support the defence taken by the appellant. Therefore, mere filing of the letters does not corroborate the defence taken by the appellant.

30. Learned counsel for the appellant vehemently argued that deposition of the victim did not find any corroboration with the deposition of PW1 and PW2. Since these two witnesses are not the eyewitnesses, therefore the sole testimony of the victim cannot be relied upon.

31. Considering this argument, it is relevant to mention here that the victim had stated that the accused took her to the under-construction house and after shutting her mouth disrobed her and committed rape upon her. The accused-appellant penetrated his private parts into the vagina of the victim. The victim deposed in categorical terms regarding rape committed upon her by the accused-appellant. There is no contradiction in the examination-in-chief and the cross examination of the victim. Her evidence inspire confidence and has a ring of truth. Moreover, the statement of the informant and the sister of the victim also corroborate the presence of the accused-appellant at the place of occurrence, since they have stated that they saw the accused-appellant fleeing from the place of occurrence while wearing his pant. PW-2 Priya specifically stated that she found her sister in a disrobed condition, therefore, the evidence of the victim and her sister is consistent with the facts of the prosecution and their evidence is trustworthy.

32. Learned counsel for the accused-appellant submitted that since there are contradictions in the statements of the victim and the other witnesses of fact,

therefore, the conviction cannot be recorded against the accused-appellant on solitary evidence of the victim.

33. 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."

34. 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. 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."

35. 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."

36. The Hon'ble Apex Court in **State of Punjab VS. Gurmeet Singh, (1996) 2 SCC 384** has held that minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be taken into consideration if the statement of the prosecutrix is otherwise reliable. The Hon'ble Apex Court observed as:-

"The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not over-look. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl of a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration

notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances."

37. The Hon'ble Apex Court in ***State of H.P. v. Raghubir Singh (1993) 2 SCC 622,*** has held that the evidence of prosecutrix does not require corroboration if it inspires confidence. The Hon'ble Apex Court observed as:-

"this Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity."

38. On the basis of the observation made by the Hon'ble Apex Court, it is to be noted that the victim has remained consistent in her statement throughout before the trial Court and also when her statement under 164 Cr.P.C. was recorded.

39. Learned counsel for the appellant argued that the ocular evidence and the medical evidence is not consistent with each other. PW-4 Dr. Shubhra Singh observed during the medical examination of the prosecutrix that no spermatozoa was found and no definite opinion about sexual assault was also given.

40. Considering the argument of the learned counsel for the appellant it is to be noted here that the victim by her reliable and trustworthy evidence has proved the incident happened with her. She specifically stated that the appellant forcibly raped her. PW-4 Dr. Shubhra Singh found abrasion on the private part of the victim and also opined that in view of the aforesaid abrasions there was a possibility of rape of the victim. Moreover, the FSL report exhibit Ka-13 also corroborates the incident as human semen was found on the underwear of the appellant. Therefore, it cannot be observed that there is inconsistency between the ocular and the medical evidence.

41. On the basis of the above discussions, the observation made by the Hon'ble Apex Court as referred and on the appreciation of the documentary and oral evidence available on record, it is concluded that on 07.12.2013 at around 8.00 pm the appellant forcibly raped the victim. The evidence of PW-1 informant, PW-2 the sister of the victim and above all PW-3 the victim are found to be trustworthy and their evidence inspire confidence. A conclusion is drawn that the witnesses of fact have fully corroborated the case of prosecution. Therefore, the prosecution has succeeded to bring home the charge framed against the appellant.

42. The learned trial Court appreciated the documentary and oral evidence available on record in a rightful manner and arrived at a conclusion that appellant-accused committed the offence and recorded the conviction of the appellant-accused.

43. In view of the above, the judgment and the order of sentence passed by the learned trial Court is liable to be affirmed and criminal appeal is liable to be dismissed.

Order

44. The Criminal Appeal is accordingly dismissed. The judgment and order dated 05.11.2019 passed by the learned trial Court in Special Session Trial No. 19/2014 (State of U. P. Vs Azam) arising out of Case Crime No. 652 / 2013, under Section 376 IPC and Section 5 (m)/6 of POCSO Act, Police Station-Khorabar, District-Gorakhpur is hereby affirmed.

45. Let a certified copy of the judgment/order along with lower court record be sent to the court concerned for necessary compliance forthwith.

(2023) 3 ILRA 1236
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.03.2023

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Criminal Appeal No. 1343 of 2015

Om Prakash Vimal ...Appellant
Versus
State ...Respondent

Counsel for the Appellant:
Nandit Kumar Srivastava, Pranjal Krishna, Prashant Singh Gaur

Counsel for the Respondent:
Bireshwar Nath, Shiv P. Shukla

A. Criminal Law – Code of Criminal Procedure,1973 – Section 374(2) -Appeal under Section 374(2) Cr.P.C. read with Section 27 of the Prevention of Corruption Act, 1988- Conviction of income tax official under Sections 7, 13(2) read with Section 13(1)(d) of P.C. Act- bribe demanded to nil the income tax assessment of the informant- trap laid- accused appellant caught red handed by CBI- court refuted submission that recovery of bribe amount not made from accused. (Para 37)

HELD: In view thereof, this Court does not find any credence in the submission of the learned counsel for the accused-appellant that recovery was not made from the accused-appellant. Once the accused-appellant accepted the bribe amount and he kept it in the drawer of the office table, which was of the accused-appellant, the recovery from the drawer of the office table of the accused-appellant, is recovery from the accused-appellant himself. (Para 37)

B. Conviction under Sections 7 and 13 of the P.C. Act- essentials- demand and acceptance of illegal gratification by accused public servant- no offence without proof of demand- term "demand"- not defined in P.C. Act- inserted by interpretative process- Section 20 of P.C. Act- Statutory presumption of guilt- shift in burden of proof- accused to prove that what has been received- valuable consideration and not an illegal gratification- foundational facts proved- presumption of receipt of obtainment of illegal gratification- if in absence of evidence of the complainant- inferential deduction of culpability/guilt of public servant- based on evidence adduced by prosecution permissible- conviction upheld- Appeal dismissed. (Paras 39 to 46)

HELD: It is well settled law that to record the conviction under Sections 7 and 13 of the P.C. Act, the demand and acceptance of illegal gratification by the accused public servant should be proved by cogent and credible evidence. It is also settled law that mere possession and recovery of money without proof of demand by the accused does not constitute an offence under Sections 7 and 13(2) read with 13(1)(d) of the PC Act, 1988 (P. Satyanarayana Murthy Vs District Inspector of Police, St. of Andhra Pradesh & anr., (2015) 10 SCC 152). (Para 39)

Term "demand" does not find place under P.C. Act, 1988, but it has virtually been inserted in the statute by interpretative process. Section 20

of the P.C. Act derives certain statutory presumption of guilt.. (Para 40)

Plain reading with the words of Section 20 of the P.C. Act, would mean that if it can be proved that a public servant has received gratification, Section 20 of the P.C. Act brings in statutory presumption that he has received the same with an illegal motive as laid down in Section 7 of the Act. This shifts the burden of proof to the accused, who is required to prove that what has been received, is a valuable consideration and not an illegal gratification. (Para 41)

Constitution Bench of the Supreme Court in a recent judgment in the case of Neeraj Dutta vs St., (2022) SCC OnLine SC 1724, has held that to constitute an offence under Sections 7 and 13(2)/13(1)(d) (i) and (ii) of the P.C. Act, 1988, if a bribe giver makes an offer to pay without there being any prior demand of the same by a public servant and public servant accepts and receives the bribe, it would be a case of acceptance under Section 7 of the P.C. Act, 1988. If a public servant himself makes a demand and demand is accepted by bribe giver and bribe is paid by the bribe giver, it is a case of obtainment under Section 13(1)(d)(i) and 13(1)(d)(ii) of the P.C. Act. (Para 42)

It has been held that if the foundational facts are proved, presumption of receipt of obtainment of illegal gratification would be made. If such a presumption of fact would be raised, it is subject to rebuttal by the accused as the presumption under Section 20 of the PC. Act is not an inviolable presumption. However, if the presumption is not rebutted, the offence gets proved as provided under Section 20 of the P.C. Act. (Para 44)

The Supreme Court has answered the reference that if in absence of evidence of the complainant (direct/primary/oral/documentary evidence), it would be permissible to draw an inferential deduction of culpability/guilt of a public servant under Sections 7, 13(2)/13(1)(d) of the P.C. Act based on other evidence adduced by the prosecution. (Para 46)

Appeal dismissed. (E-14)

List of Cases cited:

1. P. Satyanarayana Murthy Vs District Inspector of Police, St. of Andhra Pradesh & anr. (2015) 10 SCC 152

2. Neeraj Dutta Vs St. (2022) SCC OnLine SC 1724

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

1. The present appeal under Section 374(2) Cr.P.C. read with Section 27 of the Prevention of Corruption Act, 1988 (for short "P.C. Act') has been filed against the judgement and order dated 5.11.2015 passed by the learned Special Judge, CBI, Court No.2, Lucknow in Criminal Case No.9 of 2007 (CBI Vs. Om Prakash Vimal), arising out of RC No.0062006A0030/2006, Police Station CBI/ACB, Lucknow, whereby the learned trial court has convicted and sentenced the accused-appellant under Section 7 of P.C. Act for three years rigorous imprisonment with fine of Rs.40,000/- and default of payment of fine, further to undergo six months rigorous imprisonment and under Section 13(2) read with Section 13(1)(d) of P.C. Act for four years rigorous imprisonment with fine of Rs.60,000/- and in default of payment of fine, further to undergo one year additional rigorous impoverishment with direction that both the sentences shall run concurrently except for fine.

Facts:-

2. Brief facts of the case are that a written complaint dated 26.12.2006 was received in the office of the Superintendent of Police, CBI. Lucknow by Sri Shailendra Kumar, Proprietorship of firm of M/s Kashyap Trading Company alleging that the said concern of the complainant was in the wholesale trading of food-grains and

was audited regularly by the Chartered Accountant every year. From the year 2002-03 as his firm was running into losses, the income tax was not payable and, therefore, was not paid. The complainant received a notice from the Income Tax Office in April, June and November, 2006 in respect of the returns of the proprietorship firm of the complainant for Financial Years 2003-04 and 2004-05. In respect of these notices, he met the accused-appellant several times and clarified his position through letter dated 7.12.2006. On 21.12.2006, the accused-appellant demanded Rs.60,000/- as bribe amount to nil his income tax assessment. The accused-appellant threatened the complainant that in case he would not pay the bribe amount, heavy tax and penalty would be imposed on the complainant. Thereafter, on the request of the complainant, the accused-appellant told him to reduce the bribe amount to Rs.50,000/- and directed the complainant to bring the bribe amount by 27.12.2006 at his residence in making the tax liability of the complainant nil.

3. The Superintendent of Police, CBI, Lucknow after verifying the complaint, directed for registration of the FIR and nominated Sri V. Dixit as Trap Laying Officer (TLO). A trap team was constituted, which included Shailendra Kumar, the complainant; Ram Shabd Verma, independent witness; Sri Junail Ibad Khan, independent witness; N.N. Pandey, CBI Inspector; G.K. Dubey; A.K. Pandey; Diwakar Pandey; R.K. Tewari, Sub-Inspector; S.K. Pandey, Ashok Kumar; R.N. Shukla, Constable and G.S. Bisht with T.L.O. In presence of these persons, pre-trap proceedings were completed. The complainant brought Rs.50,000/- in denomination of Rs.500/- each. The numbers of these currency notes were noted down and they were treated with Phenolphthalein powder, and the said bribe amount was kept in the right pocket of pant of the complainant.

4. Ram Shabd Verma, independent witness, was deputed as shadow witness to be present at the time of giving the bribe amount by the complainant to the accused-appellant. The other independent witness, Junail Ibad Khan was directed to remain present with the CBI team. The CBI team after competing the pre-trap proceedings, proceeded to the residence of the accused-appellant at 3 PM on 27.12.2006 itself.

5. The complainant and the shadow witness were on motorcycle. The accused-appellant was seen going to his office on foot from his residence. The complainant stopped the motorcycle and requested the accused-appellant to go to his residence. However, the accused-appellant asked the complainant to reach to his office. This conversation between the accused-appellant and the complainant was clearly heard by the shadow witness,Ram Shabd Verma. This conversation was told to T.L.O. Sri V. Dixit, who decided to catch the accused-appellant red handed accepting the bribe amount in his office.

6. As per the plan, the complainant and the shadow witness went to the retiring room of the accused-appellant at 16.15 hours. On indication by the shadow witness, the CBI team with independent witness, Junail Ibad Khan reached to the office of the accused-appellant and caught him red handed accepting the bribe amount. The bribe amount was recovered from the drawer of the office table of the accused-appellant. The colour of wash of the hands and fingers of the accused-appellant turned

pink. The bribe amount was recovered by the independent witness, Junail Ibad Khan from the drawer of the office table of the accused-appellant. The numbers of the currency notes matched with the numbers mentioned in the pre-trap proceedings. After completing the investigation, charge sheet was submitted by the CBI/ACB, Lucknow under Sections 7 and 13(2) read with Section 13(1)(d) of the P.C. Act.

7. The CBI concluded in its investigation that the accused-appellant was caught red handed while demanding and accepting the bribe amount of Rs.50,000/- on 27.12.2006 in presence of the two independent witnesses in his office and the accused-appellant was arrested on the spot. Sanction order for prosecuting the accused-appellant was issued by the Commissioner of Income Tax, Faizabad on 23.3.2007. After taking cognizance, the accused-appellant was summoned to face the trial. After completing the proceedings under Section 207 Cr.P.C. on 24.10.2007, charges were framed against the accused-appellant by the learned trial court under Sections 7 and 13(2) read with Section 13(1)(D) of P.C. Act. The accused-appellant denied charges and claimed trial.

8. In investigation, it was noticed that the accused-appellant was posted as Income Tax Officer from 30.6.2005 to 27.12.2006. The accused-appellant was on a position to make assessment of the income tax of the proprietorship firm of the complainant. The case file for assessment of the proprietorship firm of the complainant was pending from the date when the accused-appellant took charge on 30.6.2005 from his predecessor, Sri Nimish Mishra. The accused-appellant did not finalise the assessment of the proprietorship firm of the complainant and kept it pending and did not finalise the assessment order till 27.12.2006. He kept the proceedings of assessment pending in order to receive illegal gratification from the complainant.

9. During investigation, it was also noticed that no order was passed in the order-sheet of the assessment proceedings of the proprietorship firm of the complainant since June, 2006. Initially, the accused-appellant demanded Rs.60,000/- from the complainant as illegal gratification on 21.12.2006. However, finally he agreed to receive Rs.50,000/- as illegal gratification on 27.12.2006 to finalise the assessment at nil tax on the proprietorship firm of the complainant.

Evidence:-

10. The prosecution to prove its case, examined the following witnesses:-

1. P.W.-1, D.C. Pant, in respect of the sanction order passed by him for sanctioning prosecution of the accused-appellant;

2. P.W.-2, Shailendra Kumar, the complainant;

3. , Ram Shabd Verma, shadow witness;

4. P.W.-4, V. Dixit, T.L.O.;

5. P.W.-5, Junail Ibad Khan, independent witness;

6. P.W.-6, Shobhnath Saroj, Income Tax Officer;

7. P.W.-7, Devendra Singh, Additional Superintendent of Police, Investigating Officer;

8. P.W.-8, Yogendra Prasad Gupta, Assistant General Manager, BSNL, Basti;

9. P.W.-9, Virendra Dev Singh, Income Tax Inspector, Basti; and

10. P.W.10, Ajit Kumar Jain, Retired Additional Commissioner,

11. Several documentary evidences were also produced in support of the prosecution case, which are mentioned in the impugned judgement and order of the learned trial court.

12. The accused-appellant in his statement recorded under Section 313 Cr.P.C. denied the prosecution case, evidence and the circumstances against him. The accused-appellant said that on 30.6.2005, he took the charge of the Income Tax Officer, Basti. The complainant could not have been discharged of his liability to pay the income tax, The appellant did not demand or accept any bribe amount from the complainant and neither any bribe amount was recovered from him. As soon as he reached the office from his residence after having lunch at his residence, the CBI personnel apprehended him. The complainant wanted to escape from the income tax liability, for which he conspired and falsely implicated the accused-appellant. The accused-appellant, however, said that Rs.50,000/- was kept in the drawer of his office table by the complainant in his absence. The accused-appellant said that he was innocent and he neither demanded any bribe amount from the complainant nor any bribe amount was recovered from him. The complainant met the accused-appellant while he was coming back to his office from his residence after having lunch. The accused-appellant was on foot and the complainant was on motorcycle. Before the accused-appellant could reach his office on foot, the complainant reached to the office of the accused-appellant and kept Rs.50,000/- in the drawer of his office table. Further, he said that he could not have discharged the complainant from his liability to pay the income tax. When the complainant could come to know that on 31.12.2006 the order would be passed against him fixing his income tax liability, he falsely implicated the accused-appellant.

13. In his defence, the accused-appellant produced two witnesses, D.W.-1 Hari Ram, and Nand Kumar, D.W.-2 and also submitted documentary evidence Ext.Ka-1 and Ext.Ka-2, information received under the Right to Information Act.

14. P.W.-1, Sri D.C. Pant, Income Tax Commissioner, Faizabad proved the order dated 23.3.2007 (Ext.Ka-1) granting sanction for prosecution of the accused-appellant.

15. P.W.-2, Shailendra Kumar, the complainant, deposed that he got registered M/s Kashyap Trading Company proprietorship firm in the year 1996 and started wholesale business of food-grains in the year 1999. Initially, his business did not come within the income tax limit. However, w.e.f. 2003-04 when he took loan of Rs.18,00,000/- from the bank, his business increased and he submitted the requisite papers before the Income Tax Department in Varanasi and Basti. No income tax was paid as his business was not running in profit. A raid was conducted on 30.1.2004 at the complainant's place, and this affected the business of the complainant and he suffered losses.

16. The accused-appellant started proceedings in respect of the Assessment Years 2003-04 and 2004-05 of the proprietorship firm of the complainant. The entire requisite papers were submitted before the accused-appellant. However, the accused-appellant demanded Rs.60,000/- for finalising the assessment and making the tax liability nil. He demanded the bribe

money of Rs.60,000/- on 21.12.2006. When the complainant expressed his inability to pay Rs.60,000/-, the accused-appellant agreed to accept Rs.50,000/- to be paid on 27.12.2006 at his residence and said that he would pass the order on 31.12.2006 making the tax liability nil in respect of the proprietorship firm of the complainant. He further deposed in respect of the pre-trap and post-trap proceedings. He said that he and the shadow witness reached to the office of the accused-appellant after he met the appellant while he was coming back from his residence after having lunch on 27.12.2006. The accused-appellant asked whether he brought the bribe amount of Rs.50,000/- or not. He introduced the shadow witness as his brother-in-law and requested the accused-appellant to reduce the bribe amount, on which he said that *"neither brother-in-law nor father-in-law would be of any help, whatever was agreed, the complainant should pay"*. On this, he took out Rs.50,000/- Phenolphthalein treated currency notes from his right hand pocket of the pant and gave it to the accused-appellant, which he took from his right hand and kept in the drawer of his office table. On indication by the shadow witness, the CBI team reached there and the accused-appellant was caught red handed.

17. P.W.-3, Ram Shabd Verma, shadow witness, also reiterated the pre-trap and post-trap proceedings and fully corroborated the evidence of the complainant, P.W.-2.

18. P.W.-4, Sri V. Dixit, DSP, CBI/ACB, Dehradun in his evidence said that from May, 2002 to May, 2008 he was posted as Inspector in the office of the CBI/ACB, Lucknow. On 26.12.2006, at around 1230 hours Sri Praveen Ranjan, Superintendent of Police, CBI, Lucknow called him in his room and introduced him to the complainant, proprietor of M/s Kashyap Trading Company. He handed over the complaint given by Shailendra Kumar, the complainant, on which RC No.0062006A0030/2006 was registered on 26.12.2006. He proved the signatures of Sri Praveen Ranjan on the said complaint as well as the FIR, which were exhibited. The said witness also fully corroborated the pre-trap and post-trap proceedings and said that the bribe amount was recovered by the independent witness, Junail Ibad Khan from the drawer of the office table of the accused-appellant and the numbers of the currency notes were matched with the numbers written in the pre-trap proceedings. The seizure memo was prepared, which was exhibited and the envelop containing the bribe amount was also exhibited as Ext.Ka-2.

19. P.W.-5, Junail Ibad Khan, independent witness, in his deposition said that on 27.12.2006, he was working as Engineer, Sub-division, Mobile in the office of the General Manager, Telecom, BSNL, Basti. He also corroborated the pre-trap and post-trap proceedings. The said witness said that he recovered Rs.50,000/- bribe amount from the drawer of the office table of the accused-appellant.

20. P.W.-6, Sri Shobh Nath Saroj, Income Tax Officer, Gonda in his deposition said that on 28.12.2006 he took charge of the Income Tax Officer, Basti in place of the accused-appellant as the accused-appellant was arrested by the CBI. He proved the document regarding penalty imposed on M/s Kashyap Treading Company for Assessment Year 2004-05 vide order dated 20.6.2005 passed by Sri Nimish Mishra, Income Tax Officer under

Section 271-B of the Income Tax Act. He also deposed and proved the document imposing penalty of Rs.80,000/- on the complainant for the Assessment Year 2003-04 vide order dated 20.6.2005 by Sri Nimish Mishra. The order-sheet from 14.2.2005 to 20.6.2005 was written by Sri Nimish Mishra, the then Income Tax Officer for the Assessment Year 2003-04 in respect of the income tax return of the complainant. Vide order dated 5.8.2005, notice under Section 226(3) of the Income Tax Act was sent to the Branch Manager, State Bank of India, Basti for recovering Rs.80,000/- from the bank account of the proprietorship firm of the complainant. However, the said notice was not mentioned in the order-sheet, and it was the duty of the accused-appellant to mention the said fact and the notice in the order-sheet.

21. In respect of the Assessment Year 2004-05, the witness said that after 14.6.2006, no order was written on the order-sheet in respect of the proceedings for the Assessment Year 2004-05 by the Income Tax Officer, whereas the accused-appellant had given notices dated 15.6.2006, 24.11.2006 and 30.11.2006 to the complainant, proprietor of the firm. However, these notices were not part of the order-sheet and have not been mentioned.

22. For the Assessment Year 2003-04 in respect of the proceedings of income tax assessment of the complainant's firm, there was no proceeding/order in the order-sheet after 7.6.2006. However, it was the duty of the Income Tax Officer, Basti to write the order-sheet. The question that why the order-sheet was not written by the accused-appellant, who was posted as Income Tax Officer at the relevant time, the witness said that it could very well be explained by the accused-appellant himself.

23. P.W.-7, Devendra Singh, Additional Superintendent of Police, CBI, New Delhi said that after the prosecution sanction was received, charge sheet was filed on 26.2.2007 against the accused-appellant in the competent court.

24. P.W.-8, Sri Yogendra Pratap Gupta, Assistant General Manager, BSNL, Basti said that on the direction of the superior officer, he remained present as witness out of his free will during search of the house of the accused-appellant on 27.12.2006.

25. P.W.-9, Virendra Dev Singh, Inspector, Income Tax Office, Basti deposed that he was posted as Stenographer from 2003 to 2007 in the Income Tax Office, Basti. Vide notice dated 5.12.2003 issued under Section 142 of the Income Tax Act under the signature of the then Income Tax Office, Sri Nimish Mishra, the complainant, Shailendra Kumar was directed to submit the details of the account for the Assessment Year 2003-04 and similar notice was issued for the Assessment Year 2002-03 and the details of the account were to be submitted by 24.12.2003. He said that till 27.12.2006, no assessment order was passed in respect of the complainant, proprietor of M/s Kashyap Trading Company for the Assessment Years 2003-04 and 2004-05 and it was the accused-appellant, who was the competent authority to pass the assessment order. This witness proved several documents filed on record by the CBI.

26. P.W.10, Ajit Kumar Jain, Retired Additional Income Tax Commissioner in his deposition said that he was promoted on the post of Additional Income Tax

Commissioner in January, 2005 and remained posted in Lucknow on the said post till 31.8.2008. He was given the additional charge of Income Tax Range, Gonda in November, 2005, which remained under him till 2007. The Income Tax Office, Basti comes within the range of Gonda. He further said that the accused-appellant got the charge of the Income Tax Officer, Basti on 30.6.2005 after Sri Nimish Mishra. He said that for the Assessment Years 2003-04 and 2004-05, it was the accused-appellant as an Income Tax Officer, Basti, who was competent to pass the order. Till the accused-appellant was arrested by the CBI in the trap proceedings, he did not pass any order for the Assessment Years 2003-04 and 2004-05 in respect of the proprietorship firm of the complainant.

27. D.W.-1, Hari Ram said that at the relevant time he was posted as Notice server in the Income Tax Office, Bassti.

28. D.W.-2. Nand Kumar, who was posted as Senior Private Secretary at the relevant time, proved the signature of Dr. A.K. Singh, Income Tax Commissioner, Gorakhpur.

Submissions:-

29. Sri Nandit Srivastava, learned Senior Advocate, assisted by S/Sri Pranjal Krishna, J.P. Awasthi, Mohd. Ibrahim Khan and Anshuman Srivastava for the accused-appellant has submitted that as per the prosecution case, seven persons were present on the spot when the trap proceedings were conducted, who might have heard the conversation between the accused-appellant and the complainant, but they were not examined during trial by the CBI. The complainant had clear motive to falsely implicate the accused-appellant in order to escape from payment of heavy income tax and penalty. Learned trial court had ignored the evidence brought on record to show that the accused-appellant had no motive to demand and accept the bribe amount from the complainant. The complainant was a defaulter of the Income Tax Department as he evaded the tax. The predecessor Income Tax Officer had imposed penalty and intimated the recovery proceedings against the complainant. Therefore, the accused-appellant was not in a position to recall or review the said order passed by the predecessor in office. The accused-appellant was not in a position to pass the assessment order for nil payment of income tax. He has further submitted that the learned trial court had failed to appreciate the evidence of P.Ws.6, 9 and 10, who were the Income Tax Officers and deposed in respect of the orders imposing penalties on the complainant.

30. Learned counsel for the accused-appellant has further submitted that the definite case of the accused-appellant that while he was coming to office on foot from his residence after having lunch, the complainant, who was on motorcycle, entered the office of the accused-appellant and kept the bribe amount in the drawer of the office table of the accused-appellant, should not have been brushed aside by the learned trial court. It is also submitted that even as per the evidence of P.W.-2, when the complainant met the accused-appellant on the way to his office from his residence, the complainant requested him to reach the residence. However, the accused-appellant asked the complainant to meet him in the office. He, therefore, has submitted that the prosecution story that the accused-appellant asked the complainant to give the bribe amount at his residence, falls to ground.

31. Learned counsel for the accused-appellant has further submitted that the alleged bribe amount was recovered from the drawer of the office table of the accused-appellant. The retiring room of the accused-appellant was vacant during lunch as he went to his residence for having lunch and the possibility of putting the bribe amount by the complainant in the drawer of the office table of the accused-appellant during this period, was not a mere suspicion, but was a reality.

32. Learned counsel for the accused-appellant has further submitted that the principle Falsus in Uno Falsus in Omnibus was ignored by the learned trial court in spite of the fact that most of the prosecution witnesses did not depose truthfully. The prosecution had failed to prove the case against the accused-appellant beyond reasonable doubt and the principle *"It is better that ten guilty persons escape than that one innocent suffer"* was ignored by the learned trial court while convicting and sentencing the accused-appellant. When there was no motive for demand of bribe amount by the accused-appellant, the conviction and sentence of the accused-appellant in absence of any evidence of demand is unjustified. He, has, therefore, prayed for allowing the appeal and acquitting the accused-appellant.

33. On the other hand, Sri Shiv P. Shukla, learned counsel for the CBI has submitted that the accused-appellant kept the file of the complainant for the Assessment Years 2003-04 and 2004-5 pending since June, 2006 without any order on the order-sheet with mala fide intention to demand illegal gratification from the complainant to make the assessment for nil tax. The income tax returns for the Assessment Years 2003-04 and 2004-05 were filed on 26.9.2005 and after notice was issued, relevant papers were submitted on 7.12.2006, but the assessment was not finalised. It is not in dispute that the accused-appellant was in the capacity to finalise the assessment of M/s Kashyap Trading Company, a proprietorship firm of the complainant for the Assessment Years 2003-04 and 2004-05.

34. The evidence of P.W.-2, Shailendra Kumar, the complainant; P.W.-3, Ram Shabd Verma, shadow witness; P.W.-4, V. Dixit, T.LO. and P.W.-5, Junail Ibad Khan, independent witness, would go to prove beyond reasonable doubt that the accused-appellant demanded and accepted the bribe amount of Rs.50,000/- from the complainant, which was recovered from the drawer of the office table of the accused-appellant. He has, therefore, submitted that the learned trial court after detail examination of the evidence, found the case fully proved against the accused-appellant for offences under Sections 7 and 13(2) read with Section 13(1)(d) of P.C. Act for which the accused-appellant was convicted and sentenced by the learned trial court as mentioned above. It is submitted that once the demand and acceptance had been proved and the bribe money was recovered, charge against the accused-appellant got fully proved beyond reasonable doubt and, therefore, the appeal is liable to be dismissed.

35. I have considered the submissions advanced on behalf of the learned counsel for the parties and perused the judgment and order passed by the learned trial court.

Conclusion:-

36. The question which falls for consideration in the present appeal, is

whether the prosecution had been able to establish demand and acceptance of illegal gratification of Rs.50,000/- by the accused-appellant from the complainant by leading cogent and credible evidence. The complainant in his evidence had deposed regarding demand and acceptance of the bribe amount and he had also deposed in respect of the pre-trap and post-trap proceedings and, the testimony of the complainant, P.W.-2 was fully corroborated by Ram Shabd Verma, P.W.-3, shadow witness. P.W.-5, Junail Ibad Khan, independent witness, also corroborated the testimony of P.Ws.2 and 3 regarding demand and acceptance of the bribe amount. The hundred currency notes of Rs.500/- each, total Rs.50,000/-, were recovered from the drawer of the office table of the accused-appellant and the numbers of the notes would match the number of notes written down in the pre-trap proceedings.

37. In view thereof, this Court does not find any credence in the submission of the learned counsel for the accused-appellant that recovery was not made from the accused-appellant. Once the accused-appellant accepted the bribe amount and he kept it in the drawer of the office table, which was of the accused-appellant, the recovery from the drawer of the office table of the accused-appellant, is recovery from the accused-appellant himself.

38. Considering the evidence on record, I am of the view that the prosecution was able to prove the demand and acceptance of the bribe amount of Rs.50,000/- from the complainant, P.W.-2 by the accused-appellant, which was recovered from the drawer of the office table of the accused-appellant.

39. It is well settled law that to record the conviction under Sections 7 and 13 of the P.C. Act, the demand and acceptance of illegal gratification by the accused public servant should be proved by cogent and credible evidence. It is also settled law that mere possession and recovery of money without proof of demand by the accused does not constitute an offence under Sections 7 and 13(2) read with 13(1)(d) of the PC Act, 1988 (P. Satyanarayana Murthy Vs District Inspector of Police, State of Andhra Pradesh and another, (2015) 10 SCC 152).

40. Term "demand" does not find place under P.C. Act, 1988, but it has virtually been inserted in the statute by interpretative process. Section 20 of the P.C. Act derives certain statutory presumption of guilt. Section 7 of the P.C. Act has to be read in conjunction with Section 20 P.C. Act, which reads as under:-

"20. Presumption where public servant accepts gratification other than legal remuneration.--

(1) Where, in any trial of an offence punishable under section 7 or section 11 or clause (a) or clause (b) of sub-section (1) of section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

(2) Where in any trial of an offence punishable under section 12 or under

clause (b) of section 14, it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7, or as the case may be, without consideration or for a consideration which he knows to be inadequate.

(3) Notwithstanding anything contained in sub-sections (1) and (2), the court may decline to draw the presumption referred to in either of the said sub-sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no interference of corruption may fairly be drawn."

41. Plain reading with the words of Section 20 of the P.C. Act, would mean that if it can be proved that a public servant has received gratification, Section 20 of the P.C. Act brings in statutory presumption that he has received the same with an illegal motive as laid down in Section 7 of the Act. This shifts the burden of proof to the accused, who is required to prove that what has been received, is a valuable consideration and not an illegal gratification.

42. Constitution Bench of the Supreme Court in a recent judgment in the case of ***Neeraj Dutta vs State,*** (2022) SCC OnLine SC 1724, has held that to constitute an offence under Sections 7 and 13(2)/13(1)(d) (i) and (ii) of the P.C. Act, 1988, if a bribe giver makes an offer to pay without there being any prior demand of the same by a public servant and public servant accepts and receives the bribe, it would be a case of acceptance under Section 7 of the P.C. Act, 1988. If a public servant himself makes a demand and demand is accepted by bribe giver and bribe is paid by the bribe giver, it is a case of obtainment under Section 13(1)(d)(i) and 13(1)(d)(ii) of the P.C. Act.

43. It has been held that if the foundational facts are proved, presumption of receipt of obtainment of illegal gratification would be made. If such a presumption of fact would be raised, it is subject to rebuttal by the accused as the presumption under Section 20 of the PC. Act is not an inviolable presumption. However, if the presumption is not rebutted, the offence gets proved as provided under Section 20 of the P.C. Act.

44. In paragraphs 4 and 5 of the aforesaid judgment, ingredients to constitute an offence under Sections 7 and 13(1)(d) of the P.C. Act, 1988 have been mentioned. Paragraphs 4 and 5 of the aforesaid judgment, which are relevant, wound extracted hereunder:-

"4. The following are the ingredients of Section 7 of the Act:

i) the accused must be a public servant or expecting to be a public servant;

ii) he should accept or obtain or agrees to accept or attempts to obtain from any person;

iii) for himself or for any other person;

iv) any gratification other than legal remuneration;

v) as a motive or reward for doing or forbearing to do any official act or to show any favour or disfavour.

5. Section 13(1)(d) of the Act has the following ingredients which have to be

proved before bringing home the guilt of a public servant, namely, -

(i) the accused must be a public servant;

(ii) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or by abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or while holding office as public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest.

(iii) to make out an offence under Section 13(1)(d), there is no requirement that the valuable thing or pecuniary advantage should have been received as a motive or reward.

(iv) an agreement to accept or an attempt to obtain does not fall within Section 13(1)(d).

(vi) mere acceptance of any valuable thing or pecuniary advantage is not an offence under this provision.

(vii) therefore, to make out an offence under this provision, there has to be actual obtainment.

(viii) since the legislature has used two different expressions namely "obtains" or "accepts", the difference between these two must be noted."

45. In paragraph 74 of the aforesaid judgment, the law for establishing guilt of the accused/public servant under Sections 7 and 13(1)(d) has been summarized, which would read as under:-

"74. What emerges from the aforesaid discussion is summarised as under:

(a) Proof of demand and acceptance of illegal gratification by a public servant as a fact in issue by the prosecution is a sine qua non in order to establish the guilt of the accused public servant under Sections 7 and 13(1)(d)(i) and(ii) of the Act.

(b) In order to bring home the guilt of the accused, the prosecution has to first prove the demand of illegal gratification and the subsequent acceptance as a matter of fact. This fact in issue can be proved either by direct evidence which can be in the nature of oral evidence or documentary evidence.

(c) Further, the fact in issue, namely, the proof of demand and acceptance of illegal gratification can also be proved by circumstantial evidence in the absence of direct oral and documentary evidence.

(d) In order to prove the fact in issue, namely, the demand and acceptance of illegal gratification by the public servant, the following aspects have to be borne in mind:

(i) if there is an offer to pay by the bribe giver without there being any demand from the public servant and the latter simply accepts the offer and receives the illegal gratification, it is a case of acceptance as per Section 7 of the Act. In such a case, there need not be a prior demand by the public servant.

(ii) On the other hand, if the public servant makes a demand and the bribe giver accepts the demand and tenders the demanded gratification which in turn is received by the public servant, it is a case of obtainment. In the case of obtainment, the prior demand for illegal gratification emanates from the public servant. This is an offence under Section 13(1)(d)(i) and (ii) of the Act.

(iii) In both cases of (i) and (ii) above, the offer by the bribe giver and the demand by the public servant respectively have to be proved by the prosecution as a fact in issue. In other words, mere acceptance or receipt of an illegal gratification without

anything more would not make it an offence under Section 7 or Section 13(1)(d), (i) and (ii) respectively of the Act. Therefore, under Section 7 of the Act, in order to bring home the offence, there must be an offer which emanates from the bribe giver which is accepted by the public servant which would make it an offence. Similarly, a prior demand by the public servant when accepted by the bribe giver and inturn there is a payment made which is received by the public servant, would be an offence of obtainment under Section 13(1)(d) and (i) and (ii) of the Act.

(e) The presumption of fact with regard to the demand and acceptance or obtainment of an illegal gratification may be made by a court of law by way of an inference only when the foundational facts have been proved by relevant oral and documentary evidence and not in the absence thereof. On the basis of the material on record, the Court has the discretion to raise a presumption of fact while considering whether the fact of demand has been proved by the prosecution or not. Of course, a presumption of fact is subject to rebuttal by the accused and in the absence of rebuttal presumption stands.

(f) In the event the complainant turns "hostile', or has died or is unavailable to let in his evidence during trial, demand of illegal gratification can be proved by letting in the evidence of any other witness who can again let in evidence, either orally or by documentary evidence or the prosecution can prove the case by circumstantial evidence. The trial does not abate nor does it result in an order of acquittal of the accused public servant.

(g) In so far as Section 7 of the Act is concerned, on the proof of the facts in issue, Section 20 mandates the court to raise a presumption that the illegal gratification was for the purpose of a motive or reward as mentioned in the said Section. The said presumption has to be raised by the court as a legal presumption or a presumption in law. Of course, the said presumption is also subject to rebuttal. Section 20 does not apply to Section 13(1)(d)(i) and (ii) of the Act.

(h) We clarify that the presumption in law under Section 20 of the Act is distinct from presumption of fact referred to above in point (e) as the former is a mandatory presumption while the latter is discretionary in nature."

46. The Supreme Court has answered the reference that if in absence of evidence of the complainant (direct/primary/oral/documentary evidence), it would be permissible to draw an inferential deduction of culpability/guilt of a public servant under Sections 7, 13(2)/13(1)(d) of the P.C. Act based on other evidence adduced by the prosecution.

47. Considering the evidence on the anvil of the law propounded by the Supreme Court in the case of *Neeraj Dutta* (supra), I am of the view that the prosecution has been able to prove the case of demand and acceptance of the bribe by the accused-appellant from the complainant and, the learned trial court has rightly convicted and sentenced the accused-appellants for the aforesaid offences.

48. In view thereof, I find no substance in this appeal, which is hereby ***dismissed***. The accused-appellant is on bail. His bail bonds are cancelled and sureties are discharged. He shall be taken into custody forthwith to serve out the sentence as awarded by the learned trial court. The trial court record be returned back forthwith.

(2023) 3 ILRA 1249
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.03.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Criminal Appeal No. 5517 of 2015

Dharmendra Kumar ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Ramesh Kumar Pandey, Sri Ashish Kumar Singh

Counsel for the Respondent:
G.A.

A. Criminal Law – Indian Penal Code,1860 - Section 302 – sentenced to life imprisonment- allegation- son of accused appellant came to her house to call the deceased- accused appelant was seen taking out the body of the deceased from his house- several injuries inflicted by knife- presumption of Section 106 of the Indian Evidence Act, 1872- appellant under duty to explain about death of deceased- dead body recovered from his house- presumption rightly invoked. (Paragraph 12)

HELD: Therefore, applying the presumption of Section 106 of The Indian Evidence Act, 1872 (hereinafter referred to as the 'Evidence Act'), it is a duty of the appellant to explain about the death of deceased Awadhesh as the dead body of the deceased was recovered from the house of the appellant. It also appears from the record that though initially appellant confessed under Section 161 Cr.P.C. that he had killed deceased Awadhesh in a fit of moment when he saw him in a compromising position with his daughter Sapna. Sessions Judge also convicted the appellant on the ground that body of the deceased Awadhesh was found from his house and it appears from circumstantial evidence as well as subsequent conduct of appellant that he killed Awadhesh by causing him knife injury when he had seen him in a compromising position with his daughter at his house. Even the appellant did not give sufficient explanation in his St.ment recorded under Section 313 Cr.P.C. for finding the dead body of deceased Awadhesh from his house. Therefore, presumption under Section 106 Indian Evidence Act, 1872 was rightly invoked by the Sessions Judge against the appellant. (Para 12)

B. Exception 1 of Section 300 IPC- No direct evidence- Appellant killed the deceased Awadhesh in a fit of moment- saw him in compromising situation with his daughter- impugned trial court judgement modified- conviction under Section 304 IPC- sentence modified to 10 years imprisonment- Appeal partly allowed. (Paragraphs 14, 15, 16 and 17)

HELD: In view of the above fact and circumstances, we are of the opinion that firstly, there is no direct evidence that the appellant has caused the death of deceased Awadhesh but from the circumstantial evidence as well as presumption under Section 106 of the Evidence Act, he was held guilty for causing death of Awadhesh. Secondly, this fact is also not in dispute that death of the deceased caused by the appellant was not premeditated but because of the fact he lost self-control by grave and sudden provocation because he has seen deceased Awadhesh in a compromising position with his daughter Sapna and in such circumstances, this fact cannot be disputed that a father after seeing his daughter in a compromising position with a person will definitely loose self-control and if he caused death in that spur of moment, then same will fall under culpable homicide not amounting to murder. Even, the Apex Court in the case of St. of U.P. Vs Lakhmi in Criminal Appeal no.234 of 1993 decided on 12.02.1998 reported in AIR 1998 SC 1007 and in case of Hansa Singh Vs St. of Punjab in Criminal Appeal No.248 of 1973 decided on 20.08.1976 reported in AIR 1977 SC 1801 observed that in such situation, cases will fall under Section-304 IPC and not under

Section 302 IPC. Thereafter, after considering the evidence on record as well as the contention of learned counsel for the appellant and learned AGA, it is clearly established that the present case falls under Section 304 IPC and not under Section 302 IPC, in view of the Exception 1 of Section 300 IPC. Therefore, appellant deserves to be convicted under Section 304 IPC. (Para 16)

Appeal partly allowed. (E-14)

List of Cases cited:

1. Criminal Appeal No.734 of 2014 decided on 03.04.2014 in the case of Saroj @ Suraj Panchal & anr. Vs St. of W. B.

2. Criminal Appeal No.219 of 2013 decided on 21.05.2020 in the case of Thiruchanur Amaranath Vs St. of A.P. rep. by Public Prosecutor Hyderabad

3. St. of U.P. Vs Lakhmi AIR 1998 SC 1007

4. Hansa Singh Vs St. of Pun.AIR 1977 SC 1801

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

1. By way of present criminal appeal, the appellant has challenged the judgement and order dated 30.10.2015 passed by the Special Judge (Essential Commodity Act)/Additional Sessions Judge, Ghaziabad in Sessions Trial No.483 of 2012 (State Vs. Dharmendra Kumar) arising out of Case Crime No.1591 of 2011, under Section-302 IPC, Police Station-Indrapuram, District-Ghaziabad. By the impugned judgement, the Sessions Judge convicted the appellant under Section-302 IPC and imposed punishment of life imprisonment along with fine of Rs.40,000/- on the appellant and in case of non-payment of penalty, it was directed that he would be further liable to undergo one year imprisonment.

Prosecution Case

2. First informant Phoola Devi (PW-1) submitted a tehrir dated 13.09.2011 in Police Station-Indrapuram. In that tehrir, it was mentioned that first informant Phoola Devi had been residing along with her family at RC/51 N Hayatnagar Khoda. Accused Dharmendra came to her house to call her son Awadhesh Chandra Yadav. Thereafter, between 3 to 4 brother of Dharmendra, Harendra Kumar came to her house and told her to take his son as he has suffered several knife injuries. Thereafter, she along with her younger son Mahesh went to the house of appellant, then he saw that accused persons were taking out her son from house and told her loudly to take the dead body of her son. Thereafter, she and her son brought Awadhesh along with police at metro hospital where the doctors declared him dead.

3. On the basis of above tehrir dated 13.09.2011, a case in case crime no.1591 of 2011, under Section-302 IPC was registered against the accused Dharmendra and Harendra at 18:15 hours. S.I. Munshi Lal was handed over the investigation of the aforesaid case who after recording the statement of first informant went on the spot and prepared site plan at the place of incident and after recording the statement of witnesses, collected blood-stained floor and normal soil along with pillow and blood-stained bed sheet as well as blood stained knife. Panchayatnama of the body of Awadhesh aged about 21 years was also prepared on 13.09.2011 at 16:30 at Metro Hospital, Noida in presence of witnesses. Thereafter, postmortem of the body of Awadhesh was also conducted at District Hospital by Dr. K.N. Tiwari on 14.09.2011 at 2:15 pm. As per the postmortem report, following antemortem injuries were found on the person of deceased Awadhesh Chandra Yadav :

(i) 11 incised (punctured) wound in the abdomen over the area of 20 x 20 cm of size 4 x 2 cm to 1.50 x 1 cm;

(ii) three wounds were found at the left side and;

(iii) 8 wound were found at the right side.

All wound were deep in abdomen.

In internal examination of dead body, blood was also found in the abdomen. Small intestine, liver were having cut, 100 ml semi digested food was also found large intestine.

4. As per the opinion of the doctor, cause of death is hemorrhage and shock due to above injuries. Panchayatnama of dead body of Sapna Kumari aged about 17 years was also conducted on 13.09.2011 at Metro Hospital, Gautam Buddh Nagar at 16:30 in presence of witnesses. Thereafter, her body was also sent for postmortem which was conducted by Dr. K.N. Tiwari on 14.09.2011 at 2:45 pm. As per the postmortem report, several incised wound were also found on different parts of her body including abdomen. In internal examination, blood was also found in her abdomen and chest. As per the opinion of the doctor, Kumari Sapna also died due to haemorrhage, shock, due to ante-mortem injuries. But as a trial is with regard to Awadhesh Kumar, therefore, detailed discussion of the injury of Kumari Sapna is not relevant, at present, as no case was registered for her death.

5. After preparation of panchayatnama and postmortem, investigation was handed over to new Investigating Officer, Ram Pawan Singh on 27.11.2011 and on receiving the investigation, he recorded the statement of several witnesses and found that the co-accused Harendra was not involved in the aforesaid incident as he was not present at the place of incident, therefore, his name was removed during investigation and present appellant, Dharmendra was arrested by police on 18.03.2012 and thereafter, on the basis of available evidence, charge-sheet dated 21.03.2012 was submitted against the appellant under Section 302 IPC. Additional Sessions Judge framed charges against appellant on 08.06.2012 under Section-302 IPC and appellant denied the charges and requested for trial.

Prosecution Evidence

6. In support of prosecution, 12 witnesses were examined in which Phoola Devi as PW-1, Ramu Singh as PW-2, Mahendra Singh as PW-3, Awadhesh Bhagat as PW-4, Harendra Kumar as PW-5, Sub-Inspector Chaman Prakash Sharma as PW-6, Dr. K.M. Tiwari as PW-7, Constable Mool Chandra Sharma as PW-8, Usha wife of Prabhu Dayal as PW-9, also, Ram Sen Singh as PW-9, Manju as PW-10, Inspector Munshi Lal as PW-11.

7. After conclusion of prosecution witnesses, appellant was examined under Section 313 Cr.P.C. In his examination, appellant clearly denied his involvement in the murder of Awadhesh and pleaded his false implication by the first informant. In additional examination under Section 313 Cr.P.C., the appellant refused to give any evidence and pleaded that he has been falsely implicated merely because the alleged incident occurred in his house.

Contention of Appellant

8. The sole contention of the appellant is that present case does not fall under Section 302 IPC but falls under Section 304 IPC, in view of Exception 1 of Section 300

IPC because death of Awadhesh if caused by the appellant is due to losing his self control after seeing the deceased Awadhesh in a compromising position with his daughter, Sapna.

Contention of Prosecution

9. Learned AGA contended that from the evidence it is clear that the appellant has killed his daughter Sapna and son of first informant namely Sheru alias Awadhesh with knife and the appellant has also confessed his involvement in the aforesaid crime before the Investigating Officer and police has recovered a blood-stained knife from the place of incident. Forensic Science Laboratory report also established this fact and further contended that from the facts and circumstances, allegations against the appellant under Section 302 IPC is clearly established, therefore, judgement and order of Sessions Judge is absolutely correct.

Discussion on Prosecution Evidence

10. In the statement, first informant PW-1 had stated that she is last seen witness of deceased Awadhesh going to the house of Dharmendra and she stated in her statement that on the date of incident i.e. 13.9.2011, she was suffering from fever and her son Awadhesh was also lying with her and then son of appellant, Dharmendra, Roshan came to her house to call deceased Awadhesh. When she asked Awadhesh where he is going to, then Awadhesh told her that Roshan son of Dharmendra had come to call him. Thereafter, he left the house and she further stated in the statement that Harendra had come to her house between 3 to 4 and told her that her son has received knife injuries. When she went at the place of incident, then she found one policeman and one boy bringing out his son from the house of appellant. At the place of incident, she had seen that there were several injuries on the back of her son, Awadhesh and blood was oozing out but because of crowd, she could not see other injuries. Her son, Awadhesh died on the way when he was taken to hospital. Thereafter, she reached police station at 6:00 pm. She also proved tehrir before the court which was marked as Ext No.Ka-1. PW-2 Ramu Singh did not support the prosecution story, therefore, he was declared hostile. Similarly, PW-3 Mahendra Singh also did not support the prosecution story and he was also declared hostile. Prosecution witness Awadhesh Bhagat, PW-4 was a witness of panchayatnama and he admitted in his statement that he had signed the panchayatnama and proved the same as Ext Ka-2. PW-4 also proved memo of recovery regarding collected blood-stained soil and normal soil with cement floor and also proved blood-stained pillow, bed sheet and knife recovered from the place of incident. PW-5 Harendra Kumar did not support the prosecution story and was declared hostile. PW-6 Sub-Inspector Chaman Prakash Sharma was the formal witness regarding preparation of panchayatnama as well as preparation of memo regarding collection of blood-stained soil and simple soil, blood-stained bed sheet, pillow, blood-stained knife recovered from the place of incident near the dead body. PW-7 Dr. K.N. Tiwari, who conducted the postmortem of dead body of the deceased Awadhesh Chandra as well as Kumari Sapna and he proved postmortem report and stated that death of Awadhesh and Kumari Sapna was caused due to antemortem injuries. Another, formal witness PW-8 Mool Chandra Sharma proved chik and GD carbon copy. PW-9 Usha, wife of Prabhu Dayal was the tenant

of appellant-Dharmendra Kumar and she stated that the deceased used to come to the house of appellant for the last one year and she had seen the deceased with Kumari Sapna at 2:30 pm and she also proved recovery of dead body of Kumari Sapna and deceased Awadhesh from the house of Dharmendra.

11. Ram Sen Singh, who received investigation on 20.12.2011 was also examined as PW-9, and submitted that after recording statement of remaining witnesses and on completing his investigation, he found sufficient evidence against the appellant, therefore, he submitted charge-sheet against him and proved the same before the Court. Prosecution witness PW-10 Manju Rani was also the tenant of appellant-Dharmendra and she also stated that deceased Awadhesh was having friendship with the son of appellant and he used to come to the house of appellant and on the date of incident at about 2 to 2 during day time, deceased Awadhesh came to the house of appellant and at that time Sapna was alone in her house. When she came out of her room then she had seen that both Awadhesh and Sapna were lying injured at the gate and she also proves that one knife was also found near the body of Sapna and body of deceased Awadhesh was lying upon the body of Sapna. Earlier, Investigating Officer Munshi Lal, was also examined as PW-11, who proved the fact that he initiated investigation of this case and also prepared site plan at the place of incident and also recorded statement of witnesses. He also proved the challan of dead body of deceased Awadhesh as well as challan of dead body of Sapna, prepared in the writing of Sub-Inspector Chaman Prakash Sharma. The Forensic Science Laboratory report dated 19.09.2013 which is also on record as Paper No.26Ka/2 shows that recovered knife, pillow, bed sheet and plaster were blood-stained.

Analysis of Evidence

12. From the perusal of record, it is clear that deceased Awadhesh came to the house of appellant where he was seriously injured because of knife injuries along with the daughter of the appellant Sapna. Though, PW-2 and PW-3, PW-5 did not support the prosecution story and were declared hostile but from the evidence of PW-9 Smt. Usha as well as PW-10 Smt. Manju, who were the tenants in the house of appellant, it is clearly established that the dead body of deceased Awadhesh was found at the house of appellant. Similarly, from the statement of PW-1, it is also established that she had lastly seen the deceased Awadhesh while he left for the house of appellant on the fateful day. Therefore, applying the presumption of Section 106 of The Indian Evidence Act, 1872 (hereinafter referred to as the 'Evidence Act'), it is a duty of the appellant to explain about the death of deceased Awadhesh as the dead body of the deceased was recovered from the house of the appellant. It also appears from the record that though initially appellant confessed under Section 161 Cr.P.C. that he had killed deceased Awadhesh in a fit of moment when he saw him in a compromising position with his daughter Sapna. Sessions Judge also convicted the appellant on the ground that body of the deceased Awadhesh was found from his house and it appears from circumstantial evidence as well as subsequent conduct of appellant that he killed Awadhesh by causing him knife injury when he had seen him in a compromising position with his daughter at his house. Even the appellant did not give sufficient explanation in his statement

recorded under Section 313 Cr.P.C. for finding the dead body of deceased Awadhesh from his house. Therefore, presumption under Section 106 Cr.P.C. was rightly invoked by the Sessions Judge against the appellant.

13. Learned counsel for the appellant also contended that the appellant has committed the murder of Awadhesh in a fit of moment due to sudden provocation when he had seen the deceased Awadhesh with his daughter Sapna in a compromising position, therefore, the present case falls under Section 304 IPC instead of Section 302 IPC. After considering the evidence as well as the contention of appellant, sole issue for consideration here is whether the death of Awadhesh is culpable homicide not amounting to murder or culpable homicide amounting to murder.

14. From perusal of evidence, it is clearly established that appellant has caused death of Awadhesh by causing him knife injury when he had seen him in a compromising position with his daughter. On perusal of Exception 1 of Section 300 IPC, it is clear that culpable homicide is not murder if the offender is deprived of the power of self control by grave and sudden provocation which causes the death of person who gave the provocation. Exception 1 of Section 300 IPC is being quoted as below:

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

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

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

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

*Exception 1.?**When culpable homicide is not murder.?**Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.*

The above exception is subject to the following provisos:?

First.?That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.?That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.?That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.?Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact."

15. Therefore, contention of learned counsel for the appellant that the present case does not fall under Section 302 IPC but falls under Section 304 IPC because

this case is covered under Exception 1 of Section 300 IPC appears to be correct because on seeing Awadhesh in a compromising position with his daughter appellant lost his self control by grave and sudden provocation by this incident in which the deceased Awadhesh was found in a compromising position with the daughter of appellant. In support of his case, learned counsel for the appellant has also relied upon judgements of Apex Court in **Criminal Appeal No.734 of 2014** decided on 03.04.2014 in the case of **Saroj @ Suraj Panchal and Anr. Vs. State of West Bengal** as well as judgement of Andhra Pradesh High Court in **Criminal Appeal No.219 of 2013** decided on 21.05.2020 in the case of **Thiruchanur Amaranath Vs State of A.P. rep. by Public Prosecutor Hyderabad**. In the above cases, the Hon'ble Court observed that death caused due to sudden provocation does not fall for the punishment under Section 302 IPC but falls under Section-304 IPC as the same is not culpable homicide amounting to murder.

16. In view of the above fact and circumstances, we are of the opinion that firstly, there is no direct evidence that the appellant has caused the death of deceased Awadhesh but from the circumstantial evidence as well as presumption under Section 106 of the Evidence Act, he was held guilty for causing death of Awadhesh. Secondly, this fact is also not in dispute that death of the deceased caused by the appellant was not premeditated but because of the fact he lost self control by grave and sudden provocation because he has seen deceased Awadhesh in a compromising position with his daughter Sapna and in such circumstances, this fact cannot be disputed that a father after seeing his daughter in a compromising position with a person will definitely loose self control and if he caused death in that spur of moment, then same will fall under culpable homicide not amounting to murder. Even, the Apex Court in the case of **State of U.P. Vs Lakhmi** in **Criminal Appeal no.234 of 1993** decided on **12.02.1998** reported in **AIR 1998 SC 1007** and in case of **Hansa Singh Vs. State of Punjab** in **Criminal Appeal No.248 of 1973** decided on 20.08.1976 reported in AIR 1977 SC 1801 observed that in such situation, cases will fall under Section-304 IPC and not under Section 302 IPC. Thereafter, after considering the evidence on record as well as the contention of learned counsel for the appellant and learned AGA, it is clearly established that the present case falls under Section 304 IPC and not under Section 302 IPC, in view of the Exception 1 of Section 300 IPC. Therefore, appellant deserves to be convicted under Section 304 IPC.

17. Therefore, present appeal is **partly allowed** and impugned judgement of Session is modified to the extent of substituting the punishment of appellant under Section 302 IPC with the punishment under Section 304 IPC with the imprisonment of ten years along with fine of Rs.40,000/-. In case of non-payment of fine, the appellant will further undergo one year imprisonment. Period spent by the appellant in jail during pendency of trial as well as pendency of present appeal will be adjusted in imprisonment imposed by this order and if appellant has already completed ten years in jail, then he should immediately be released on depositing the fine, if he is not wanted in any other case.

(2023) 3 ILRA 1256
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.03.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Matter Under Article 227 No. 6654 of 2020

Km. Chandana Mukherji ...Petitioner
Versus
A.D.J., Spl. Judge P.C. Act, Lko. & Anr. ...Respondents

Counsel for the Petitioner:
Arun Kumar Srivastava

Counsel for the Respondents:
Ghanshyam Yadav

Civil Law –Code of Civil Procedure, 1908 - Order XXVI Rule 9 - Application for issuance of commission- suit of cancellation of sale deed and permanent injunction dismissed by trial court- order under challenge- purpose of issuance of commission- ascertain alleged possession of the plaintiff- Plaintiff liable to succeed on his own footing- Order XXVI Rule 9 not applicable for purpose of collection of evidence for plaintiff- order of trial court upheld- Petition dismissed.

HELD: A perusal of the aforesaid provision makes it evident that commission to make local investigations can be permitted by the court where it deems local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or ascertaining market value of any property, or amount of any mesne profit or damages or annual net profits. The purpose of issuance of commission as such is evident from the conditions indicated thereunder itself which is only for the purposes of elucidating primarily any matter in dispute. The provisions of Order XXVI Rule 9 of the Code do not make it applicable for the purposes of collection of evidence on behalf of the plaintiff.

Upon applicability of aforesaid judgments in the present facts and circumstances of the case, it is evident that application for issuance of commission to conduct an investigation and examination regarding possession of parties to a dispute would not be maintainable in terms of Order XXVI Rule 9 of the Code as observed herein above particularly when there is no explanation furnished by the plaintiff that he could not have access to any documents required for proving his possession over suit property. Even otherwise, it is impossible for a commission to decide possession of a particular party to dispute over the suit property only on the basis of a cursory examination

It has already been observed herein above that applications under Order XXVI Rule 9 cannot be allowed merely for purposes of facilitating the case of one or the other party and it is not the business of the courts to discharge burden of evidence of either party

Petition dismissed. (E-14)

List of Cases cited:

1. Remco Industrial Workers House Building Coop. Society Vs Lakshmeesha M. (2003)11 SCC 666

2. Radhey Shyam & anr. Vs A.D.J. 2011 (2) CRC 469

3. New Meena Sahkari Awas Samiti Ltd. through its President Vs A.D.J., Lucknow passed in Misc. Single No. 2267 of 2012

(Delivered by Hon'ble Manish Mathur, J.)

1. Heard learned counsel for petitioner and learned counsel appearing on behalf of opposite party No.2.

2. Petition under Article 227 of Constitution of India has been filed assailing order dated 10th January, 2018 passed by trial court rejecting petitioner's application for issue of commission under Order 26 Rule 9 of the Code of Civil

Procedure as well as order dated 31st January, 2020 passed by revisional court dismissing the revision.

3. The limited question of law requiring adjudication in the present petition is whether the court below was justified in rejecting the application filed by petitioner-plaintiff for issuance of commission in a suit for cancellation of sale deed and permanent injunction.

4. Learned counsel for petitioner submits that the aforesaid suit had been filed for cancellation of sale deed and permanent injunction with regard to immovable property in which both the plaintiff as well as defendant claimed possession over property in dispute. Under an apprehension that status quo would be changed by the defendants, the petitioner-plaintiff was constrained to file application for issuance of commission under Order 26 Rule 9 read with Section 151 CPC on 2nd August, 2016. The same was rejected by means of detailed order dated 25th September, 2017, which became final since no revision there against was effected. It is submitted that subsequently in view of a fresh apprehension on the part of plaintiff a subsequent application under Order 26 Rule 9 read with Section 151C.P.C. was filed on 14th November, 2017 which has been rejected by means of impugned orders.

5. Learned counsel for petitioner submits that the courts below have erred in rejecting the application for issuance of commission in view of the fact that the suit was not only for cancellation of sale deed but for permanent injunction as well and therefore it was incumbent upon the court concerned to have indicated the status of parties as on the date on which the application was being made so as to prevent any future change at the spot. It is submitted that the trial court as well as revisional court have misdirected themselves in rejecting the application primarily on the ground that earlier as well application for issuance of commission at the behest of plaintiff had been rejected on 25th September, 2017. It is thus submitted that the impugned order dated 10th January, 2018 is ineffective and non speaking order. Learned counsel has placed reliance on the judgment rendered by co-ordinate Bench of this court in the case of New Meena Sahkari Awas Samiti Limited through its president versus Additional District Judge, Lucknow passed in Misc. Single No. 2267 of 2012 to buttress his submissions to the effect that the court can not prevent a party from adducing best evidence, if such evidence can be gathered with the help of commission.

6. Learned counsel appearing on behalf of opposite party No.2 has refuted submissions advanced by learned counsel for petitioner with submission that orders impugned are in consonance with settled law and do not warrant any inference particularly in view of the fact that the suit was primarily for cancellation of sale deed in which there is no occasion for determination of actual spot condition by issuance of commission. It is submitted that there is no error in the order dated 10th January, 2018 which has been rejected primarily on account of the fact that second application for issuance of commission under Order 26 Rule 9 C.P.C. has been filed although the first one had already been rejected on 25th September, 2017, which became final since the same was not contested. Learned counsel has in turn placed reliance on a judgment rendered by another coordinate bench of this Court in

the case of Radhey Ahyam and another versus Additional District Judge and others reported in 2011 (2) CRC 469 to buttress his submission that purpose of appointing commission is not to fill a lacuna in pleadings or to find out some evidence in favour of one or the other party.

7. Considering submissions advanced by learned counsel for parties and perusal of material on record, it transpires that suit had been filed for cancellation of sale deed and for permanent injunction. During course of suit proceedings, an application under Order 26 Rule 9 read with Section 151 CPC had been filed for issuance of commission which was rejected by means of order dated 25th September, 2017 primarily on the ground that question regarding possession of parties over the property in dispute can not be ascertained by issuance of commission. It was further held that issuance of commission can not be a substitute for adducing evidence. It is noticeable that the aforesaid order dated 25th September, 2017 attained finality and no revision there against was filed by the petitioner-plaintiff but subsequently another application for issuance of commission under Order 26 Rule 9 read with Section 151 CPC dated 14th November 2017 was again filed by the plaintiff. It is relevant to indicate that in both the applications the applicant is Smt. Sarla who has been brought on record as a substitute party in place of original plaintiff Km. Chandana Mukherji, who passed away during pendency of suit proceedings.

8. A reading of both applications brings to the fore the fact that essential pleadings for issuance of commission in both the application remain the same which pertained to apprehension on behalf of plaintiff that actual ground situation may be changed by the defendant in case forcible possession of the same is taken from the plaintiff. The second application has been rejected by means of impugned order dated 10th January, 2018 primarily on the ground that earlier as well application at the behest of plaintiff has been rejected by the court by detailed order dated 25th September, 2017 on the same pleading raised by plaintiff and therefore there was no merit found in the second application for issuance of commission. The revisional court has also taken essentially the same grounds for rejecting revision preferred by plaintiff.

9. From a perusal of record, it transpires that the purpose of issuance of commission at the behest of plaintiff in both applications was to ascertain alleged possession of plaintiff over the property in dispute.

10. For proper appreciation of the present dispute, it would be necessary to advert to the provisions of Order XXVI Rule 9 of the Code pertaining to issuance of commission which is in the following terms:-

*" **Commission to make local investigations.**- In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:*

Provided that, where the State Government has made rules as to the persons to whom such commission shall be

issued, the Court shall be bound by such rules."

11. A perusal of the aforesaid provision makes it evident that commission to make local investigations can be permitted by the court where it deems local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or ascertaining market value of any property, or amount of any mesne profit or damages or annual net profits. The purpose of issuance of commission as such is evident from the conditions indicated thereunder itself which is only for the purposes of elucidating primarily any matter in dispute. The provisions of Order XXVI Rule 9 of the Code do not make it applicable for the purposes of collection of evidence on behalf of the plaintiff.

12. Hon'ble supreme Court in the case of *Remco Industrial Workers House Building Coop. Society v. Lakshmeesha M. and others reported in (2003)11 SCC 66*6; A.I.R. 2003 Supreme Court 3167 has already held that a plaintiff is liable to succeed on his own footing and not on the weakness of the defendant. As such the pleadings made in the plaint are required to be corroborated or substantiated by evidence which is also required to be placed on record by the plaintiff himself. The only exception in such a case could be where such evidence is beyond reach of the plaintiff or is in such a secured place that he would normally not have access thereto but for the issuance of commission for nature indicated in such a case, it would be necessary and incumbent upon the plaintiff to plead particularly as to why the plaintiff could not have access to such evidence which would therefore require issuance of commission for the purposes of collection of such evidence. Hon'ble Supreme Court in the case of Padam Sen (supra) has clearly held that it is not the business of court to collect evidence for party or even to protect the rival party from evil consequences of making forged entry in the books of accounts. It was held that defendants request which amounted to courts collecting documentary evidence which the defendants considered to be in their favour at that point of time could not be permitted. Relevant paragraph 15 of the judgment are as follows:-

"15. It cannot, however, be lost sight of that the burden to prove title and claim for possession of specific land in Survey No. 132/2 was initially on the plaintiff. Defendant 1 in the written statement contested the claim of the plaintiff and claimed title in itself. The grant of occupancy rights in favour of tenant Muniyappa contained in the order dated 28-5-1965 (Ext. D-3) was produced in the trial court without objection from the plaintiff and allowed to be exhibited and marked as Ext. D-3. When such a document of grant of suit land to the extent of 1 acre 3 guntas in favour of Defendant 1 was before the trial court, it was necessary for it to consider its effect on the subsequent grant dated 9-12-1969 (Ext. P-1) in favour of the erstwhile inamdar. The legal position not in dispute is that if the suit land in Survey No. 132/2 -- area 1 acre 3 guntas had already been granted by the order dated 28-5-1965 (Ext. D-3) to the tenant Muniyappa, the same land could not have formed part of the grant to the extent of 1/7th share to the erstwhile inamdar in the order dated 9-12-1969 (Ext. P-1). A clear legal issue, based on an earlier grant dated 28-5-1965 (Ext. D-3) and the subsequent grant dated 9-12-1969 (Ext. P-1) with the identity of the land under the two grants did arise before the trial court as well as the appellate court.

The said issue has not been answered by any of the two courts below. The plaintiff has to succeed on the strength of its own case and not on the weakness of the case of the defendant. In opposing the prayer for remand, the learned counsel appearing for the plaintiff-respondent has placed strong reliance on the decision of the Privy Council in Kanda v. Waghu [AIR 1950 PC 68 : 77 IA 15] . The contention advanced is that since pleadings based on Ext. D-3 were not raised in the written statement of Defendant 1 and no issue on the basis of Ext. D-3 having been raised in the trial court, this Court should not remit the matter for retrial on the said issue."

13. The same analogy has also been drawn by co-ordinate Bench of this Court in the case of Parvez Akhtar (supra) in the following manner:-

"11. In other words, the object of local investigation is not so much to collect evidence, which maybe taken in the court, but just to facilitate the appreciation of the evidence led or nature of the controversy between the parties or to facilitate appreciation of any point, which is left doubtful in the evidence of the parties before the court. The object of issuance of commission is that some assistance may be derived from those facts found actually after the investigation by the Commissioner on the spot, but that investigation must be in respect of the matter in dispute and not otherwise. The legislature required that the discretion of the court can be exercised following all conditions with a view to obtain certain facts investigated by the Commissioner which promises peculiar facts and which can be had from the spot inspection itself, but that must be directly in respect of any matter in dispute. This is with a view to enable the court to properly and correctly appreciate evidence on record. The report of the Commissioner clarifies and explains any point which might appear to be doubtful after the evidence has been led by the parties. The provision of Order XXVI Rule 9, presuppose evidence on the record and independent evidence, led by the parties, which requires elucidation."

14. Various high courts in the country have also elucidated the provisions of Order XXVI Rule 9 in the same manner as indicated in the judgments rendered by High Court of Himanchal Pradesh in the case of Naseeb Deen (Supra) and H.V. Nangendrappa (supra) by the High Court of Karnataka.

15. Upon applicability of aforesaid judgments in the present facts and circumstances of the case, it is evident that application for issuance of commission to conduct an investigation and examination regarding possession of parties to a dispute would not be maintainable in terms of Order XXVI Rule 9 of the Code as observed herein above particularly when there is no explanation furnished by the plaintiff that he could not have access to any documents required for proving his possession over suit property. Even otherwise, it is impossible for a commission to decide possession of a particular party to dispute over the suit property only on the basis of a cursory examination.

16. It has already been observed herein above that applications under Order XXVI Rule 9 can not be allowed merely for purposes of facilitating the case of one or the other party and it is not the business of the courts to discharge burden of evidence of either party.

17. So far as judgment cited by learned counsel for petitioner in the case of New Meena Sahkari Awas Samiti (supra) is concerned, the pronouncement of law in the said judgment is that court can not prevent a party from adducing best evidence if such evidence can be gathered with the help of commission. The judgment cited by learned counsel for petitioner is clearly correct in terms of provisions of Order 26 Rule 9 CPC and does not take a contrary view to the earlier judgment of this Court that possession of parties over property in dispute can not be determined by issuance of commission. As such the petitioner does not derive any benefit from the aforesaid judgment.

18. Considering the judgment on the point and law as discussed herein above, no exception can be taken to the impugned orders and as such the petition being devoid of merits is dismissed.

(2023) 3 ILRA 1261
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.11.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Matters Under Article 227 No. 2691 of 2020
Connected With
S.C.C. Revision Defective No. 234 of 2014

Smt. Malati Sharma
...Defendant- Petitioner
Versus
Raj Kumar Yadav ...Plaintiff- Respondent

Counsel for the Petitioner:
Sri Kiran Arora, Sri Ram Akbal Upadhyay, Sri Jai Govind Upadhyay

Counsel for the Respondent:
C.S.C., Sri Prakhar Tandon

A. Civil Law – Landlord-tenant dispute- Small Causes Suit for arrears of rent and ejectment- decreed against the tenant-respondent (petitioner herein)- Small Causes Revision against decree also dismissed- Order under challenge- Landlord respondent title- sale deed by erstwhile owners- Petitioner occupant as a tenant- recital to the said effect in sale deed- landlord issued notice to defendant petitioner- demanding rent and arrears- tenant failed to pay rent- hence, the suit.

B. Petitioner tenant claimed right by means of an unregistered agreement for sale- impact of an unregistered instrument- otherwise required to be registered- whether it could have been relied otherwise for collateral purposes in court of law proceedings- yes, but collateral purpose is to be seen in the nature of possession of plaintiff over the suit land- no title flows from an unregistered instrument, which in law requires to be registered- petitioner tenant not entitled to any benefit on the strength of agreement for sale.

HELD: Upon bare reading of the aforesaid paragraphs of the judgment, the conclusion drawn would be that an unregistered document can be looked into for collateral purposes but the collateral purpose is to be seen in the nature of possession of plaintiff over the suit land. Applying the above principles to the present case, petitioner's predecessor in interest was admittedly tenant of the tenanted premises in question and came to change the nature of possessory rights from the tenant to proposed vendee under an agreement of sale which was never registered.

The judgment cited clearly holds that no title flows from an unregistered instrument, which in law is required to be registered. If that be so then status which the predecessor in interest of the petitioner had enjoyed and from whom petitioner succeeded that possessory rights, at the most would be of a tenant and to retain possession it is necessary to make payment of rent otherwise a tenant in default of payment of rent would deserve ejectment under the law. The person under an unregistered agreement

for sale cannot even maintain a suit for its performance so as to acquire any possessory rights in law. So the nature of possession would only stand always to be a tenant qua the premises.

C. Evidence- evidentiary value- for appreciation in a judicial proceeding- no document filed in original- trial court rightly did not consider the notarised photocopy of unregistered instrument.

HELD: In the present case only a notarized photo copy of alleged agreement was filed. The document led was not proved in the absence of original. It could not have been a case for raising any valid presumption in law either. A notarized photocopy was also not proved by getting public notary examined so as to claim that it was a photo copy of the original. In such view of the matter, therefore, neither benefit under Section 53-A of the Transfer of the Property Act, 1882 should have been given to the petitioner to protect possession in suit for recovery of arrears of rent and ejectment nor, the suit could be held to be not maintainable and required return of plaint under Section 23 of Provincial Small Cause Courts Act, 1887.

One must remember that the evidence, which is required to be appreciated by a court of law in a judicial proceeding, must be having evidenciary value. The pleadings if raised are not supported by lawfully admissible evidence then any St.ment of fact in a pleading would stood unworthy of consideration unless admitted to the rival side. So the argument that the Court did not appreciate the document of agreement for sale filed, in my cconsidered view is totally misplaced as no such document was filed in original. The document being unregistered one was required to be filed in original and was to be proved in accordance with law as well

D. Tenant's defence stood struck off in the suit- finding not assailed in revision- tenant claimed possessory rights under an agreement for sale- courts below- held petitioner's status as tenant- respondent landlord entitled to recover rent-petitioner deserved ejectment- admittedly, petitioner did not pay rent- defence rightly struck off under Order XV Rule 5 of CPC.

HELD: So in my considered view, since admittedly petitioner has not paid rent even in compliance of second part of Order XV of Rule 5 of Code of Civil Procedure, 1908, the defence has rightly been struck off. Having discussed the aforesaid fact and the law on the point, I find no error much less a substantial one in the findings either returned by the trial court or in revision and, therefore, I decline to interfere in the matter any exercise of my supervisory power under Article 227 of the Constitution.

E. Jurisdiction of Judge, Small Causes Court- hearing a summary suit questioning title of landlord- Small Causes Courts can incidentally go into the question of title in a suit between a landlord and a tenant- subject to decision of regular civil court in the civil suit, if filed.

HELD: On the point of jurisdiction of Judge, Small Causes to hear a summary suit where title of land lord has been questioned, this Court in the case of Suresh & anr. v. Ram Bharosey Lal Gupta & ors. 2014 0 Supreme (All) 1579 (2014 11 ADJ 327) considered the matter of return of plaint on the basis of unregistered instrument of sale of an immovable property. The Court examined first Section 54 of the Transfer of Property Act alongside Section 17 of the Indian Registration Act, 1968 vide paragraph 17 and then also examined Section 23 of the Provincial of Small Cause Courts Act, 1887 vide paragraph 18 and then referred to the judgment of Supreme Court in the case of Budhu Mal v Mahabir Prasad and Others, AIR 1988 SC 1772 vide paragraph 21 by reproducing the relevant paragraph of the Supreme Court's judgment. Learned Single Judge thereafter proceeded to refer the judgment of the Supreme Court in the case of Shamim Akhtar v. Iqbal Ahmed, AIR 2001 SC 1, wherein Supreme Court had held that Small Causes Court can incidently go into question of title in a suit between land lord and the tenant but of course, subject to the decision of a regular civil court in the civil suit, if filed. The Court also referred to the judgment in the case of Sheel Chand v. IInd A.D.J.,Jhansi, 2006 (1) ARC 359 and then finally held that question of rejection of plaint would arise when the court cannot decide the right of plaintiff and relief claimed by him for want of proof or disproof of

title. In that case, land lord had set up a title on the basis of registered instrument whereas defendants were contesting the matter on the basis of unregistered instrument which the Court held to be ex facie illegal.

Petition dismissed. (E-14)

List of Cases cited:

1. Dharmaji @ Baban Bajirao Shinde Vs Jagannath Shankar Jadhav, 1994 LawSuit (Bom) 3

2. A R C Overseas Pvt. Ltd. Vs Bougainvillea Multiplex and Entertainment Centre Pvt. Ltd. & anr., 2007 LawSuit (All) 1562

3. Maya Devi & anr. Vs Vipin Kumar Kushwaha & anr., 2016 0 Supreme (All) 3530

4. Suresh & anr. Vs Ram Bharosey Lal Gupta & ors. 2014 (11) ADJ 327

5. Budhu Mal Vs Mahabir Prasad & ors., AIR 1988 SC 1772

6. Shamim Akhtar Vs Iqbal Ahmed, AIR 2001 SC 1

7. Sheel Chand Vs IInd A.D.J.,Jhansi, 2006 (1) ARC 359

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

1. Heard Sri K.K.Arora, learned counsel for the petitioner and Sri Prakhar Tandon, learned counsel for the contesting respondents.

2. Both the matters arise out of same suit, therefore, are being heard and decided together by this common judgment.

3. The petitioner before this Court is tenant respondent in Small Causes Suit No. 193 of 2012, which came to be decreed dated 24.7.2019 for arrears of rent and ejectment.

4. The petitioner challenged the order of the Judge Small Causes before the Additional District Judge, Court No. 2 by instituting Small Causes Revision being No. 60 of 2019 which also came to be dismissed vide order dated 31st January, 2020 confirming the judgment of the Judge, Small Causes and hence this miscellaneous petition under Article 227 of the Constitution.

5. Present petitioner has also filed revision against the order passed by the Judge, Small Causes rejecting the application of the petitioner under Section 23 of Small Causes Courts Act, 1887.

6. The main arguments that were advanced by learned counsel for the petitioner can be summarized as under:

i. The petitioner having questioned the title of the land lord plaintiff *qua* property in question which is a residential house, the Judge Small Causes could not have decided the suit for arrears of rent and ejectment;

ii. While deciding point no. 1 the Judge, Small Causes, absolutely failed to take into account the pleadings raised in the written statement with regard to an agreement for sale between vendors of the plaintiff land-lord and the husband of the petitioner so as to appreciate her claim for acquiring possession by way of transfer and, therefore, her status as a tenant had changed entitling her to claim possessory rights in terms of Section 53-A of the Transfer of the Property Act, 1882; and

iii. The petitioner having already instituted a suit to declare the sale deed executed in favour of the land lord plaintiff dated 13.06.2011 to be *null and void*, the benefit under Section 23 of the Small

Causes Act, should have been given to him and his application was wrongly rejected.

7. In support of his arguments, learned counsel for the petitioner relied upon the judgment of Bombay High Court in the case of **Dharmaji @ Baban Bajirao Shinde v. Jagannath Shankar Jadhav, 1994 LawSuit (Bom) 3** and that of this Court in the case of **A R C Overseas Private Limited v. Bougainvillea Multiplex and Entertainment Centre Pvt. Ltd. And Another, 2007 LawSuit (All) 1562.**

8. Per contra, the arguments advanced by learned counsel for the respondent land lord are:

(i). Petitioner having not deposited rent even as per second part of Rule 5 (Allahabad Amendment) of Order XV of Code of Civil Procedure, 1908 (CPC) his defence was rightly struck off and this finding having not been assailed either in the Small Causes Revision or before this Court, the suit deserved to be decreed and revision petition was also rightly dismissed and so now these petitions also deserve to be dismissed; and

(ii) land lord had acquired valid title by virtue of sale deed dated 13.6.2011, executed by admitted owners, namely, Deepak Kumar, Gopal Das, through his power of attorney and Indra Kumar, successor in interest of Tikam Chand and the instrument of sale very much contained recitals to the effect that contesting petitioner was a tenant only and was in arrears of rent, therefore, vendee would be entitled to maintain a suit for ejectment by determining tenancy with issuance of notice under Section 106 of the Transfer of Property Act, 1888, for recovery of arrears of rent and ejectment;

(iii). Petitioner failed to lead any evidence by producing original agreement for sale which was claimed so as to set up any prima facie right to hold possession and photocopy of the agreement for sale being secondary evidence was not admissible in absence of any admission at the end of plaintiff in that regard;

(iv). Neither registered power of attorney dated 14.7.1998 was admitted to the land lord respondents nor, sale deed admittedly executed by two owners of the property and the power of attorney holder of third owner dated 13.6.2011 admitted tenant respondent to be owner, nor did it contain any recital in respect of any notarized agreement for sale executed on 14.7.1998.

(v). There was no reason to execute an unregistered agreement for sale and only notarized it whereas power of attorney executed in the same date dated 14.07.1998 was registered.

(vi). This Court in exercise of its supervisory jurisdiction under Article 227 of the Constitution would not enter into findings of fact unless findings of fact are so perverse that if they are not arrested, it woud lead to miscarriage of justice .

9. Learned counsel for the respondent accordingly submitted that in the present case none of the findings could be held to be perverse nor, there was any such ground taken in this miscellaneous petition except the ground that the tenant petitioner having questioned the title, Court could not have tried the suit as Small Causes Suit treating the petitioner to be tenant and respondent as land lord.

10. Before coming to the legal arguments advanced before this Court, it is necessary to briefly state facts of the case so as to have better appreciation of the

arguments advanced by learned counsel appearing for the respective parties.

11. The land lord respondent claimed to have acquired title of the premises in question which is a residential house, by registered sale deed executed in his favour on 13.06.2011 by Deepak Kumar, Indra Kumar, S/o Tikam Chand and Anup Mishra, the power of attorney holder of Gopal Das and the sale deed transferred the possession of entire premises in favour of Raj Kumar Yadav and carried recital very much to the effect that in the entire building, Smt. Malti Sharma was in occupation as a tenant with liability to pay rent @ Rs. 100/- per month to the vendors coupled with the house tax, water tax and sewer tax totalling to Rs. 944/- per month, however since 1995 despite demand she did not pay rent and so she ran into arrears of rent since 1st April, 1995 which she was liable to pay and, therefore, through the sale deed right to demand rent stood transferred to the vendee and also to get her evicted from the premises in the event rent was not paid, by bringing in a suit for recovery of arrears of rent and ejectment.

12. The land lord respondent did issue notice to the defendant petitioner demanding rent and arrears thereof and when the petitioner failed to pay rent in response to the notice, he instituted a suit for recovery of rent and ejectment .

13. It appears that while petitioner tenant filed her written statement questioning the right of the land lord respondent to demand rent, she also instituted a suit for declaring sale deed dated 13.6.2011 as *null and void* and also sought relief in the nature of permanent prohibitory injunction and it is in this background that an application under Section 23 of the Provincial Small Causes Act, 1887 came to be filed before the Judge, Small Causes which was dismissed against which revision was also dismissed and against that miscellaneous petition has been filed.

14. In the written statement plea was taken that owner of the property Tikamchand, Gopal Das, Deepak Kumar executed notarized agreement for sale on 14.09.1998 in favour of the petitioner and her husband and petitioner got them paid in advance certain amount as a consideration and then power of attorney was executed on 14.9.1998 in favour of Anuj Mishra by all three owners of the property to manage property in question and if decided to execute the sale, in that event sale was to be executed in favour of proposed purchaser. The sale deed was never executed as such whereas Tikam Chand's son, Indra Kumar, Deepak Kumar and one Anuj Mishra in the capacity of power of attorney holder of Gopal Das executed sale deed on 13.6.2011 in favour of Raj Kumar, the land lord respondent.

15. Points for determination that were formulated by Judge Small Causes included also a point for determination, as to whether defence of the tenant petitioner was liable to be struck off under Order XV Rule 5 for non payment of rent even after institution of suit.

16. All the issues were answered in favour of the land lord respondent and the suit was decreed.

17. In the case of **A R C Overseas Private Limited** (*supra*) cited by learned counsel for the petitioner, this Court had the occasion to examine the impact of an unregistered instrument, which otherwise

was required to be registered under the Indian Registration Act, and whether it could have been relied upon otherwise for collateral purposes in Court of law proceedings. In the said case, the plaintiff appellant claimed to be in lawful occupation of a shop by virtue of a lease executed between the parties, however boards of the shop got removed by the lessor and the lessee was threatened from entering into the shop again. The suit for injunction brought by lessee was dismissed, against which appeal was preferred. The plaintiff was non suited on the ground that there was an arbitration clause under the lease agreement entered into between the parties.

The whole issue, therefore, in the said case was that the document being unregistered whether could not be used for any collateral purpose. It was in these circumstances, the Court proceeded to examine Section 107 of the Transfer of Property Act 1882 alongside Section 49 of the Registration Act, 1908 and vide paragraphs 12 and 13, the Court held thus:

"12. If we go through the later part of second paragraph of Section 107 of the Transfer of Property Act, as above, we shall be able to find that lease by oral agreement accompanied by delivery of possession need not be registered. Therefore, if the registration of the document is not available to the appellant but it was in the possession, the same is good enough for the purpose of creation of jural relationship between the parties. It is significant to note that the appellant has relied upon his initial possession. In paragraph 14 of the Judgment in Anthony v. K.C. Ittoop and Sons and Ors. , it was held that when it is admitted by both rides that the appellant was inducted into the possession of the building by the owner thereof and that the appellant was paying monthly rent or had agreed to pay rent in respect of the building, the legal character of the appellant's possession has to be attributed to a jural relationship between the parties. Such a jural relationship, on the fact-situation of the case, cannot be placed anything different from that of lessor and lessee falling within the purview of second paragraph of Section 107 of the Transfer of Property Act.

13. Secondly, last part of Section 49 of the Registration Act, as above, specifically speaks that "as evidence of any collateral transaction not required to be effected by registered instrument". Therefore, law is crystal clear to that extent. In Mattapalli Chelamayya (dead) by his Legal Representatives and Anr. v. Mattapalli Venkataratnam (dead) by his Legal Representatives and Anr. . the Supreme Court held that it should be noted that Section 49 does not say that the document cannot be received in evidence at all. All that it says the document cannot be received as evidence of any transaction affecting such property. If under the Evidence Act the document is receivable in evidence for a collateral purpose, Section 49 is no bar. This construction of the provision, which was accepted for a long time by the High Courts, has been duly recognized by the amending Act 21 of 1929, which added a proviso to the section. The proviso clearly empowers the Courts to admit any unregistered document as evidence of a collateral transaction not required to be registered. In Satish Chand Makhan and Ors. v. Govardhan Das Byas and Ors. *, it was held that unregistered lease deed can be admitted in evidence for collateral purpose, invoking proviso to Section 49 of the Registration Act, as terms of lease are not a collateral purpose within its meaning. In Rai Chand Jain v. Miss*

Chandra Kanta Khosla , speaks that it is well settled that unregistered lease executed by both the parties can be looked into for collateral purposes. In Bondar Singh and Ors. v. Nihal Singh and Ors. , it was held that legal position is clear that Petition allowed document like the sale deed, even though not admissible in evidence, can be looked into for collateral purposes. The Court held that the collateral purpose is to be seen on the nature of the possession of the plaintiffs over the suit land. The sale deed in question at least shows that initial possession of the plaintiffs over the suit land was not illegal or unauthorized. Therefore, the undisputed initial possession herein is the guiding factor about validity of the document."

18. Upon bare reading of the aforesaid paragraphs of the judgment, the conclusion drawn would be that an unregistered document can be looked into for collateral purposes but the collateral purpose is to be seen in the nature of possession of plaintiff over the suit land.

19. Applying the above principles to the present case, petitioners predecessor in interest was admittedly tenant of the tenanted premises in question and came to change the nature of possessory rights from the tenant to proposed vendee under and agreement of sale which was never registered.

20. The judgment cited clearly holds that no title flows from an unregistered instrument, which in law is required to be registered. If that be so then status which the predecessor in interest of the petitioner had enjoyed and from whom petitioner succeeded that possessory rights, at the most would be of a tenant and to retain possession it is necessary to make payment of rent otherwise a tenant in default of payment of rent would deserve ejectment under the law. The person under an unregistered agreement for sale cannot even maintain a suit for its performance so as to acquire any possessory rights in law. So the nature of possession would only stand always to be a tenant *qua* the premises.

21. Looking to this nature of possession of a tenant, an unregistered agreement would only hold him to be not an unauthorized occupant and to that extent instrument will have an evidenciary value so as not to invoke provision for deemed vacancy under the Act No. 13 of 1972.

22. The Judgment of Bombay High Court in the case of **Dharmaji @ Baban Bajirao Shinde** (*supra*) cited by learned counsel for the petitioner also holds protection of possession to such an extent only. Hon' V.A.Mohta, J vide paragraphs 4 and 5 of the judgment held thus:

"4. Scrutiny of Sec. 53A would indicate that the necessary conditions for application of the provisions are : (1) There is a written contract signed by or on behalf of the transferor to transfer the immoveable property for consideration. (2) The terms of the contract pertaining to transfer are clearly discernible. (3) Transferee in part performance of the contract is either put in possession or is continued in possession and has done some act in furtherance of the contract. (4) Transferee has performed or is willing to perform his part of the contract. Wherever the above conditions are fulfilled the transferor or any person claiming under him is debarred from enforcing against the transferee or any person claiming under him any right in respect of the property in

question even though the contract though required to be registered is not registered or where there is instrument of transfer, the transfer is not legally complete.

5. The section recognizes in a modified form English doctrine of equity of part performance, which is designed to relieve the rigour of law and provides a remedy when a transfer or an agreement to transfer falls short of legal requirements. It is meant to protect transferees who for appropriate consideration take possession, spend money and/or put in labour in improvements relying on the terms of the contract which for want of registration or any other legal requirement cannot be proved or cannot confer title on them. Thus the crux of the provision seems to be that mutual covenants are operative though title is not transferred as a result, the transferee though cannot seek to enforce his title can resist the attack on his rights under the contract, which would include right to retain possession. Often it is said that the right cannot be used as a sword and can be used only as a shield. If this right as a shield is available to him as a defendant, I do not see any justification for a view that it would be denied to him even if by force of circumstances he as a law abiding citizen is compelled to approach the Court as a plaintiff to use that shield. The transferee is entitled to resist any attempt on the part of the transferor to disturb transferee's lawful possession under the contract of sale and his position --either as a plaintiff or as a defendant --should make no difference. Contrary interpretation viz., the transferee can use the shield only as a defendant and not as a plaintiff, would defeat the very spirit of Section 53-A for it will be possible for an over powering transferor to forcibly dispossess the transferee even against the covenants in the contract and compel him to go to the Court as a plaintiff. As far as letter of law is concerned, there is nothing which militates against the above object oriented interpretation. "

23. But even this limited protection, I would further hold would otherwise be available to the petitioner if she proves it by leading a document in evidence either as primary evidence or secondary to be proved. In the present case only a notarized photo copy of alleged agreement was filed. The document led was not proved in the absence of original. It could not have been a case for raising any valid presumption in law either. A notarized photocopy was also not proved by getting public notary examined so as to claim that it was a photo copy of the original. In such view of the matter, therefore, neither benefit under Section 53-A of the Transfer of the Property Act, 1882 should have been given to the petitioner to protect possession in suit for recovery of arrears of rent and ejectment nor, the suit could be held to be not maintainable and required return of plaint under Section 23 of Provincial Small Cause Courts Act, 1887.

24. One must remember that the evidence, which is required to be appreciated by a court of law in a judicial proceeding, must be having evidenciary value. The pleadings if raised are not supported by lawfully admissible evidence then any statement of fact in a pleading would stood unworthy of consideration unless admitted to the rival side. So the argument that the Court did not appreciate the document of agreement for sale filed, in my cconsidered view is totally misplaced as no such document was filed in original. The document being unregistered one was required to be filed in original and was to be proved in accordance with law as well.

25. Yet another point which is to be considered in the matter is that petitioner defence stood struck off in the suit and yet petitioner did not take any plea in the entire memo of revision filed before the court below assailing the findings on the relevant issue no. 4. Since it is admission on the part of the petitioner that he was not paying rent for acquired possessory rights under an agreement for sale and her status changed from the tenant of the proposed purchaser and as such she was questioning the title of the respondent land lord, possibly for this very reason she did not contest the issue. Courts below have held that petitioner did continue in the capacity of tenant of the original land lord, who passed on title to the contesting respondent, and the sale deed contained recitals that petitioner was tenant and was in arrears of rent so land lord /respondent (subsequent purchasers) would be entitled to recover the rent and in the event of default, to claim ejectment. The suit was thus rightly filed and the payment having not been made towards rent by the petitioner, she deserved ejectment.

26. This Court in the case of **Maya Devi and Another v. Vipin Kumar Kushwaha and Another, 2016 0 Supreme (All) 3530,** has very clearly held that whether defendant admits in a suit for recovery of arrears of rent and ejectment himself to be tenant or owner even if the defendants questioning the title of land lord and his right to maintain suit, he is required to pay rent in compliance of the second part of Order XV of Rule 5 of the Code of Civil Procedure, 1908 dealing with relevant provisions of the Code of Civil Procedure, 1908. Vide paragraphs 5,6, 7,8 and 9 the Court has held thus:

"5. Order XV Rule 5 CPC applicable in the State of U.P. is in two parts. The first part deals with the deposit of amount admitted by the tenant to be due and the second part deals with the monthly amount due whether it is admitted or not by the tenant. In default in payment of either of the two amounts mentioned in the aforesaid two parts of Rule 5 of Order XV CPC, the court would be empowered to struck off the defence.

6. In Pradyuman Jee vs. Special/Additional District Judge, Ballia and others 2008 (71) ALR 892, it has been held that in case where the defendant denies the existence of landlord and tenant relationship, he may not be required to deposit the amount referred to in the first part of Rule 5 Order XV CPC, but he would still be required to deposit "monthly amount due" within a week from the date of its accrual throughout the continuation of the suit whether he admit the said amount to be due or not.

7. The aforesaid decision was followed by this Court in the case of Mukesh Singh and another vs. Ramesh Chand Solanki 2011 (89) ALR 655. His Lordship therein held that as the tenant therein had not complied with the second part of Rule 5 of Order XV CPC the defence was rightly struck off irrespective of the fact that he denied the relationship of landlord and tenant.

8. A similar view has also been expressed by another Judge of this Court in the case of Yusuful Haq @ Yusuf and others vs. Smt. Ghayyur Fatma and others 2012 (92) ALR 526.

9. In the aforesaid case it was held that where the defendant denies the existence of landlord and tenant relationship, he may not be required to deposit the amount admitted to be due at or before the first hearing of the suit but he would still be required to deposit the monthly amount due within a week from the

date of its accrual throughout the continuation of the suit because such deposit has to be made in spite of the fact he admits any amount to be due or not.

27. So in my considered view, since admittedly petitioner has not paid rent even in compliance of second part of Order XV of Rule 5 of Code of Civil Procedure, 1908, the defence has rightly been struck off.

28. Having discussed the aforesaid fact and the law on the point, I find no error much less a substantial one in the findings either returned by the trial court or in revision and, therefore, I decline to interfere in the matter any exercise of my supervisory power under Article 227 of the Constitution.

29. On the point of jurisdiction of Judge, Small Causes to hear a summary suit where title of land lord has been questioned, this Court in the case of **Suresh and Another v. Ram Bharosey Lal Gupta and Others 2014 0 Supreme (All) 1579 (2014 11 ADJ 327)** considered the matter of return of plaint on the basis of unregistered instrument of sale of an immovable property. The Court examined first Section 54 of the Transfer of Property Act alongside Section 17 of the Indian Registration Act, 1968 vide paragraph 17 and then also examined Section 23 of the Provincial of Small Cause Courts Act, 1887 vide paragraph 18 and then referred to the judgment of Supreme Court in the case of Budhu Mal v Mahabir Prasad and Others, AIR 1988 SC 1772 vide paragraph 21 by reproducing the relevant paragraph of the Supreme Court's judgment. Learned Single Judge thereafter proceeded to refer the judgment of the Supreme Court in the case of Shamim Akhtar v. Iqbal Ahmed, AIR 2001 SC 1, wherein Supreme Court had held that Small Causes Court can incidently go into question of title in a suit between land lord and the tenant but of course, subject to the decision of a regular civil court in the civil suit, if filed. The Court also referred to the judgment in the case of Sheel Chand v. Iind A.D.J.,Jhansi, 2006 (1) ARC 359 and then finally held that question of rejection of plaint would arise when the court cannot decide the right of plaintiff and relief claimed by him for want of proof or disproof of title. In that case, land lord had set up a title on the basis of registered instrument whereas defendants were contesting the matter on the basis of unregistered instrument which the Court held to be *ex facie* illegal. Vide paragraph 17, 25, 26, the Court held thus:

"17. The transfer of immoveable property is governed by Act, 1882 and provides the way in which an immoveable property can be transferred. Section 54 says that transfer of immoveable can be made either by registered instrument or by delivery of property of a value less than Rs.100/-. No other mode is prescribed in the section. It is not stated therein that if a document is written so as to transfer immoveable property worth below Rs.100/- , it shall not require registration. On the contrary, if it is worth less than Rs.100/- and transfer is not proposed by an instrument reduced in writing, by mere delivery of property such transfer is permissible but where it is reduced in writing, it must be a registered instrument. Moreover, there is no exclusion with regard to requirement of registration of aforesaid document under Section 17 of Act, 1908. The documents, which are excluded from the requirement of registration, does not include transfer of immoveable property by sale irrespective of amount of consideration. Even otherwise,

Section 17 of Act, 1908 nowhere provides, if a registration of a document is provided under any statute, that would not be necessary by virtue of Section 17 of Act, 1908. Section 17 of Registration Act nowhere has overriding effect as such over Section 54 therefore, both these provisions have to be read together. That being so, I am clearly fortified from the view taken by this Court in Budhi Ram (supra) that sale of property, if made through an instrument in writing then it shall not result in transfer of property, even if worth of property is less than Rs.100/-, since registration of document is necessary by virtue of Section 54 of Act, 1882. In such a case, I do not find any provision which may come to help a party who is staking his claim on the basis of an unregistered instrument. I am, therefore, clearly in agreement with the view taken by Court below that sale deed dated 22.12.1976, being an unregistered document, was a nullity and did not result in conferring any rights upon defendant-tenants i.e. petitioners with regard to suit property.

25. The above authorities clearly show that a mere dispute of title raised, would not oust the jurisdiction of Small Cause Court in proceeding to decide a suit, filed before it, and it is not bound to return the plaint on mere raising of such a dispute. Section 23 clearly says; only when the Court comes to the conclusion that it cannot decide the right of plaintiff and relief claimed by him since that would depend upon the proof or disproof of a title to immovable property, it may return the plaint and not otherwise.

26. In the present case plaintiff-landlord claim their rights founded on a registered instrument while the petitioner-defendants contested the matter relying on an unregistered document which was ex facie illegal. Hence there was no substantial dispute of title. It cannot be said that plaint ought to have been returned by Trial Court and the suit was incompetent. This question is also answered against petitioners. "

30. In the present case I also find that respondent land lord has acquired title by virtue of a registered sale deed dated 13.6.2011 whereas petitioner tenant was contesting the title of the land lord on the basis of an unregistered agreement for sale of which even original copy was not filed before the Court as an evidence to the pleadings raised .

31. In view of above, therefore, I do not find any error apparent on the face of record in the judgments and order passed by the trial court and, therefore, refuse to interfere in this revision petition. Both the petitions filed under Article 227 of the Constitution and revision filed under Section 25 of the Provincial of Small Cause Courts Act, 1887, being no. 234 of 2014 accordingly dismissed for want of merit and consigned to records.

(2023) 3 ILRA 1271
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2022

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Matters Under Article 227 No. 10252 of 2022 (Civil)

Vijay Kumar Chaubey
...Defendant- Petitioner
Versus
Rajendra Agarwal ...Plaintiff- Respondent

Counsel for the Petitioner:
Sri Akhilesh Kumar Singh

Counsel for the Respondent:

Civil Law –Uttar Pradesh Municipality Act, 1916- Section 160 -Maintainability of appeal before Chief Judicial Magistrate- State Government- notification dated 11.07.1974- Appeal under Section 160 can be heard by the court of Chief Judicial Magistrate- impugned order passed by Chief Judicial Magistrate, Gorakhpur is within its jurisdiction- Petition dismissed.

HELD: Learned counsel for the petitioner has placed reliance on a judgment of this Court dated 08.05.2020 passed in the Matters Under Article 227 No.9748 of 2019 (Sajal Kumar and 2 others Vs Chief Judicial Magistrate, Ballia and 6 others), in which, referring to Section 160 of the Municipality Act, Court has held that the District Magistrate of the District alone has power to hear the appeal and the Chief Judicial Magistrate does not have any such power. A perusal of the said judgment shows that the same was passed as the notification dated 07.11.1974 was not placed before the Court. Thus, the said judgment passed without taking into consideration the notification dated 07.11.1974 does not lay down the correct law.

Petition dismissed. (E-14)

List of Cases cited:

Matters Under Article 227 No.9748 of 2019 (Sajal Kumar & ors. Vs Chief Judicial Magistrate, Ballia & ors.)

(Delivered by Hon'ble Vivek Chaudhary, J.)

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

2. The petitioner has filed the present petition challenging the order dated 15.10.2022 passed by the learned Chief Judicial Magistrate, Ghazipur in Appeal No.5 of 2021 (Rajendra Kumar Agarwal Vs. Vijay Kumar Chaubey and others), under Section 160 of the U.P. Municipality Act, whereby he has rejected the preliminary objection with regard to maintainability of the appeal under Section 160 of the U.P. Municipality Act, 1916.

3. The objection was raised by the petitioner before the appellate Court that the appeal is not maintainable before the Chief Judicial Magistrate under Section 160 of the Municipality Act and would be maintainable before the District Magistrate. The said act itself provides that the State Government may issue an appropriate notification giving power to hear the appeal to any other Authority/Court also. By notification dated 11.07.1974, issued in consultation with the Allahabad High Court, the State Government provided that the appeal can be heard by the Court of Chief Judicial Magistrate also. The notification dated 11.07.1974, is quoted below:-

"संख्या-80/6(1) दो-ग-7(5)/70
श्री चन्द्रभूषणधर द्विवेदी
उप सचिव
उ०प्र० शासन

सेवा में
समस्त जिला मजिस्ट्रेट
उ०प्र०
नियुक्ति (ग) विभाग
दिनांक लखनऊ, नवम्बर 7, 1974

विषय- यू०पी०म्यूनिस्पेल्टीज एक्ट 1916 की धारा 160 तथा 318 तथा अन्य प्रकीर्ण स्थानीय एवं विधिक अधिनियमों के अधीन अपीलों की सुनवाई।

महोदय,

उपरोक्त विषय पर शासन के पृष्ठ संख्या-3551(1)/दो-ग(5)/70 दिनांक 6 जून 1974के अनुक्रम में मुझे यह कहने का आदेश हुआ है कि शासन ने उच्च न्यायालय इलाहाबाद के परामर्श से यह निर्णय लिया है कि यू०पी०म्यूनिस्पेल्टीज एक्ट 1916 की धारा 160 तथा

318 के अधीन अपीले चीफ जुडिशियल मजिस्ट्रेटों के द्वारा ग्रहण की जानी तथा सुनी जानी चाहिए।

2- शासन ने यह भी निर्णय लिया है कि अन्य प्रकीर्ण स्थानीय या विशेष,अधिनियमों के अन्तर्गत अपील तथा पुर्नीक्षण प्रार्थना पत्रों की सुनवाई चीफ जुडिशियल मजिस्ट्रेटो द्वारा की जाएगी सिवाए उस दशा में जब कि उनके अधिकार स्वयं विशेष अधिनियमों द्वारा सीमित कर दिये गए हो।

भवदीय
ह० चन्द्रभूषणधर द्विवेदी
उपसचिव"

4. Referring to the above quoted notification, learned Chief Judicial Magistrate, Ghazipur has rejected the objection.

5. Learned counsel for the petitioner has placed reliance on a judgment of this Court dated 08.05.2020 passed in the Matters Under Article 227 No.9748 of 2019 (Sajal Kumar and 2 others Vs. Chief Judicial Magistrate, Ballia and 6 others), in which, referring to Section 160 of the Municipality Act, Court has held that the District Magistrate of the District alone has power to hear the appeal and the Chief Judicial Magistrate does not have any such power. A perusal of the said judgment shows that the same was passed as the notification dated 07.11.1974 was not placed before the Court. Thus, the said judgment passed without taking into consideration the notification dated 07.11.1974 does not lay down the correct law.

6. In view thereof, the order passed by the Chief Judicial Magistrate, Ghazipur in Appeal No. 5 of 2021, is within its jurisdiction.

7. No other submission is made by the petitioner.

8. Thus, no force is found in the present petition and the same is dismissed.

(2023) 3 ILRA 1273
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.02.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Matters Under Article 227 No. 546 of 2023

Smt. Shahnaz Begum ...Petitioner
Versus
District Judge, Sultanpur & Ors. ...Respondents

Counsel for the Petitioner:
Mohammad Aslam Khan

Counsel for the Respondents:
Kaleem Ur Rehman, Shaista Parveen

A. Civil Law – Code of Civil Procedure, 1908 - Order XXXIX Rule 4 - Objections allowed- Temporary injunction set aside- temporary injunction against co-sharers of the property without partition- Full bench decision of Chedi Lal- right of co-sharer distinct from relief to be granted- his share invade by other co-sharers- exclusively appropriating or cultivating land or raising constructions- injunction suit maintainable- only when exclusive appropriation by other co-sharers- or when plaintiff cannot be adequately compensated at the time of partition- lastly, greater injury to the plaintiff by refusal of relief than by granting it- question answered negatively against the plaintiff- no partition- no averment regarding trampling of exclusive share of the plaintiff.

HELD: Upon consideration of Full Bench Decision, it is apparent that the Full Bench has answered the question that right of cosharers in respect of joint land is required to be kept separate and distinct from the question as to

what relief should be granted to a co-sharer particularly when his share has been invaded by other co-sharers either by exclusively appropriating and cultivating land or by raising constructions thereon. The Full Bench has clearly held that it would only be in case where the rights of co-sharer have been exclusively appropriated by other co-sharers that a suit for injunction would be maintainable against co-sharers. The aspect has further been elaborated with the aspect that in case evidence establishes that plaintiff cannot be adequately compensated at the time of partition and that greater injury will result to him by refusal of relief than by granting it, that injunction could be granted.

As such, the aspect which can be culled out from the Full Bench decision is to the extent that relief of injunction to plaintiff against co-sharers would be maintainable only in the event the share of plaintiff has been entirely and exclusively encroached upon by the other co-sharers and secondly that the plaintiff cannot be adequately compensated at the time of partition and thirdly that greater injury will result to him by refusal of the relief than by granting him.

In view of aforesaid discussion, this Court comes to the considered conclusion that there is no error in the orders impugned pertaining to the fact that injunction could not have been granted in favour of plaintiff against other co-sharer without partition being effected between them and without any averment that the exclusive share of the plaintiff was being trampled upon by the other co-sharers.

B. Civil Law Civil Procedure Code, 1908 - Order XXXIX Rule 4 - injunction obtained by concealing the true facts- untrue case- that plaintiff is the sole owner of the property- trial court's order upheld- Petition dismissed.

HELD: Upon applicability of aforesaid judgment in the present facts and circumstances of the case, it is evident that the plaintiff had set up an untrue case by giving an impression that she was the sole owner of the entire plot no.1297 minjumala. It is a finding of fact recorded concurrently by both the courts below and has also been admitted by learned counsel for petitioner that in fact plaintiff has only a share in the property in dispute and is not owner in possession over the entire plot although there is no such averment in the plaint.

In view of aforesaid, this Court does not find any error with regard to finding recorded that there was material concealment of fact in the plaint

Petition dismissed. (E-14)

List of Cases cited:

1. Chhedi Lal & anr. Vs Chhotey Lal AIR 1951 Allahabad 199

2. Devendra Kumar Trikha Vs The District Judge, Lucknow & ors. 1983(1) Lucknow Civil Decision page1

3. T. Ramalingeswara Rao (Dead) through Legal Representatives & anr. Vs N. Madhava Rao & ors. (2019)4 Supreme Court Cases 608

4. Mohd. Baqar Vs Naim-un-Nisha Bibi AIR 1956 SC 548

(Delivered by Hon'ble Manish Mathur, J.)

1. Heard Mr. Mohd. Arif Khan, learned Senior Counsel assisted by Mr. Mohd. Aslam Khan, learned counsel for petitioner.

2. In view of order being proposed to be passed, notices to opposite parties no.1 and 2 and opposite parties no.4 to 10 stand dispensed with.

3. Although there is reporting of caveat on behalf of opposite party no.3 but despite the matter being taken up in the revised list, no one has put in appearance on behalf of caveator.

4. Petition under Article 227 of the Constitution of India has been filed against order dated 17.08.2022 passed by the trial court whereby objections under order 39

Rule 4 of the Code of Civil Procedure have been allowed vacating the temporary injunction earlier granted. Appellate order dated 18.01.2023 has also been challenged.

5. Learned counsel for petitioner submits that the petitioner had purchased an area measuring 0.01109 hectare of Gata No.1297 having a total area of 0.1110 hectare by means of registered instrument of transfer dated 28.11.2008. It is submitted that when the defendants 1 and 2 started interfering in the possession of petitioner and raising construction on the plot in question, the petitioner was compelled to file the Regular Suit No.81 of 2022 for permanent injunction in which initially an ex parte interim injunction was granted but thereafter the same was vacated by means of the impugned order upon application being filed by defendants.

6. It is submitted that in the impugned order dated 17.08.2022, the trial court has clearly erred in recording a finding that there was material concealment of fact in the plaint which resulted in issuance of ex parte temporary injunction. It is submitted that a copy of the sale-deed dated 28.11.2008 had been filed alongwith copy of plaint clearly indicating the area purchased by the plaintiff in the plot in question and it was only after examining the same that ex-parte temporary injunction was granted. As such, it is submitted that there was no concealment of fact by the plaintiff and finding recorded to the contrary by means of impugned order is clearly erroneous.

7. Learned counsel has also drawn attention to the other ground for vacation of interim injunction that the trial court has erred in holding that temporary injunction cannot be granted against a co-sharer when proceedings for partition of the property in question are pending adjudication. It is submitted that it is settled law that suit for permanent injunction would be maintainable against co-sharers also in case the possession of plaintiff is being interfered with to an extent that it would hamper peaceful enjoyment of the property which has been purchased by the said co-sharer.

8. Reliance has been placed on judgment rendered by full bench decision of this Court in the case of ***Chhedi Lal and another versus Chhotey Lal*** reported in ***AIR 1951 Allahabad 199*** as well as in the case of ***Devendra Kumar Trikha versus The District Judge, Lucknow and others*** reported in ***1983(1)Lucknow Civil Decision page1.***

9. It is thus submitted that the trial court clearly fell in error in vacating the temporary injunction granted earlier on the aforesaid two counts.

10. Learned counsel has also adverted to the appellate Court judgment to submit that the findings recorded by the trial court in the impugned order dated 17.08.2022 has been merely copied without any independent application of mind to the grounds raised in the memorandum of appeal particularly with regard to the fact that there was no concealment of fact in the plaint and suit for injunction would be maintainable against the co-sharer in the light of full bench decision of this Court as followed subsequently.

11. Upon consideration of submissions advanced by learned counsel for petitioner, it appears from the material on record that suit for permanent injunction has been filed by the petitioner indicating

that she is the owner in possession of Gata No.1297 Minjumla having an area of 0.1110 hectare situate in the village in question. The prayer clause also indicates that injunction has been sought over Gata No.1297 Minjumla having an area of 0.1110 hectare. Although the plaint does not indicate any reference to the registered sale-deed dated 28.11.2008 but as per submission of learned counsel for petitioner, the aforesaid sale-deed was on record having been filed along with plaint and it was after consideration of the sale-deed indicating petitioner's share in the property to be restricted to 0.2019 hectare that trial court granted ex parte interim injunction.

12. A perusal of the trial court order indicates primarily two grounds for vacation of the ex parte interim injunction with first being that the property in dispute being Gata No.1297 Minjumla is a part and parcel of one plot which has not been partitioned by any competent court or authority and as such prior to grant of any permanent injunction, it would be necessary that plaintiff's share over the property disputed should be identified. It has also been indicated that plaintiff has not made any averment in the plaint with regard to the sale-deed or the portion of disputed property which has been purchased by her and over which she has possession.

13. Secondly, the trial court has reached a prima facie conclusion that the plaint was filed concealing material facts particularly the fact that plaintiff had only a share in the property disputed although relief is being claimed over the entire Gata No.1297 Minjumala. It is indicated in the order that neither any area of the property purchased by the plaintiff has been indicated in the plaint nor has any boundary been indicated and on the contrary, plaint has been filed seeking a relief of permanent injunction over the entire plot of 1297 Minjumla. As such, the trial court has reached a conclusion that averments in plaint were only to mislead the court concerned.

14. A perusal of impugned appellate court's order also indicates the same reasoning having been followed.

15. With regard to submissions advanced by learned counsel for petitioner, the following two questions which are required to be adjudicated in the present writ petition would be as follows:

A. Whether temporary injunction could have been granted to the petitioner-plaintiff against co-sharers of the property without any partition thereupon ?

B. Whether there was any concealment of fact in the plaint leading to grant of ex parte interim injunction?

16. **Question No.A**:- With regard to the first proposition, learned counsel for petitioner has placed reliance on Full Bench judgment of this Court in the case of ***Chhedi Lal*** (supra). The facts of the case was that one Tika Ram was owner of the plot in dispute and was survived by four sons one of whom died issue less. The portion of their shares in property in question exchanged hands and their successors started raising construction over the disputed plot whereafter the co-sharers filed suit for possession of the plot by demolition of construction raised by defendants on the ground that they were sole owners of entire property owned by late Tika Ram. The question with regard to injunction being granted against co-sharers

was the issue on hand before the Full Bench and after noticing a number of judgments, the Full Bench held as follows:-

"25. As a result of the foregoing discussion, it appears to us that the question of the right of co-sharers in respect of joint land should be kept separate and distinct from the question as to what relief should be granted to a co-sharer, whose right in respect of joint land has been invaded by the other co-sharers either by exclusively appropriating and cultivating land or by raising constructions thereon. The conflict in some of the decisions has apparently risen from the confusion of the two distinct matters. While therefore a co-sharer is entitled to object to another co-sharer exclusively appropriating land to himself to the detriment of other co-sharers, the question as to what relief should be granted to the plaintiff in the event of the invasion of his rights will depend upon the circumstances of each case. The right to the relief for demolition and injunction will be granted or withheld by the court according as the circumstances established in the case justify. The court may feel persuaded to grant both the reliefs if the evidence establishes that the plaintiff cannot be adequately compensated at the time of the partition and that greater injury will result to him by the refusal of the relief than by granting it. On the contrary if material and substantial injury will be caused to the defendant by the granting of the relief, the court will no doubt be exercising proper discretion in withholding such relief. As has been pointed out in some of the cases, each case will be decided upon its own peculiar facts and it will be left to the court to exercise its discretion upon proof of circumstances showing which side the balance of convenience lies. That the court in the exercise of its discretion will be guided by considerations of justice, equity and good conscience cannot be overlooked and it is not possible for the court to lay down an inflexible rule as to the circumstances in which the relief for demolition and injunction should be granted or refused."

17. The aforesaid Full Bench Judgment has thereafter been followed with approval by Coordinate Bench of this Court in the case of ***Devendra Kumar Trikha*** (supra).

18. Upon consideration of Full Bench Decision, it is apparent that the Full Bench has answered the question that right of co-sharers in respect of joint land is required to be kept separate and distinct from the question as to what relief should be granted to a co-sharer particularly when his share has been invaded by other co-sharers either by exclusively appropriating and cultivating land or by raising constructions thereon. The Full Bench has clearly held that it would only be in case where the rights of co-sharer have been exclusively appropriated by other co-sharers that a suit for injunction would be maintainable against co-sharers. The aspect has further been elaborated with the aspect that in case evidence establishes that plaintiff cannot be adequately compensated at the time of partition and that greater injury will result to him by refusal of relief than by granting it, that injunction could be granted.

19. As such, the aspect which can be culled out from the Full Bench decision is to the extent that relief of injunction to plaintiff against co-sharers would be maintainable only in the event the share of plaintiff has been entirely and exclusively encroached upon by the other co-sharers

and secondly that the plaintiff cannot be adequately compensated at the time of partition and thirdly that greater injury will result to him by refusal of the relief than by granting him.

20. Upon applicability of aforesaid Full Bench decision in the present facts and circumstances of the case, it is evident not only from the sale-deed but also from submissions advanced by learned counsel for petitioner-plaintiff that the plaintiff had purchased only a portion of the property in question ad measuring 0.01293 hectare out of the total area of 0.1110 hectare in Gata No.1297 Minjumla. A reading of the plaint does not indicate any averment that any encroachment was being made by the defendants over the entire and exclusive property purchased by the plaintiff. It is also evident that a suit for partition between the parties is pending consideration of the competent court in terms of Section 116 of the U.P. Revenue Code, 2006. There has not been any finding recorded by the courts below or even in the present petition that plaintiff cannot be adequately compensated at the time of partition with regard to construction being raised over the property in question. It is also not the case of plaintiff that any construction is being raised over the property purchased by him by means of the instrument of transfer dated 28.11.2008.

21. In the case of ***Devendra Kumar Trikha*** (supra), the facts of the case were that a suit for permanent injunction had been filed against the co-owner with the prayer that the plaintiff was exclusively realizing rent arising from the property in question although the plaintiff being co-sharer had a right to a portion of rents being so realized. In paragraph 3 of the aforesaid judgment, Coordinate Bench has clearly held that since the share in rent of the co-sharers was being exclusively and completely taken over by the defendant, the suit as such for permanent injunction would be maintainable.

22. Here it would be noticeable that in both the judgments, great emphasis has been laid on the fact that relief of injunction against the co-sharer could be granted only in case the share of another co-sharer has been exclusively trampled upon. The facts and circumstances of the present case are otherwise.

23. In a recent judgment of Hon'ble the Supreme Court the aforesaid aspect has already been taken care of and adjudicated in the case of ***T. Ramalingeswara Rao (Dead) through Legal Representatives and Another versus N. Madhava Rao and others*** reported in ***(2019)4 Supreme Court Cases 608*** wherein the aspect of whether injunction can be granted against co-sharers has been dealt with in the following manner:-

"16. In our view, even assuming that the plaintiffs claimed to be in possession of the suit property (which the two courts below did not find in their favour) for claiming injunction, yet they were not entitled to claim injunction against the other co-sharers over the suit property. It is a settled principle of law that the possession of one co-sharer is possession of all co-sharers, it cannot be adverse to them, unless there is a denial of their right to their knowledge by the person in possession, and exclusion and ouster following thereon for the statutory period. (See Mohd. Baqar v. Naim-un-Nisa Bibi [Mohd. Baqar v. Naim-un-Nisa Bibi, AIR 1956 SC 548].)

17. So far as the claim of the plaintiffs as being in exclusive possession

to the exclusion of others was concerned, the same was held not proved by the two courts below."

24. The aforesaid judgment rendered by Hon'ble the Supreme Court is based on another previous judgment of Hon'ble the Supreme Court in the case of ***Mohd. Baqar v. Naim-un-Nisha Bibi*** reported in ***AIR 1956 SC 548*** and clearly states the settled proposition that possession of one co-sharer is possession of all co-sharers and cannot be adverse to them unless there is a denial of their right to their knowledge by the person in possession, and exclusion and ouster following thereon.

25. In the considered opinion of this Court, the aforesaid judgment is clearly applicable in the present facts and circumstances where a co-sharer is seeking grant of temporary injunction against a co-sharer with proceedings for partition pending between them.

26. In view of aforesaid discussion, this Court comes to the considered conclusion that there is no error in the orders impugned pertaining to the fact that injunction could not have been granted in favour of plaintiff against other co-sharer without partition being effected between them and without any averment that the exclusive share of the plaintiff was being trampled upon by the other co-sharers.

27. **Question No.A** is answered accordingly negatively against petitioner.

28. **Question No.B**: So far as question pertaining to concealment of fact as recorded in the judgments under challenge is concerned, it is evident from the sale-deed brought on record as Annexure No.11 that petitioner-plaintiff had purchased an area measuring 0.01293 hectare by means of instrument of transfer dated 28.11.2008. It is also the submission of learned counsel for petitioner that aforesaid is the only area purchased by petitioner-plaintiff by means of the aforesaid sale-deed although the entire area of property in dispute being Gata no.1297 minjumala is 0.1110 hectare.

29. It is also evident from a reading of plaint that there is no averment therein as to the portion of disputed property which has been purchased by plaintiff and the only indication comes in paragraph 2 of the plaint whereunder it has been stated that the area of property in question being Gata No.1297 minjumala is 0.1110 hector. It is also evident that in prayer clause, permanent injunction has been sought over the entire Gata No.1297 minjumala indicating an area of 0.1110 hectare. There is no averment in the plaint with regard to defendants being co-sharers in the property in question although it is admitted that the defendants are in fact co-sharers of plaintiff in the disputed property.

30. Upon consideration of aforesaid factors, it is evident that the plaintiff has failed to indicate his right over the property in question as also his share thereupon with such omission extending to the fact that defendants were co-sharers of the plaintiff in the disputed property.

31. The aspect of concealment of fact has been adverted to in the Full Bench decision in the case of ***Chhedi Lal*** (supra) in the following term:

"26. It now remains to deal with each of the appeals separately upon its own facts. So far as Second Civil Appeal No.282 of 1943 is concerned, the plaintiffs set up an untrue case that they were the sole

owners and both the courts below have found that the defendants had a subsisting interest in the land in suit and had a right to build. It has also found against the plaintiffs that they made no oral protest, as alleged by them. Both the courts below have exercised their discretion upon the circumstances of the case in favour of the defendants and have refused the reliefs asked for by the plaintiffs. In this appeal the question resolves itself merely into the fact whether the discretion was exercised improperly. We are of opinion that the plaintiffs have failed to establish circumstances which would justify this Court in second appeal to interfere with the exercise of the discretion concurrently by the two courts below. We accordingly dismiss this appeal with costs."

32. Upon applicability of aforesaid judgment in the present facts and circumstances of the case, it is evident that the plaintiff had set up an untrue case by giving an impression that she was the sole owner of the entire plot no.1297 minjumala. It is a finding of fact recorded concurrently by both the courts below and has also been admitted by learned counsel for petitioner that in fact plaintiff has only a share in the property in dispute and is not owner in possession over the entire plot although there is no such averment in the plaint.

33. In view of aforesaid, this Court does not find any error with regard to finding recorded that there was material concealment of fact in the plaint.

34. **Question No.B** is answered accordingly against the petitioner.

35. In view of aforesaid that both the questions formulated by this Court have been answered against petitioner-plaintiff, the petition being devoid of merit is **dismissed at the admission stage itself.**

36. It is however made clear that the aforesaid answering of two questions is limited to the application for temporary injunction only and would not have any bearing on the final adjudication of the suit which would be on its own merits and would not prejudice the suit proceedings between co-sharers of the property in question, which would be subject to evidence.

(2023) 3 ILRA 1280
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.03.2023

BEFORE

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

Criminal Appeal No. 532 of 1997

Lalji & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri A.C. Nigam, Sri Dhirendra Kumar Srivastava, Sri Janmed Kumar, Sri Kameshwar Singh, Sri Om Prakash Chaurasia, Sri Satya Prakash Shukla, Sri Surendra Singh

Counsel for the Respondent:
G.A.

A. Criminal Law – Appeal- Indian Penal Code-1860 - Sections 302 & 34 -Against conviction under IPC read with Section 34 IPC- Accused killed the deceased by beating him with lathies- Deceased was raising wall on land- accused claimed to be theirs- Appellants' plea- conviction based on testimony of interested witnesses- no specific roles assigned.

B. No delay in filing of FIR- Ocular evidence- trustworthy and reliable- corroborated from medical evidence- establishment of motive for commission of crime- not necessary- relationship of eye-witnesses *inter se*- not a ground to discard their testimony- Non-examination of Investigating Officer- no prejudice caused to the defence. (Paragraphs 28 to 42)

HELD: It is true that there is no mention of motive in F.I.R. about the commission of crime. Even PW-1, PW-2 and P.W. 3 have also not disclosed anything that became the root cause of committing murder by the appellants except conversation started on the part of the appellants and Lalman in relation to construction of the wall belonging to cow shed but it is settled law that merely because the prosecution fails to prove motive for commission of the crime, it must not necessarily result in acquittal of the accused. It is well settled that where ocular evidence is found to be trustworthy and reliable and finds corroboration from the medical evidence, a finding of guilt can safely be recorded even if the motive for the commission of crime has not been proved. (Para 28)

It is common knowledge that village (mohalla) life is faction ridden and involvement of one or the other in the incidents is not unusual. One has also to be cautious about the fact that wholly independent witnesses are seldom available or are otherwise not inclined to comeforth, lest they may invite trouble for themselves for future. Therefore, relationship of eye-witnesses inter se, cannot 16 be a ground to discard their testimony. There is no reason to suppose the false implication of the appellants at the instance of the eye-witnesses. It would also be illogical to think that witnesses would screen the real culprits and substitute the appellants for them. (Para 36)

It is also relevant to note that the prosecution witnesses i.e. P.W.1 & P.W.2. have not been confronted with their previous St.ment as recorded by the Investigating Officer under section 161 Cr.P.C. except P.W.3 Chibilli on some minor issues which are not material to the case. Even regarding the place of occurrence there is no dispute. In this way, it cannot be said that any prejudice had been caused to the defence on account of non-examination of Investigating Officer. (Para 42)

C. No specific role assigned- role of Lalji in inflicting fatal injury established- no premeditation of all accused persons to commit murder- benefit of doubt available to the other accused. (Paragraphs 43 and 44)

HELD: There is no specific role assigned to other appellants for assault except general allegation that all of the appellants assaulted the deceased but post mortem report Ext. Ka-2 does not support the allegation of assault by 19 more than one person. Thus from the evidence on record it is clearly established beyond reasonable doubt that appellant Lalji caused injury to the deceased as a result of which, he died. So for as other appellants are concerned, their participation in causing injuries to the deceased cannot be said to be proved beyond reasonable doubt only on the basis of their presence on the spot with Lalji unless there is an act of premeditation of all the accused persons to commit murder of the deceased which is lacking from the very outset and it was only to the extent of preventing the deceased from further construction on the land in dispute. (Para 43)

In our opinion, the evidence on record clearly establishes the case of the prosecution against the appellant Lalji beyond any shadow of doubt but not against other accused appellants Shyamji and Pyare. They are entitled for benefit of doubt. (Para 44)

D. Nature of injuries- all but one are simple- no intention of the appellants to commit murder of the deceased- intention only to prevent deceased from further construction of wall of cow shed- knowledge to cause injury likely to cause death- Offence under Section 304 Part-II- No liability under Section 302 IPC- Sentence reduced- Appeal partly allowed.

HELD: In this case, as noticed above, the appellant Lalji was equipped with lathi, a blunt weapon. There was no previous enmity between the parties. There was dispute relating to goshala land which was being claimed by both

23 of them. The deceased was heightening the walls which was prevented by the accused appellant and there was oral altercation on this issue. In the course of oral altercation, the appellant assaulted the deceased with lathi on his head. The deceased tried to esacpe, the appellant again assaulted him but lathi blows were made on hands, not on head or chest. The circumstances show that there was no premeditation in the mind of appellant to cause death of the deceased or to cause such bodily injury which was likely to cause his death. On account of oral altercation, in the spur of moment, he assaulted the deceased with lathi on his head and again other lathi blows on his hands. Striking lathi on the head can be attributed to have knowledge that the injury was likely to cause death but it was not with the intention to cause such bodly injury which was likely to cause death. The intention of the appellant seemed to be only to prevent the deceased from making further construction on the wall of cow shed (goshala) land. Thus, there appears absence of intention on the part of the appellant but it was only with the knowledge to cause injury likely to cause death which would fall within the ambit of Section 304 Part-II IPC. (Para 49)

Appeal partly allowed. (E-14)

List of Cases cited:

1. St. of Himachal Pradesh Vs Jeet Singh 1999 (38) ACC 550 SC

2. Nathuni Yadav & ors. Vs St. of Bihar & ors. 1997 (34) ACC 576

3. Thaman Kumar Vs St. of Union Territory of Chandigarh 2003 (47) ACC 7

4. Brahm Swaroop & anr. Vs St. of U.P. (2011) 6 SCC 288

5. Dalip & ors. Vs St. of Pun. A.I.R. (1953) SC 364

6. Masalti Vs St. of U.P. (A.I.R.) 1965 SC 202

7. Rameshwar & ors. Vs St. 2003 (46) ACC 581

8. Behari Prasad Vs St. of Bihar 1996 SCC (2) 317

9. Pulicherla Nagaraju @ Nagaraja Vs St. of A.P. (2006) 11 SCC 444

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

1. The present criminal appeal emanates from the judgment and order dated 26.02.1997 passed by the learned Sessions Judge, Mirzapur in Sessions Trial No. 77 of 1993 (State Vs. Lalji and others) arising out of Crime No. 196 of 1991 under Section 302/34 IPC, Police Station Chunar, District Mirzapur whereby accused Lalji, Shyamji, Pyare and Chhotai have been convicted and sentenced under Section 302 read with Section 34 IPC with life imprisonment.

2. The prosecution case in brief is that on 26.10.1991 at about 4 p.m. Lalman, father of the informant was heightening the walls of the cow shed (Gaushala) on the land granted on lease with the informant, sister Savita, mason Chibilli and labour Sita. In the meantime, Lalji, Shyamji, Pyare and Chhotai equipped with lathies came there. While abusing they claimed the land belonging to them as their lease land. Lalman responded by saying that it was his lease land over which the old cow shed was constructed. At that Shyamji exhorted and all the accused persons started beating him with lathies. He ran for about 30-40 steps but the accused persons surrounded him and killed by beating with lathies. On hue and cry, Satyawan and Dhananjay came there and then the accused persons went away. The F.I.R. was lodged by the informant Shyam Bahadur on the same day at about 8.30 p.m. at the police Station Chunar as crime No. 370 of 1991, under

Section 302 IPC. The detail of which was entered into G.D. Report no.42

3. The investigation of the case was handed over to S.I. V.P. Singh who proceeded to the place of occurrence and collected blood stained and plain soil from the spot and prepared the fard.

4. The inquest of deceased Lalman was conducted by S.I. V.P. Singh, inquest report was prepared in presence of witnesses, dead body was sealed, other essential papers were prepared and the dead body was handed over to constables Murtaza Ali and Chhangur Dubey for post-mortem.

5. Dr. S.C. Srivastava conducted the autopsy on the dead body of Lalman on 27.10.1991 at 3 p.m. at District Hospital Mirzapur & prepared the postmortem report Exhibit Ka-2. Details of which are as under:

The dead body was brought in sealed cloth. Seal compared and found intact. The age of the deceased was about 60 years and time since death was about one day.

External Examination: Average built body. Rigor mortis passed off in upper extremities and was present in lower extremities. Blood clot was present in nostrils. Eyes were closed.

Ante-mortem injuries:(1) Lacerated wound 3 cm x ½ cm x bone deep on right side of scalp, 8 cm above right external ear.

(2) Lacerated wound 8 cm x 2 cm x cranial cavity deep over right side of scalp posteriorly 5 cm above and posterior to right external ear. The underlying bone was fractured and brain matter was visible.

(3) Lacerated wound 2 cm x 1 cm x cranial cavity deep over posterior side of scalp on right side 2 cm below injury no. 2.

(4) Abrasion 4 cm x 1 cm over upper surface of right shoulder.

(5) Abrasion 2.5 cm x 1 cm over posterior surface of left elbow.

(6) Abrasion 2 cm x 2 cm over posterior medial surface of left arm 7 cm above left wrist.

(7) Abrasion 1 cm x 1 cm over posterior surface of left wrist.

Cause of death was mentioned as coma due to head injury.

6. After inspection of the place of occurrence, Investigating Officer prepared the site plan and recorded the statements of witnesses conversant to the facts of the case, thereafter concluded the investigation and found a case, prima facie made out under Section 302/34 IPC. After preparing the charge sheet, he submitted it to the court concerned.

7. The cognizance of the offence was taken by the court concerned and copies of prosecution papers were provided to accused persons in compliance of Section 207 Cr.P.C. and the case was committed to the court of session for trial.

8. Learned trial court framed the charges under Section 302 read with Section 34 IPC on the basis of material on record and after giving opportunity of hearing to appellants. Charge was read-over and explained to them. They did not plead guilty but denied it and claimed for trial. Consequently, case was fixed for prosecution evidence.

9. The prosecution examined P.W.1 Shyam Bahadur, the informant, P.W.2 Dhananjai, P.W.3 Chibilli (mason) as eye

witnesses. P.W. 4 Dr. S.C. Srivastava who conducted the postmortem was also examined.

10. After conclusion of prosecution evidence the statement of appellants were recorded under Section 313 Cr.P.C. wherein they stated that they had not committed the murder and statements made by the prosecution witnesses were false. Accused Lalji stated that Arazi no. 330 measuring 1 bigha 10 biswa belonged to him on the basis of the patta granted in his favour on 25.07.1979. Since then he was in possession of that land, there was a case before the Tehshildar, Chunar which was decided in his favour on 30.11.1988. On that land, the deceased was making construction by force and in the night somehow he sustained injuries and he along with his real brothers were implicated falsely with a view to grab his land. Likewise, accused Shyamji, Pyare and Chhotai also stated about the incident and the statements made by the prosecution witnesses being false.

11. Appellants were given an opportunity for defence but they did not adduce any evidence in their support.

12. Learned trial Court heard the argument for prosecution as well as appellants, passed the judgment and order dated 26.2.1997 wherein he found all of the appellants guilty under Section 302 read with Section 34 IPC and sentenced them for rigorous imprisonment for life. Against this judgment and order, these two appeals have been preferred by the accused persons. One Criminal Appeal No. 477 of 1997 was filed by accused Chhotai but during the pendency of the appeal, he had died, as a result his appeal stood abated.

13. We have heard Sri Janmed Kumar, learned counsel on behalf of appellant no. 1, Sri Satya Prakash Shukla learned counsel on behalf of appellant nos. 2 and 3, Sri Arun Kumar Singh learned A.G.A. for the State and perused the record.

14. Learned counsels for the appellants would submit that the judgment and order passed by the learned trial court is against evidence available on record which is bad in the eyes of law being based on the testimony of interested witnesses who are relatives of the deceased. The F.I.R. was lodged with inordinate delay having no explanation. There was no motive to commit the murder of the deceased. P.W. 1 Shyam Bahadur being son of the deceased was an interested witness. P.W. 2 Dhananjay Singh was not present on the place of the occurrence but he was a managed witness. P.W. 3 Chibilli (mason) was also related to the deceased, therefore, the testimony of three prosecution witnesses cannot be said to be reliable. There are inter se contradictions in their testimony which do not inspire confidence. Further it was submitted that no specific role has been assigned to any of the accused except general role. In such a situation, liability cannot be fixed on either of the appellants to cause injuries on the person of the deceased. No liability can be fixed by invoking the provision of Section 34 IPC. The injuries found on the person of the deceased were simple in nature and cannot be said to have been caused with the intention or knowledge to cause death of the deceased. It is also submitted that the nature of the injuries found on the person of the deceased cannot be said to have been caused with lathi by three accused persons but they occur due to fall on some stone during night hours. The Investigating Officer who investigated the case was not

examined during trial which caused prejudice to the accused appellants. In this way, the whole prosecution case becomes unreliable and the conviction of the appellants by the learned trial court is a result of misappreciation of evidence on record, unsustainable in the eye of law and the appellants, as such are liable to be acquitted. Lastly, it was argued in alternative that the offence said to have been committed does not fall within the ambit of Section 302 IPC but at the most it could be said to be covered to the extent of Section 304 Part II of IPC.

15. Learned A.G.A. opposed the submissions made by the learned counsel for the appellants and urged that in this case, the appellants went on the spot where the deceased was heightening the wall on his pre-constructed cow shed on the land allotted to him on lease and made assault with lathi in furtherance of the common intention of all to cause his death, as a result the deceased sustained injuries and died. The F.I.R. of the incident was lodged by the informant promptly without any delay. P.Ws. 1, 2 and 3 are eye-witnesses of the incident, who were working on the spot at the time of the incident. Further it was urged that P.W. 3 Chibilli was a mason and was not resident of the same village so he cannot be said to be related to the deceased he was an independent witness who gave vivid details of the incident during his examination before the court. There are no major contradictions in the testimony of the prosecution witnesses. The injuries found on the person of the deceased also corroborate with the description by the ye witnesses about the manner of injuries caused by the accused appellants. In this way, it is established with the evidence on record that the injuries were caused by the appellants to the deceased as a result of which he had died. So far as non-examination of the Investigating Officer is concerned, it was argued that it does not cause any prejudice to the appellants and on mere non-examination of the Investigating Officer the prosecution case will not fail, as there was sufficient evidence on record to support the prosecution case. The evidence on record is sufficient on the basis of which the learned trial judge has recorded the conviction of the appellants, perfectly justified in the eye of law. There is no illegality or impropriety. The appeal is liable to be dismissed as such.

16. From the submissions of the learned counsels for the parties, the following questions emerge for consideration of this Court as (i) to whether there was delay in lodging the F.I.R., (ii) motive was absent, (iii) absence of common intention to cause death of the deceased, (iv) the unreliability of witnesses being relatives and interested, (v) the nature of injuries found on the person of the deceased, (vi) the effect of non-examination of Investigating Officer and (vii) as to whether the case comes within the purview of Section 302 IPC or under Section 304 Part II IPC.

17. Before we deal with the contentions of the learned counsel for the appellants, it would be convenient to take note of the evidence as adduced by the prosecution.

18. P.W.1 Shyam Bahadur is the informant who deposed that he knew accused Lalji, Shyamji, Pyare and Chhotai, who were residents of his village. Amongst them Lalji, Shyamji and Pyare were real brothers and Chhotai was their friend. Deceased Lalman was the father of the

informant who was murdered four years ago at about 4 o'clock when he was at his cow shed (gausala) and for heightening the wall, work was being done by the mason Chibilli with labour Sita. The land of cow shed was given in favour of his father on lease. The accused came there and prevented his father from constructing the wall, on which he retaliated that it was his old cow shed and the lease deed was in his favour. At that Shyamji exhorted and all the four accused persons started beating his father with lathies who tried to escape but while he could run for about 30 paces, all the four accused persons surrounded him and caused his death by beating. At the time of the incident, he, his sister Sangita, labour Sita and mason Chibilli were present and Dhananjay & Satyawan had reached on the spot hearing their hue and cry. They all saw the incident and accused persons went away after beating. He got tahreer (*written report)* scribed by Mastram and after hearing the contents thereof, he affixed his thumb impression and lodged the F.I.R. He admitted the tahreer (*written report*) having been given by him at the police station and also identified his thumb impression on it, which was proved as Ext. Ka-1.

This witness was subjected to gruelling cross-examination by the learned counsels for the appellants before the trial court but the witness had not disclosed any such fact which weakens his testimony. He had affirmed the fact of beating by the appellants.

19. P.W.2-Dhananjay Singh deposed that he knew accused Lalji, Shyamji, Pyare and Chhotai, who were residents of his village. Deceased Lalman was also a resident of his village who was murdered about four years ago. At the time of the incident Lalman was heightening the wall of his old cow shed where mason Chibilli was carrying construction work of the wall and labourer Sita was also present on the spot. The son of Lalman namely Shyam Bahadur and his daughter Savita were also present. The land of cow shed belonged to deceased Lalman and was in his possession. At the time of the incident at a distance of about 25-30 paces away, the witness was giving food to his *charwaha*. In the meantime, Lalji, Shyamji, Pyare and Chhotai equipped with lathi-danda came on the spot and started beating Lalman who fell down on the ground and succumbed to his injuries. P.W.2. stated that he went on the spot and saw the incident. The accused persons went away towards the east direction. Daroga Ji reached on the spot in the night and collected blood stained and plain soil from the site and prepared the *fard*, on which he also made his signature.

This witness also faced gruelling cross-examination made by the learned counsel for the appellants, but nothing contrary to the case of the prosecution could be pointed out from his deposition.

20. P.W.3 Chibilli deposed that he knew Lalji, Shyamji, Pyare and Chhotai, who were residents of village adjacent to his own village located at about 1 km. He also knew deceased Lalman who was murdered four years ago at about 4 p.m. This witness was working on the cow shed of Lalman at the time of alleged incident. At that time Lalman, his son Shyam Bahadur, daughter Savita and labourer Sita were also present. All the four accused persons equipped with lathies came at the cow shed (gausala) and started beating Lalman who fell on the ground after sustaining injuries. All the accused persons

went towards east direction after committing the incident.

This witness also faced gruelling cross-examination made by the learned counsel for appellants but nothing contrary to the case of the prosecution could be brought before us from his deposition.

21. All the prosecution witnesses remained intact during their cross-examination. No such contradictions are visible in their statements which would make their testimony unreliable and unnatural. Minor contradictions pointed out in their deposition are of cosmetic nature and cannot affect the credibility of their testimony.

22. P.W.4 Dr. S.C. Srivastava stated that on 27.10.1991, he was posted as Child Specialist in the District Hospital, Mirzapur. At about 4 o'clock he conducted postmortem of the dead body of deceased Lalman which was brought by Constables Murtaza Ali and Chhangur Dubey from the Police Station Chunar. He had prepared postmortem report and in his opinion the cause of death was coma as a result of injury on the head of the deceased. He prepared the postmortem report in his handwriting and signature which he proved as Ext. Ka-2. He also stated that injury nos. 1, 2 and 3 were on vital parts and due to injury no. 2, the injured would have gone into coma, thereafter, his death was possible. He also opined that injury no. 1 to 7 could have occured with lathi.

This witness was also subjected to cross-examination on behalf of the appellants but nothing adverse was found.

22. There is not even an iota of evidence on record which may even remotely suggest that Pws. 1, 2 & 3 had grudges against the appellants for any cause to implicate them falsely.

23. Injuries on the person of deceased Lalman were caused by lathi as stated by P.Ws. 1, 2 & 3. Ext. Ka-2 is the post-mortem report wherein multiple lacerated and abrasion wounds were found on the body of the deceased Lalman and P.W.4 Dr. S.C. Srivastava has proved the injuries and told that all the injuries were likely to be caused with *lathi*. He opined that cause of death was coma due to head injury.

24. In this way injuries found on the body of deceased Lalman are proved to have been caused with lathi at about 4 p.m on 26.10.1991 and it corroborates the manner of causing injuries resulting into death as stated by P.Ws. 1, 2 & 3. Thus, the eye witnesses account regarding cause of death finds corroboration from the medical evidence on record.

25. There is no delay in lodging the F.I.R. Occurrence took place at 4 p.m. on 26.10.1991 and F.I.R. was lodged at 8. 30 p.m. on the same day, after four hour and thirty minutes. It cannot be said to be inordinate delay.

27. Learned counsel has also drawn attention of this Court towards the absence of motive to commit murder. He urged that the prosecution has failed to prove any motive on the part of the appellants to commit the crime.

28. It is true that there is no mention of motive in F.I.R. about the commission of crime. Even PW-1, PW-2 and P.W. 3 have also not disclosed anything that became the root cause of committing murder by the appellants except conversation started on

the part of the appellants and Lalman in relation to construction of the wall belonging to cow shed but it is settled law that merely because the prosecution fails to prove motive for commission of the crime, it must not necessarily result in acquittal of the accused. It is well settled that where ocular evidence is found to be trustworthy and reliable and finds corroboration from the medical evidence, a finding of guilt can safely be recorded even if the motive for the commission of crime has not been proved.

29. In ***State of Himachal Pradesh Vs. Jeet Singh 1999 (38) ACC 550 SC***, it was held that no doubt it is a sound principle to remember that every criminal act was done with a motive but it's corollary is not that no offence was committed if the prosecution failed to prove the precise motive of the accused to commit it as it is almost an impossibility for the prosecution to unravel full dimension of the mental deposition of an offender towards the person whom he offended.

30. In ***Nathuni Yadav and others vs. State of Bihar and others 1997 (34) ACC 576***, it was held that motive for committing a criminal act, is generally a difficult area for prosecution as one cannot normally see into the mind of another. Motive is the emotion which impels a man to do a particular act and such impelling cause unnecessarily need not be proportionately grave to grave crimes. It was further held that many murders have been committed without any known or prominent motive and it is quite possible that the aforesaid impelling factor would remain undiscoverable.

31. In our opinion, in the facts and circumstances of the case, the absence of an evidence on the point of motive cannot have any such impact so as to discard the other reliable evidence available on record which certainly establishes the guilt of the accused. In the case of ***Thaman Kumar vs. State of Union Territory of Chandigarh 2003 (47) ACC 7*** the Hon'ble Apex Court has reiterated the same view after taking into consideration the aforementioned cases.

32. The next limb of argument of the learned counsel for the appellants is that the prosecution had examined highly interested and related witnesses and they have not produced any independent witness in support of its case.

33. In the case of ***Brahm Swaroop and another vs. State of U.P. (2011) 6 SCC 288*** the Hon'ble Apex Court in Para No.21 has observed as under

"merely because the witnesses were related to the deceased persons, their testimonies cannot be discarded. Their relationship to one of the parties is not a factor that affects the credibility of a witness, more so, a relation would not conceal the real culprit and make allegations against an innocent person. A party has to lay down a factual foundation and prove by leading impeccable evidence in respect of its false implication. However, in such cases the Court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible evidence."

34. The Court also referred cases of ***Dalip and others vs. State of Punjab A.I.R. (1953) SC 364; Masalti vs. State of U.P. (A.I.R.) 1965 SC 202.***

35. In ***Masalti vs. State of U.P. (A.I.R.) 1965 SC 202***, the Hon'ble Apex Court observed in Para No.14

"but it would, we think, be unreasonably to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. The mechanical rejection of such evidence on sole ground that it's partisan would inveriably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it's partisan cannot be accepted as correct.

36. It is common knowledge that village (mohalla) life is faction ridden and involvement of one or the other in the incidents is not unusual. One has also to be cautious about the fact that **wholly** independent witnesses are seldom available or are otherwise not inclined to comeforth, lest they may invite trouble for themselves for future. Therefore, relationship of eye-witnesses inter se, cannot be a ground to discard their testimony. There is no reason to suppose the false implication of the appellants at the instance of the eye-witnesses. It would also be illogical to think that witnesses would screen the real culprits and substitute the appellants for them.

37. This Court has also made such observations in Para No.14 of ***Rameshwar and others vs. State 2003 (46) ACC 581***.

38. No doubt P.W. 1, the witness of fact examined in instant case, is real son of the deceased but the relationship itself is not a ground to reject the testimony of this witness, rather he would be last person to leave the real culprit and falsely implicate any other person. P.W. 2 is a resident of the same village of the deceased as well as appellants and he is not related to the family of the deceased. Likewise, P.W. 3 is a mason who is resident of another village and was working at the instance of the deceased. He had no interest in either of the party, therefore, he can not be termed as an interested witness. All of the witnesses are natural witnesses. P.Ws. 1 & 3 were present at the time of the incident at the site where they were constructing the wall and P.W. 2 also arrived at the place where the incident took place. They all have identified the accused persons. P.Ws. 1 & 2 being residents of the same village were known to each another. P.W.3 was also resident of the adjacent village located on 1 km. distance. So there is no question of confusion in identification. P.W.1 being relative, it can not be said that he would falsely implicate the appellants in the case, while leaving the real culprits free. There is no suggestion of enmity between the appellants and witnesses and therefore, no reason to implicate them falsely. In this way, these witnesses are wholly reliable & credible. Their testimony cannot be discarded only on the ground that they are relatives of the deceased. The arguments placed by learned counsel for the appellants, in this regard, cannot be accepted.

39. It has also been argued that non-examination of the Investigating Officer has caused prejudice to the defence as it did not get opportunity to cross-examine him. This defect vitiates the whole trial.

40. In the case of ***Behari Prasad vs. State of Bihar 1996 SCC (2) 317*** it was held by the Supreme Court that-

"For non-examination of Investigating Officer, the prosecution case should not fail. We may also indicate here that it will

not be correct to contend that if an Investigating Office is not examined in a case, such a case should fail on the ground that the accused were deprived of the opportunity to effectively cross-examine the witnesses for the prosecution and to bring out contradictions in their statements before the police. A case of prejudice likely to be suffered by an accused must depend on the facts of the case and no universal straight jacket formula should be laid down that non-examination of Investigating Officer per se vitiates a criminal trial."

41. In the facts of the present case, it transpires that the involvement of the accused in the incident has been clearly established with the evidence of the eye witnesses P.Ws. 1 to 3. Such evidences are in conformity with the case as made out in F.I.R. and also with the post mortem report.

42. It is also relevant to note that the prosecution witnesses i.e. P.W.1 & P.W.2. have not been confronted with their previous statement as recorded by the Investigating Officer under section 161 Cr.P.C. except P.W.3 Chibilli on some minor issues which are not material to the case. Even regarding the place of occurrence there is no dispute. In this way, it cannot be said that any prejudice had been caused to the defence on account of non-examination of Investigating Officer.

43. From the statements as deposed by the P.Ws. 1, 2 and particularly by P.W. 3, it came out that there was specific role of assault with lathi by appellant Lalji. First he stroke lathi on the deceased when he was making gara (*mud mortar*) and again when the deceased ran to save his life , Lalji chased him and blowed four strokes with lathi on him which hit on his hand and shoulder. Post mortem report Ext. Ka-2 also supports the aforesaid contention of P.W. 3 Chivilli. In this way, it is established that it was appellant Lalji at whose instance the dispute started and he himself made assault on the deceased with lathi as a result of which the deceased Lalman died.

There is no specific role assigned to other appellants for assault except general allegation that all of the appellants assaulted the deceased but post mortem report Ext. Ka-2 does not support the allegation of assault by more than one person. Thus from the evidence on record it is clearly established beyond reasonable doubt that appellant Lalji caused injury to the deceased as a result of which, he died.

So for as other appellants are concerned, their participation in causing injuries to the deceased cannot be said to be proved beyond reasonable doubt only on the basis of their presence on the spot with Lalji unless there is an act of premeditation of all the accused persons to commit murder of the deceased which is lacking from the very outset and it was only to the extent of preventing the deceased from further construction on the land in dispute.

44. In our opinion, the evidence on record clearly establishes the case of the prosecution against the appellant Lalji beyond any shadow of doubt but not against other accused appellants Shyamji and Pyare. They are entitled for benefit of doubt.

45. The next argument of the learned counsel for the appellants is that the injuries caused to the deceased were not intentional but the incident took place at the spur of the moment during the course of oral altercation in relation to the disputed land when the deceased was heightening the wall and both the parties were claiming

the land to be their own on the basis of the lease granted in their favour. The appellants went on the spot to prevent the deceased from making construction but he did not stop the work, upon which both the parties started quarreling and appellants assaulted the deceased with lathi causing injuries on his person, which has resulted in his death. The nature of injuries was simple and except one, all other injuries were not fatal to the life of the deceased. This shows that there was no intention of the appellants to committ murder of the deceased but only to cause simple injuries. Even knowledge can also not be inferred that they knew about the effect of injuries likely to cause death. Thus, there being no premeditation, the offence cannot fall under Section 302 IPC but utmost it may travel to the extent of Section 304 part II IPC.

46. In the case of ***Pulicherla Nagaraju @ Nagaraja Vs. State of A.P. (2006) 11 SCC 444,*** the Supreme Court while deciding whether a case falls under Section 302 or 304 part I or 304 part II IPC, held thus:

"Para 29: Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters plucking of a fruit, straying of a cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no pre-meditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot;

(iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre- meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. Be that as it may."

47. The Court while determining the question that whether it is culpable homicide or murder has to keep in focus key words used in Section 299 and 300 of IPC. It is the degree of probability of death

which determines that whether a case would fall within the ambit of "murder' or "culpable homicide not amounting to murder'. But when there is question as to whether a particular offence would come within the scope of Part-1 or Part-II of the "culpable homicide not amounting to murder', the Court would look into two important elements mentioned in the Section 304 IPC. First element is the intention and other one is the knowledge. When there is a case which involves intention to cause death with the knowledge that the act is likely to cause death then the accused would be convicted under the first part of Section 304 IPC. But if the element of intention for causing death is missing and the act is done with the knowledge that it is likely to cause death of the person, then in such a case the accused would be punished under part II of Section 304 IPC

48. Applying the law as laid down by the Supreme Court in the aforesaid decision, it is required to be considered whether the case would fall under Section 302 IPC or any other lesser offence. P.W.1 and P.W. 2 who are the eye witnesses to the incident right from the beginning deposed that when the deceased was heightening the wall of gausala on the land in dispute between the parties, appellants came there with lathies and asked the deceased to stop the work claiming the land being their own lease land which the deceased objected, on this there was hot talk. The appellants assaulted the deceased with lathi who tried to escape then again the appellants surrounded him and beaten him, as a result the decased fell on the ground and died. P.W. 3 Chibilli, the mason gave vivid details in this regard in his cross-examination and stated that appellant Lalji made assault on the deceased and when the deceased tried to escape, Lalji chased and assaulted him with lathi four times. There were injuries on the person of the deceased, lacerated wounds on the head and abrasions on the hand. In the opinion of doctor, injury no. 1, 2 and 3 were on vital parts and as a result of injury no. 2, the patient would have gone into Coma and died.

49. In this case, as noticed above, the appellant Lalji was equipped with lathi, a blunt weapon. There was no previous enmity between the parties. There was dispute relating to goshala land which was being claimed by both of them. The deceased was heightening the walls which was prevented by the accused appellant and there was oral altercation on this issue. In the course of oral altercation, the appellant assaulted the deceased with lathi on his head. The deceased tried to esacpe, the appellant again assaulted him but lathi blows were made on hands, not on head or chest. The circumstances show that there was no premeditation in the mind of appellant to cause death of the deceased or to cause such bodily injury which was likely to cause his death. On account of oral altercation, in the spur of moment, he assaulted the deceased with lathi on his head and again other lathi blows on his hands. Striking lathi on the head can be attributed to have knowledge that the injury was likely to cause death but it was not with the intention to cause such bodly injury which was likely to cause death. The intention of the appellant seemed to be only to prevent the deceased from making further construction on the wall of cow shed (goshala) land. Thus, there appears absence of intention on the part of the appellant but it was only with the knowledge to cause injury likely to cause death which would fall within the ambit of Section 304 Part-II IPC.

50. Thus, we hold that the appellant Lalji guilty under Section 304 Part-II IPC in the place of Section 302 IPC. The appellant is aged about 75 years, the occurrence took place in the year 1991 and he is in jail since 04.03.2021, therefore, to meet the ends of justice, we would like to the reduce sentence of the appellant, to three years rigorous imprisonment in the place of life imprisonment.

51. The appellants Shyamji and Pyare are acquitted of the charges levelled against them while extending them the benefit of doubt. Their conviction and sentence is hereby set aside. They are in jail, so they be released from jail forthwith, if not wanted in any other case.

52. To the extent as aforesaid the judgment and order dated 26.02.1997 as passed by the learned Sessions Judge is hereby modified.

53. Accordingly, this appeal is ***partly allowed.***

54. Copy of this judgment alongwith the original record of Court below be transmitted to the Court concerned for necessary compliance. A compliance report be sent to this Court within one month. Office is directed to keep the compliance report on record.

(2023) 3 ILRA 1293
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.03.2023

BEFORE

THE HON'BLE OM PRAKASH SHUKLA, J.

Writ A No. 13156 of 2020

Mahendra Pal & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Neel Kamal Mishra, Deepak Singh, Niteesh Kumar, Pramod Kumar Yadav, Rajeev Narayan Pandey

Counsel for the Respondents:
C.S.C., Ajay Kumar

A. Service/Education Law – Recruitment – Reservation - The U.P. Basic Education Act, 1972: Section 19(1), 19(2)(a) and (c); U.P. Basic Education (Teachers) Service Rules, 1981: Rule 9*;* U.P. Basic Education (Teachers) Service (20th Amendment) Rules, 2017: Rule 2(w), 14, 14(3), 14(3)(b); Appendix-I of Twentieth Amendment of Uttar Pradesh Basic Shiksha (Teachers) Rules, 1981; Right of Children to Free and Compulsory Education Act, 2009: Section 23(1); National Council for Teachers Education Act, 1993; The Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994: Section 3(6) - **If a candidate is entitled to be admitted on the basis of his own merit then such admission should not be counted against the quota reserved for Scheduled Caste or Scheduled Tribe or any other reserved category since that will be against the Constitutional mandate enshrined in Article 16(4).** (Para 111)

The mere fact that some relaxation was given in the pass marks in the TET did not give any advantage to the reserve category candidate as it only enabled them to compete with others by allowing them to participate in the selection process. (Para 126)

Concession granted at the level of TET, so as to make a candidate eligible to participate in the open competition, like the ATRE-2019 would not debar a reserved category candidate to be excluded from the consideration zone in the open competition, in case he is able to match and score more marks than the last general category candidate in the open category as the competition has not yet

started at that point of time. However, in case a candidate seeks relaxation of marks in passing in the ATRE-2019, obviously he would not be considered to belonging to a meritorious reserved category as not only the competition has started but this relaxation would mean reservation. (Para 151)

Any reserved category candidate, who has obtained 65% marks or more can be considered to be a meritorious reserved category candidate and accordingly allowed to compete with the general category candidate and progress to the open category, whereas a reserved category candidate, who has scored less than 65% and more than 60% in the ATRE-2019 would be considered in their own respective category and would not be allowed to progress into consideration zone with general category candidates on the basis of scoring more in the quality point as per Appendix-1 of the rules. The above proposition simply put may be understood as under:

(i) Any candidate belonging to a reserved category, who has availed relaxation of marks in ATRE-2019, which has been held to be an open competition, shall not be entitled to migrate from their respective category to the unreserved category while preparing the select list as per the quality points in terms of Appendix -1 of the rules.
(ii) Further, those candidate's, whether reserved or unreserved, scoring more than 65% marks in ATRE-2019 shall be encompassed within the consideration zone of the open category and a select list shall be accordingly prepared of these candidates separately on the quality points and accordingly 50% of the total seats shall be filled by these candidates, irrespective of whether they belong to reserved or unreserved category.
(iii) The balance 50% shall be filled by candidates from their respective reserved category as envisaged under section 3(1) of the Reservation Act.
(iv) Thereafter, the horizontal reservation as provided in the Government order should be applied accordingly, if any. (Para 152)

B. Allocating the districts of preference to MRC candidates - MRC candidates have to be only treated "notionally" as reserve category candidates for the said purpose for allotment of districts and they can opt for a seat earmarked for the reserved category, so as to not disadvantage him against less meritorious reserved category candidates. Such MRC shall be treated as part of the general category only. Further, due to the MRC's choice, one reserved category seat being occupied, and one seat among the choices available to general category candidates remains unoccupied. Consequently, one lesser-ranked reserved category candidate who had choices among the reserved category is affected as he does not get any choice anymore and as such to remedy the situation i.e. to provide the affected candidate a remedy, the seat which would have been allotted to MRC, had he not opted for a seat meant for the reserved category to which he belongs, shall now be filled up by that candidate in the reserved category list who stands to lose out by the choice of the MRC, which would leave the percentage of reservation at 50% undisturbed. (Para 153)

C. Words and Phrases – '*competition*' – '*open competition*' - The term 'competition' muchless 'open competition' has not been defined under the Reservation Act. The Cambridge Dictionary, defines "competition" to mean "an organized event in which people try to win a prize by being the best, fastest, etc. Similarly, Encyclopaedia Britannica has defined "Competition" to be an act or process of trying to get or win something (such as a prize or a higher level of success) that someone else is also trying to get or win. Thus, in common parlance, **the meaning of competition would be an event or a process, wherein each person is trying to win by being the best. Therefore, an open competition as could be understood, relevant to the context, would be a competition which is open to one and all, wherein the participants are trying to win by being the best and in that process the participants have not availed any concession or privilege.** Thus, in the said open competition, the best is chosen from the rest. The parameters applicable to all of them are one and equal and they are adjudged on the same scale of merit and most importantly, "level playing field" is afforded in the said open competition. (Para 102)

In the peculiar facts of the present case and purely to balance to equity, this court in exercise of its Jurisdiction u/Article 226 of the Constitution of India directs that till the time the respondents prepare the revised list, the candidates already appointed and presently working as Assistant Teachers in various district shall continue to work in their post till such period and shall be not disturbed, keeping in mind the examination period and the end of education session. **The appointment of those teachers, who do not find any place in the revised list as has been directed herein above and who had been appointed as per the select list of 01.06.2020 was purely fortuitous and does not entail any right in them.** The said direction is in conformity to the interim order dated 7th of December, 2020, wherein this court while issuing notice to the affected persons directed that, in the meantime, appointments made on the post of Assistant Teacher shall be subject to the final decision of these petitions. (Para 155)

Since, it has been directed that the select list dated 01.06.2020 to be revised in view of the observation made in this Judgment, the select list of 6800 dated 05.01.2022 stands quashed. Reservation should not be in any circumstances more than 50% of the total seats. (Para 158, 159)

Writ petitions disposed of. (E-4)

Precedent followed:

1. Indra Sawhney Vs U.O.I., 1992 Supp (3) SCC 217; AIR 1993 SC 477 (Para 6, 111)

2. R.K. Sabharwal Vs St. of Pun., (1995) 2 SCC 745 (Para 112)

3. Tej Pal Yadav Vs U.O.I., 174 (2010) DLT 510 (DB) (Para 116)

4. Anil Kumar Gupta, (1995) 5 SCC 173 (Para 119)

5. Jitendra Kumar Singh Vs St. of U. P. & ors., (2010) 3 SCC 119 (Para 122)

6. Vikas Sankhala Vs Vikas Kumar Agarwal, (2017) 1 SCC 350 (Para 125)

7. Gaurav Pradhan Vs St. of Raj., (2018) 11 SCC 352 (Para 128)

8. Deepa E.V. Vs U.O.I. (2017) 12 SCC 680 (Para 130)

9. Saurav Kumar Vs St. of U. P., (2021) 4 SCC 542 (Para 135)

10. Niravkumar Dilipbhai Makwana Vs Gujrat Public Service Commission, (2019) 7 SCC 383 (Para 137)

11. U.O.I. Vs Ramesh Ram & ors., (2010) 7 SCC 234 (Para 139)

12. Tripurari Sharan Vs Ranjit Kumar Yadav, (2018) 7 SCC 656 (Para 142)

13. U.O.I. Vs Ishwar Singh Khatri (1992) Supp 3 SCC 84 (Para 146)

14. Gujrat St. Deputy Executive Engineers Association Vs St. of Guj., (1994) Suppl. 2 SCC 591 (Para 146)

15. St. of Bihar Vs The Secretariat Assistant S.E. Union, AIR 1994 SC 736 (Para 146)

16. Prem Singh Vs Har. St. Electricity Board, (1996) 4 SCC 319 (Para 146)

17. Ashok Kumar Vs Chairman, Banking Service Recruitment Board, AIR 1996 SC 976 (Para 146)

18. Surinder Singh & ors. Vs St. of Pun. & ors., AIR 1998 SC 18 (Para 148)

19. Hoshiyar Singh Vs St. of U.P., (1993) Supp (4) SCC 377 (Para 149)

20. Arup Das & ors. St. of Assam, (2012) 5 SCC 559 (Para 149)

21. Ram Sharan Maurya & ors. Vs St. of U.P. & ors., (2020) SCC Online 939 (Para 27)

22. St. of U.P. & anr. Vs Anand Kumar Yadav & ors., (2018) 13 SCC 560 (Para 27)

23. Subedar Singh & ors. Vs St. of U.P., SLP No. 6687/2020 (Para 70)

24. St. of Uttar Pradesh & anr. Vs Anand Kumar Yadav & ors., (2018) 13 SCC 560 (Para 91)

25. Ritesh R. Shah Vs Dr. Y.L. Yamul & ors., (1996) 3 SCC 253 (Para 111)

Precedent distinguished:

St. (NCT of Delhi) Vs Pradeep Kumar, (2019) 10 SCC 120 (Para 134)

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

INDEX

A. Introduction

1. Reservation is a form of affirmative action that provides predetermined representation in education, employment, government schemes, scholarships and political representation to a disadvantaged group. The system of reservation existed in India even before independence. Post-independence the system of reservation came to be imbibed in our Constitution. Initially, it was introduced for a time span of 10 years as per Article 334 of the constitution of India. Post 10-year period, the parliament found the necessity to continue the system of reservation to overcome many years of societal and cultural discrimination of certain sections of society and as such it continues to hold the ground even after 75 years of Independence.

2. Under our Constitution, reservations do not refer to the sharing of state power by all social groups, but rather it refers to inclusion of subordinated and marginalised groups, who were socially and culturally backwards due to various reasons to be included in the main-stream. Thus, the reservation in that sense, in our constitution, means an inclusive remedy for upliftment of these downtrodden and essentially is participatory in nature, so that the backward classes are not only brought at par to the main-stream, but they also play an active role in the development, administration, progressive equality and achievement of our country.

3. While Article 15 of our constitution relates to reservation in Education Institutions, Article 16 relates to reservation in public employment. Interestingly, the word "backward" used in both the Articles are of utmost significance and that is the word, which has found itself in the epicentre of controversy, ever since the Article existed. Although, it was the Drafting Committee under the Chairmanship of Dr. B.R. Ambedkar that inserted the word "backward" in between the words "in favour of any" and "class of citizens" as mentioned in Article 16(4) of our constitution and eventually it was left to the respective states to determine as to who could be called backward. However, the meaning of the word "Backward" as should be understood in today's progressive India could be found from the explanation

of Shri K.M. Munshi, who was a member of the drafting committee of our constitution. In a debate in the constituent assembly relating to Article 16 of our constitution (which was originally introduced as Article 10), after the discussion proceeded for some time relating to the insertion of the word "backward" and it was contended by the members of the constituent assembly that the said word was vague, Sri K.M. Munshi, rose to the occasion to explain the content of the word 'backward' in the following words:

"What we want to secure by this clause are two things. In the fundamental right in the first clause we want to achieve the highest efficiency in the services of the State-highest efficiency which would enable the services to function effectively and promptly. At the same time, in view of the conditions in our country prevailing in several provinces, we want to see that backward class, classes who are really backward, should be given scope in the State services; for it is realised that State services give a status and an opportunity to serve the country, and this opportunity should be extended to every community, even among the backward people. That being so, we have to find out some generic term and the word "backward class" was the best possible term."

Sri Munshi proceeded to state:

I may point out that in the province of Bombay for several years now, there has been a definition of backward classes, which includes not only Scheduled Castes and Scheduled Tribes but also other backward classes who are economically, educationally, and socially backward. We need not, therefore, define or restrict the scope of the word "backward" to a particular community. Whoever is backward will be covered by it and I think the apprehensions of the Honourable Members are not justified.

4. The reservation extended on the basis of "economic criterion' is one such step, wherein poverty is visualized as a form of subordination that reflects "social backwardness'. Be that as it may, the larger debate would always remain as to whether this reservation should be the end of the story or the government is required to take other remedial action beyond welfare policies. However, to the mind of this court, reservation should not be envisaged as an end to the problem but merely a means to secure the social, economic and political justice as enshrined in our Preamble.

5. As has been recently held by the Hon'ble Apex Court, while upholding the constitutionality of providing 10% EWS Quota to economically weaker section, which is as under:

"Reservation is not an end but a means -- a means to secure social and economic justice. Reservation should not be allowed to become a vested interest. Real solution, however, lies in eliminating the causes that have led to the social, educational and economic backwardness of the weaker sections of the community".

Hon'ble Justice P.B. Pardiwala, who formed the majority view which upheld the 10% EWS quota recently in "Janhit Abhiyan V/s Union of India" decided on 7th December, 2022 by Hon'ble Supreme Court of India.

6. The observation in the constitutional Bench judgment of *Indra Shawney case*, AIR 1993 SC 477, makes it amply clear that the objective behind

reservation was the sharing of State power. The said Judgment observes that the State power which was almost exclusively monopolised by the upper castes i.e., a few communities, was now sought to be made broad-based, wherein the backward communities who were till then kept out of apparatus of power, were sought to be inducted there into and since that was not practicable in the normal course, a special provision was made to effectuate the said objective. In short, the objective behind Article 16(4) was empowerment of the deprived backward communities- to give them a share in the administrative apparatus and in the governance of the community.

7. The present bunch of matters stems out of a dispute relating to the nuances of implementation of reservation policy to the recruitment of Assistant Teachers in the primary school run by the state Government, wherein the primary issue is relating to migration of Meritorious reserved category (MRC) candidates to the open category and its consequences both the reserved category as well as the unreserved category. Before this court delves into the facts & issue in the present cases, it would be profitable to trace the law holding the ground relating to the recruitment process of the Assistant Teachers in the primary school with emphasis on the reservation policy of the state of Uttar Pradesh.

B. Recruitment Law, Rules & Amendment

8. The U.P. Basic Education Act, 1972 (hereinafter referred as the **"Act"**) is the primary law dealing with the basic education in the State of Uttar Pradesh. Section 19(1) of the Act empowers the state to make rules for carrying out the purposes of the Act and Section 19(2)(a) & (c) of the Act empowers the state to make rules relating to the recruitment and condition of service of the persons appointed to the post of Teachers. Thus, the state framed the rules for selection to the recruitment of Assistant Teachers in the primary school run by the state Government vide the U.P. Basic Education (Teachers) Service Rules, 1981 (hereinafter referred as the **"Rules"**), wherein Rule 8 of the said rules prescribed the minimum requisite qualification for appointment of Assistant Teachers of the parishad.

9. Shorn of the various details of the Act and rules framed therein, this court keeping in mind the issue raised by the writ petitioners in this bunch of matter, finds that the State Government notified UP Basic (Teachers) Service (20th Amendment) Rules, 2017 amending 1981 Rules on 09.11.2017 and the following expressions were defined in Rule 2 as under:

"(s) "Teacher Eligibility Test" means the Teacher Eligibility Test conducted by the Government or by the Government of India;

(t) "Qualifying marks in Teacher Eligibility Test" Qualifying marks in Teacher Eligibility Test will be such as may be prescribed from time to time by the National Council for Teacher Education, New Delhi;

(u) "Trainee teacher" means a candidate who has passed B.Ed./B.Ed. (Special Education)/D.Ed. (Special Education) and has also passed the teacher eligibility test and has been selected for eventual appointment as assistant teacher in Junior Basic School after successful completion of six months special training

programme in elementary education recognised by National Council for Teacher Education (NCTE);

(v) "Shiksha Mitra" means a person working as such in junior basic schools run by Basic Shiksha Parishad under the Government Orders prior to the commencement of Uttar

Or a person who has been a Shiksha Mitra and appointed as an Assistant Teacher in Junior Basic Schools run by Basic Shiksha Parishad and reverted to work as Shiksha Mitra in pursuance of the judgment of the Apex Court in SLP No. 32599/2015 State of U.P. and others v. Anand Kumar Yadav and others.

(w) "Assistant Teacher Recruitment Examination" means a written examination conducted by the Government for recruitment of a person in junior basic schools run by Basic Shiksha Parishad;

(x) "Qualifying Marks of Assistant Teacher Recruitment Examination" means such minimum marks as may be determined from time to time by the Government.

(y) "Guidelines of Assistant Teacher Recruitment Examination" means such guidelines as may be determined from time to time by the Government."

10. Thus, the concept of ATRE (Assistant Teacher Recruitment Examination) came into existence by the promulgation of 20th Amendment and the sources of recruitment of Assistant teachers as set out in Rule 5(a)(ii), inter-alia stated that the same shall be by direct recruitment as provided in Rule 14. Further, rule 8(1) dealing with the requirement of Academic qualifications of Assistant Teachers, stated as herein under:

"8. Academic Qualifications-(1) The essential qualifications of candidates for appointment to a post referred to in clause (a) of Rule 5 shall be as shown below against each:

Post	Academic Qualifications
(i) Mistresses of Nursery School	Bachelors degree from a University established by law in India or a degree recognised by the Government equivalent thereto **together with** Certificate of teaching (Nursery) from recognised training institution of Uttar Pradesh and any other training course recognised by the Government as equivalent thereto and teacher eligibility test passed conducted by the Government or by the Government of India
(ii) Assistant Master and Assistant Mistresses of Junior Basic Schools	ii.(a) Bachelors degree from a University established by law in India or a degree recognised by the Government equivalent thereto **together with** any other training course recognised by the Government as equivalent thereto **together with** the training qualification consisting of a Basic Teacher's Certificate (BTC), two years BTC (Urdu) Vishisht BTC, two-year Diploma in Education (Special Education) approved by Rehabilitation council of India or four year Degree in Elementary Education (B.El.Ed.), two years Diploma in Elementary Education (by whatever name known) in accordance with the National Council of Teacher of Education (Recognition, Norms and Procedure), Regulation or any training qualifications to be added by National Council for Teacher Education for the recruitment of teachers in primary education and Teacher eligibility test passed conducted by the Government of India and passed Assistant Teacher recruitment Examination conducted by the Government. (b) A trainee Teacher who has completed successfully six months special training programme in elementary education recognized by National Council for Teacher Education. (c) a shikshamitra who possessed bachelors degree from a University established by law in India or a degree recognised by the

	Government equivalent thereto and has completed successfully two year distant learning B.T.C. course or basic Techer's Certificate (B.T.C.), Basic Teacher's Certificate (B.T.C.) (Urdu) or Vishisht B.T.C. conducted by the State Council of Educational Research and Training and passed the Teacher Eligibility Test conducted by the Government of India and passed Assistant Teacher recruitment Examination conducted by the Government.
(iii) Trainee Teacher	iii. Bachelors degree from a University established by law in India or a degree recognized by the Government equivalent thereto **together with** B.Ed./B.Ed.(Special Education)/D.E.d.(Special Education) qualification and passed the teacher eligibility test conducted by the Government or by the Government of India. However, in case of B.Ed. (Special Education)/D.Ed.(Special Education) a course recognised by Rehabilitation Council of India (RCI) only shall be considered

11. Similarly, UP Basic (Teachers) Service (20th Amendment) Rules, 2017 as far as Rule 14 is concerned, dealt with determination of vacancies and preparation of list. The said rule inter-alia stated:

"14. Determination of vacancies and preparation of list-

(1) (a) In respect of appointment, by direct recruitment to the post of Mistress of Nursery Schools and Assistant Master or Assistant Mistress of Junior Basic Schools under clause (a) of Rule 5, the appointing authority shall determine the number of vacancies as also the number of vacancies to be reserved for candidates belonging to Scheduled Castes, Scheduled Tribes, Backward Classes, and other categories under Rule 9 and published in at least two leading daily newspapers having adequate circulation in the State as well as in concerned district inviting applications from candidates possessing prescribed training qualification and teacher eligibility test passed, conducted by the Government or by the Government of India and passed Assistant Teacher Recruitment Examination conducted by the Government.

(b) The Government may from time to time decide to appoint candidates, who are graduates along with B.Ed./B.Ed. (Special Education)/D.Ed. (Special Education) and who have also passed teacher eligibility test conducted by the Government or by the Government of India, as trainee teachers. These candidates after appointment will have to undergo six months special training programme in elementary education recognised by National Council of Teacher Education (NCTE). The appointing authority shall determine the number of vacancies as also the number of vacancies to be reserved for candidates belonging to Scheduled Castes, Scheduled Tribes, Backward Classes, and other categories under Rule 9 and advertisement would be issued in at least two leading daily newspapers having adequate circulation in the State as well as in concerned district inviting applications from candidates who are graduates along with B.Ed./B.Ed. (Special Education)/D.Ed. (Special Education) and who have also passed teacher eligibility test conducted by the Government or by the Government of India.

(c) The trainee teachers, after obtaining the certificate of successful completion of six months special training in elementary education shall be appointed as assistant teachers in junior basic school against substantive post in regular pay-scale. The appointing authority will be duty bound to appoint the trainee teachers as assistant teachers within one month of issue of certificate of successful completion of said training.

(2) The appointing authority shall scrutinize the applications received in pursuance of the advertisement under clause (a) or (b) of sub-rule (1) of Rule 14 and prepare a list of such persons as appear to possess the prescribed academic qualifications and be eligible for appointment.

(3) (a) The names of candidates in the list prepared under sub-rule (2) in accordance with clause (a) of sub-rule (1) of Rule 14 shall then be arranged in such manner that the candidate shall be arranged in accordance with the quality points and weightage as specified in the Appendix-I :

Provided that if two or more candidates obtain equal marks, the candidate senior in age shall be placed higher.

(b) The names of candidates in the list prepared under sub-rule (2) in accordance with clause (b) of sub-rule (1) of Rule 14 shall then be arranged in such manner that the candidate shall be arranged in accordance with the quality points specified in the Appendix-II:

Provided that if two or more candidates obtain equal marks, the candidate senior in age shall be placed higher.

(c) The names of candidates in the list prepared in accordance with clause (c) sub-rule (1) of Rule 14 for appointment as assistant teacher shall be same as the list prepared under clause (b) subrule (3) of Rule 14 unless the candidate under the said list is unable to successfully complete the six months special training course in elementary education in his first attempt. If the candidate successfully completes the six months special training in his second and final attempt, the candidate's name shall be placed under the names of all those candidates who have completed the said six months special training in their first attempt.

(4) No person shall be eligible for appointment unless his or her name is included in the list prepared under sub-rule (2).

(5) The list prepared under sub-rule (2) and arranged in accordance with clause (a) and (b) of sub-rule (3) of Rule 14 shall be forwarded by the appointing authority to the selection committee."

12. Appendix I referable to Rule 14(3)(a) and Appendix II referable to Rule 14(3)(b) as amended by the 20th Amendment were as under: -

"APPENDIX-I
[See Rule 14 (3)(a)]
Quality points and weightage for selection of candidates

	Name of Examination/ Degree	Quality points
1.	High School	Percentage of Marks in the examination x 10 / 100
2.	Intermediate	Percentage of Marks in the examination x 10 / 100
3.	Graduation Degree	Percentage of Marks in the examination x 10 / 100
4.	B.T.C Training	B.T.C Training
5.	Assistant Teacher Recruitment Examination	Assistant Teacher Recruitment Examination
6.	Weightage Teaching experiences as shikshamitra or/as teacher working as such in junior basic schools run by Basic Shiksha Parishad.	2.5 marks per completed teaching year, up to maximum 25 marks, whichever is less

Notes 1 - If two or more candidates have equal quality points, the name of the

candidate who is senior in age shall be placed higher in the list.

2. If two or more candidates have equal quality points and age, the name of the candidate shall be placed in the list in English alphabetical order."

"APPENDIX-II
[See Rule 14 (3)(b)]
Quality points for selection of candidates

	Name of Examination/ Degree	Quality points
1.	High School	Percentage of Marks / 10
2.	Intermediate	Percentage of Marks x 2 / 10
3.	Graduation Degree	Percentage of Marks x 4 / 10
4.	Bachelor of Education (B.Ed.)/B.Ed. (Special Education)/B. Ed. (Special Education)	Percentage of Marks x 3 / 10

Note - If two or more candidates have equal quality points the name of the candidate who is senior in age shall be placed higher in the list. If two or more candidates have equal quality point; and age, the name of the candidate shall be placed in the list in English alphabetical order."

13. Thus, as per Rule 2(w), introduced by the 20th amendment in the rules, the ATRE was introduced, which this court finds was the basis of conducting the ATRE-2018. Further, as per the amended rules, it was envisaged to be qualifying in nature and also its marks was to be included in the final merit list prepared for the purposes of selection. Thus, a two-tier system for selection was introduced, wherein firstly the candidates were to undergo and pass ATRE and only those who passed the said ATRE exam, were made eligible to participate in the selection process and the number scored in the said ATRE was given due weightage for preparing the final merit list (60% of ATRE score) from which eventually the final selection was made by the state.

14. It is significant to note that although the Rules mandated that it was an essential qualification for appointment on the post of Assistant Teacher in basic schools, (i) to have passed Teachers Eligibility Test (hereinafter referred as the **"TET"**) and (ii) also to pass ATRE examination held for the selection in question by the Basic Education Board, U.P., Allahabad, however, the passing of Teachers Eligibility Test was merely qualifying in nature as the marks obtained in the said Test was not included at the time of preparation of the final list, whereas ATRE was not only qualifying but the marks obtained in the said examination was also included in the preparation of the final merit list.

15. On 15.03.2018, by 22nd Amendment, 1981 Rules were amended removing the requirement of passing of ATRE from the essential qualifications contained in Rule 8. However, the requirement was retained in Rule 14 dealing with the procedure for selection of Assistant Teachers. The relevant part of Rule 8(1) dealing with Academic Qualifications for "Assistant Master and Assistant Mistresses of Junior Basic Schools", after the 22nd amendment read as follows: -

"ii. (a) Bachelor's degree from a university established by law in India or a degree recognised by the Government equivalent thereto **together with** any other

training course recognized by the Government as equivalent thereto **together with** the training qualification consisting of a Basic Teacher's Certificate (BTC), two year BTC (Urdu) Vishisht BTC. Two-year Diploma in Education (Special Education) approved by the Rehabilitation Council of India or four year degree in Elementary Education (B.El.Ed.), two year Diploma in Elementary Education (by whatever name known) in accordance with the National Council of Teacher Education (Recognition, Norms and Procedure) Regulations, 2002 or any training qualifications to be added by National Council for Teacher Education for the recruitment of teachers in primary education.

And

Teacher eligibility test passed conducted by the Government or by the Government of India."

Thus, as far as ATRE is concerned, the same being an essential qualification was done away with the 22nd Amendment, although it continued to be a part of rule 14 dealing with the selection process.

16. On 24.01.2019, 23rd Amendment to 1981 Rules was published. By this Amendment, the essential qualifications in Rule 8(ii) were substituted as under: -

"(ii)(a) Bachelors degree from a University established by law in India or a degree recognized by the Government equivalent thereto **together with** any other training course recognised by the Government as equivalent thereto **together with** the training qualification consisting of a Basic Teacher's Certificate (BTC), two year BTC (Urdu) Vishisht BTC. Two year Diploma in Education (Special Education) approved by Rehabilitation council of India or four year Degree in Elementary Education (B.El.Ed.), two year Diploma in Elementary Education (by whatever name known) in accordance with the National Council of Teacher Education (Recognition, Norms and Procedure), Regulations 2002, Graduation with at least fifty percent marks and Bachelor of Education (B.Ed.), provided that the person so appointed as a teacher shall mandatorily undergo a six month Bridge Course in Elementary Education recognised by the NCTE, within two years of such appointment as primary teacher or any training qualifications to be added by National Council of Teacher Education for the recruitment of teachers in primary education.

And

Teacher eligibility test passed conducted by the Government or by the Government of India."

Thus, consequently, Graduates having 50 per cent or more marks and holding a degree of Bachelor of Education (B.Ed.) became eligible for posts of Assistant Master and Assistant Mistresses in Junior Basic Schools in the manner laid down in the Amendment. The concerned provisions in 1981 Rules dealing with eligibility of such candidates were given retrospective effect from 01.01.2018.

17. On 07.03.2019, 24th Amendment to 1981 Rules was published further amending Rule 8(ii) by adding sub-clause (aa) after sub-clause (a) to the following effect:-

"(aa) Graduation with at least fifty percent marks and Bachelor of Education (B.Ed.), provided that the person so appointed as a teacher shall mandatorily undergo a six month Bridge Course in Elementary Education recognised by the

NCTE, within two years of such appointment as primary teacher or any training qualifications to be added by National Council of Teacher Education for the recruitment of teacher in primary education, and teacher eligibility test passed conducted by the Government or by the Government of India."

This Amendment gave retrospective effect to sub clause (aa) of Rule 8(ii) from 28.06.2018.

18. On 14.06.2019, 25th Amendment to 1981 Rules was published. By this Amendment, Appendix I which was referable to Rule 14(3)(a) was amended as under:

"APPENDIX-I
Quality points and weightage for selection of candidates

1.	Name of Examination/ Degree	Quality points
2.	High School	Percentage of Marks in the examination x 10 100
3.	Intermediate	Percentage of Marks in the examination x 10 100
4.	Graduation Degree	Percentage of Marks in the examination x 10 100
5.	Training Qualification of Rule	Percentage of Marks in the examination x 10 100
6.	Assistant Teacher Recruitment Examination	Percentage of Marks in the examination x 60 100
7.	Weightage Teaching experiences as shikshamitra or/as teacher working as such in junior basic schools run by Basic Shiksha Parishad.	2.5 marks per completed teaching year, up to maximum 25 marks, whichever is less

Notes 1 - If two or more candidates have equal quality points, the name of the candidate who is senior in age shall be placed higher in the list.

2. If two or more candidates have equal quality points and age, the name of the candidate shall be placed in the list in English alphabetical order."

19. Appendix II, referable to Rule 14(3)(b) was omitted by the same Amendment. Resultantly, Appendix I as it now stands after said Amendment, is the only and common Appendix for both the sources referred to in Rule 14.

C. Reservation Law, Rules & Amendment

20. **The Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994** is the primary act as far as reservation to scheduled castes, tribes and Other Backward classes is concerned in the state of Uttar Pradesh. There had been amendment in the said Act in 2002 and 2007 and section 3(1) & 3(6) of the Act as on date is as follows:

Reservation in favour of Scheduled Castes, Scheduled Tribes, and Other Backward Classes. -(1) In public services and posts, there shall be reserved at the stage of direct recruitment, the following percentage of vacancies to which recruitment's are to be made in accordance with the roster referred to in sub-section (5) in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens, -

(a)	in the case of Scheduled Castes	Twenty-one per cent;
(b)	in the case of Scheduled Tribes	Two per cent;
(c)	in case of Other Backward Classes of citizens	Twenty-seven per cent:

Provided that the reservation under clause (c) shall not apply to the category of Other Backward Classes of citizens specified in Schedule II:

Provided further that reservation of vacancies for all categories of persons shall not exceed in any year of recruitment fifty per cent of the total vacancies of that year as also fifty per cent of the cadre strength of the service to which the recruitment is to be made;

(2) XXXX

(3) XXXX

(5) XXXX

(6) If a person belonging to any of the categories mentioned in subsection (1) gets selected on the basis of merit in an open competition with general candidates, he shall not be adjusted against the vacancies reserved for such category under sub-section (1).

(7) XXXX

21. There have bene various instructions & circulars issued by the Government from time to time. However, the instructions dated 25.3.1994 issued by State of Uttar Pradesh, relevant to the context on the subject of reservation for scheduled casts/scheduled tribes/other back groups in Uttar Pradesh Public Services, the portion of which is being quoted as herein below:-

"4. If any person belonging to reserved categories is selected on the basis of merits in open competition along with general category candidates, then he will not be adjusted towards reserved category, that is, he shall be deemed to have been adjusted against the unreserved vacancies. It shall be immaterial that he has availed any facility or relaxation (like relaxation in age limit) available to reserved category."

22. As far as the reservation to Assistant teachers is concerned, Rule 9 of the said U.P. Basic Education (Teachers) Service Rules is of specific significance in the context as it provides provision for Reservation in accordance with the Uttar Pradesh Act and the orders of the State Government in force at the time of recruitment, i.e. the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 as well as the various instruction & orders issued by the State.

D. The Asst. Teacher Recruitment Examination-2019 (ATRE- 2019)

23. The state vide Government Order dated 01.12.2018 notified the 2nd ATRE ("ATRE-2019", for short) for filling up 69,000 vacancies of Assistant Teachers. Paragraphs 1, 4.1 and 4.2 of the Annexure to the G.O. were:-

"In the schools managed by the Basic Education Department the teachers imparting education have major role in the development of girls and boys studying in the schools. It has been therefore decided that in order to fill the vacant seats of the teachers in the primary schools a state level Assistant Teachers Recruitment Examination will be conducted.

Only those candidates who are graduate, trained and those who have passed the Teachers Eligibility Test will be eligible to appear in the said examination.

... ...

4. The minimum qualification, age and residence for the application:-

(1) In Rule 8 of the Uttar Pradesh Basic Education (Teachers) Service (22nd Amendment) Rules, 2018 the described educational, training passed, Government of India or by the State Government the organized Teachers Eligibility Examination (Primary Level) passed candidates will be eligible for filing the application in the Assistant Teachers Recruitment Examination, 2019.

(2) By the National Teachers Education Council, New Delhi the Minimum Qualification with regard to the Class1 to Class-5 the issued Notification dated 23.08.2010, 29.07.2011, 12.11.2014 and 28.11.2014 (has been described in Appendix-2 in preamble 1.2) and on 28.06.2018 fixed eligible candidates are entitled to file application in the Assistant Teachers Recruitment Examination, 2019."

24. Further, an advertisement came to be issued by the state on 29.12.2018 notifying that ATRE-2019 would be conducted on 06.01.2019.

25. ATRE-2019 was conducted on 06.01.2019 without there being any specification of minimum qualifying marks. However, this court finds that on the very next day i.e on 07.01.2019, the Government fixed the minimum qualifying marks for ATRE-2019 to the following effect:

(a) For the candidates of General Category, candidates getting 97 marks of the total 150 meaning 65% and more will be considered passed for "Assistant Teacher Recruitment Exam 2019'

(b) For the candidates of all other Reserved Categories, candidates getting 90 marks of the total 150 meaning 60 percent and more will be considered passed for "Assistant Teacher Recruitment Exam 2019'

26. That state Government vide the said letter dated 07.01.2019, while fixing the minimum qualifying marks also mentioned that candidates qualified on the basis of aforesaid qualifying marks will be eligible to apply against the 69000 vacancies advertised and on qualifying merely on the basis of aforesaid minimum marks will not have any claim for recruitment because this exam is only one of the eligible standards for recruitment. Further, in case of more candidates qualifying than the prescribed number of posts (69000), of the total qualified candidates, eligible candidates will be selected on the basis of final merit list against the advertised posts in accordance with Appendix-I of twentieth Amendment of Uttar Pradesh Basic Shiksha (teachers) Rules, 1981. Thus, remaining candidates will automatically be out of the selection process and they will not have any claim based on the "Assistant Teacher Recruitment Exam 2019'.

27. However, it appears that the said fixing of the minimum qualifying marks was challenged by some Shiksha Mitra challenging the above said G.O dated 07.01.2019 before this High Court, wherein although a Single bench of this court passed an order staying operation of the said G.O, however the said order was set-aside by a Division Bench of this court. The said controversy was carried to the Hon'ble Supreme Court and the controversy was set at rest in a bunch of SLPs & writ petitions, the lead case being ***"Ram Sharan Maurya & Ors V/s State of U.P & Ors."*** (2020) SCC Online 939. The Hon'ble

Supreme Court taking note of the rights of Shiksha Mitra and benefits conferred upon them by an earlier decision of the Apex court in ***State of U.P and another V/s Anand Kumar Yadav and Others (2018) 13 SCC 560,*** affirmed the view taken by the Division Bench of this court and concluded that the fixation of cut off at 65-60%, even after the examination was over by the state government, cannot be held to be impressible. The Supreme Court held that the Government was well within its rights to fix such a cut off and as such dismissed the bunch of appeals filed by the Shiksha Mitra and others.

28. In the meantime, the result for ATRE-2019, was declared by the Examining Body on 12.05.2020, wherein about 4,31,466 number of candidates got registered themselves, out of which 4,09,530 candidates appeared in the Examination and about 1,46,060 candidates were declared successful.

29. After declaration of the said result, vide order dated 13.05.2020, the State Government further accorded the permission for completing the selection process for appointment on the 69000 posts of Assistant Teacher in terms of the relevant rules and government orders.

30. That, in light of the Government order dated 13.05.2020, the Basic Education Board, U.P., Allahabad published advertisement seeking preference of district for selection of 69,000 assistant teachers on the basis of the result of ATRE 2019, vide advertisement dated 16.05.2020.

31. That, it is relevant to mention here that the Basic Education Board, U.P., Allahabad had issued guidelines on 18.05.2020, which stipulated in para l(iii) that the laws relating to reservation as applicable in state of UP as well as the various Government orders having been issued by the Government in this regard would apply to the said selection list.

32. The Basic Education Board, U.P., Allahabad published the final select list on 01.06.2020 and the same was uploaded on the official website of the Respondents, on the basis of the quality points of the qualified candidates as per Appendix - I of the Rules, in which final districts were also allotted to the selected candidates as per the preference exercised by them.

33. The said final select list dated 01.06.2020 was mired with controversy and various writ petitions came to be filed interdicting the said list both by the open category candidates as well as the reserved category candidates, with a common ground of defective application of the reservation policy, including non-compliance of section 3(6) of the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 dealing with the migration of MRC candidates to the General Category.

34. During the pendency of the aforesaid Writ Petitions, two sub select-list of selected candidates, first for 31,277 candidates on dated 11.10.2020 and a second list for 36,590 candidates on dated 30.11.2020 was issued out of the total post of 69000, wherein 1133 post of Scheduled Tribe was left vacant due to non-availability of ST candidates. Further, out of the total selected candidates, some candidates could not join and as such, a third list of sub select-list dated 26.06.2021 was issued for absorbing 6696 candidates.

35. Notably, the Secretary, U.P Basic Education Board, Pryagraj in a Writ Petition No. 1389 (S/S) of 2021 (titled Jawahar Lal & Ors V/s State of Uttar Pradesh) field an Affidavit dated 11.07.2021 stating that the entire process of selection for recruitment of 69000 Assistant Teachers has been completed and there was no vacancy available on that time.

36. Further, two writ petitions being No. 52/2021(Vinod Kr. Singh Vs State of U.P) and No. 760/2021(Shivam Pandey& Ors. V/s State of U.P) came to be filed under Article 32 of the Constitution of India by candidates who had appeared & participated in the ATRE-2019, requesting the Hon'ble Apex Court to consider the vacancies arising out of the earlier section process i.e ATRE-2018 to be added to the present selection. However, the Hon'ble Apex Court refusing to accede to the request of the said petitioners dismissed their writ petitions vide an order dated 01.02.2021 and 29.06.2021 respectively.

37. Although, there were no vacant seats left as far as ATRE-2019 was concerned and moreover the Hon'ble Apex Court has refused to consider the vacancy arising out of the earlier recruitment process (i.e seats left vacant in ATRE-2018) to be included in the present ATRE-2019, the State held a press meeting and announced that affected candidates of reserved category would be recruited for healing of discrepancies made in the recruitment process of ATRE-2019, by the remaining vacancies of ATRE-2018. Thus, the State, without rectifying the mistake in the list of 69000, issued a fourth select list of 6800 candidates of reserved category. Thus, a second leg of controversy was stirred, wherein the said fourth select list dated 05.01.2022 came to be issued making provisions for appointment of about 6800 reserved category candidates. Obviously, this select list also came to be challenged before this court by both the open category candidates as well as the reserved category candidates, wherein the open category candidates contended that the select list could not have been issued for reserved category candidates only and in any case the same could not had been over and above the number of seats advertised for ATRE-2019 as it also effected their future prospect, whereas the reserved category candidates contended that the select list was not correct as there were approximately 18988 reserved category candidates, who deserved to be appointed upon the ouster of same number of unreserved candidates and the very issuance of select list of 6800 of reserved category candidates without ouster of same number of candidates from the open category was in violation of the Reservation Act, 1994 and the same amounts to acceptance of error by the government in implementing the reservation policy. Thus, they contended that, even after adjusting 6800 reserved category candidates, at least 13000 reserved category candidates still deserved to be considered for appointment as according to them the total number of vacant/ left-over seats were 27,737 from the earlier section process i.e ATRE-2018 and as such there are still vacant seats available for the post of Assistant Teachers.

38. Yet, some petitions came to be filed by reserved category candidates, who found place in the select list of 6800 dated 05.01.2022, seeking implementation of the said list by the Government.

E. Categories of the Writ Petitions

39. Broadly, the bunch of matters, as has been agreed upon by the Ld. Counsels during the hearing, can be classified into five categories:

(A) First is the category where the select list of selection of 69000 teachers has been challenged by candidates belonging to the "reserved category" on the ground that those reserved category candidates who belong to "Meritorious Reserved Category" (MRC), thereby entitling them to be placed in unreserved category have not been so placed but have been treated as belonging to reserved category in violation of Section 3(1) & Section 3(6) of the Reservation Act, 1994. Thus, a prayer has been made to quash the select list dated 01.06.2020, in so far as the same relates to selection of MRC in the reserved category and not in the open category. The following writ petitions would be placed under this category:

1.	WRIA/13156/2020	Mahendra Pal & ors.
2.	WRIA/9050/2020	Loha Singh Patel ors.
3.	WRIA/9767/2020	Bhaskar Singh & ors.
4.	WRIA/10122/2020	Vijay Pratap Yadav & ors
5.	WRIA/10461/2020	Susheel Kumar & ors.
6.	WRIA/11638/2020	Bhupendra Kumar & ors.
7.	WRIA/11876/2020	Ravi Shankar & ors.
8.	WRIA/12793/2020	Anamika Verma & ors.
9.	WRIA/18194/2020	Narendra Pratap Singh & ors.
10.	WRIA/19535/2020	Pradeep Kumar Maurya & Ors.
11.	WRIA/19554/2020	Nisha Ahmad Ansari & ors.
12.	WRIA/21706/2020	Dharmendra Kumar Vishwakarma & ors.
13.	WRIA/3012/2021	Anurag Yadav & ors.
14.	WRIA/4568/2021	Tasleem Bano & ors.
15.	WRIA/5323/2021	Everest Kumar & ors.
16.	WRIA/5863/2021	Surendra Kumar Yadav & ors.
17.	WRIA/6527/2021	Kuldeep Kumar Verma & ors.
18.	WRIA/7678/2021	Krishna Kumar & ors.
19.	WRIA/8090/2021	Anand Kumar Vishwakarma & ors.
20.	WRIA/8414/2021	Mulayam Singh & ors.
21.	WRIA/9501/2021	Savitri Patel & ors.
22.	WRIA/12510/2021	Kuldeep Kumar & ors.
23.	WRIA/12552/2021	Ashutosh Verma & anr.
24.	WRIA/12819/2021	Sunil Kumar Gupta & ors.
25.	WRIA/13587/2021	Rekha Singh
26.	WRIA/14913/2021	Ranjeet Yadav & ors.
27.	WRIA/15040/2021	Jas Veer & ors.
28.	WRIA/16083/2021	Devendra Pratap & anr.
29.	WRIA/16538/2021	Mohd. Mueen & ors.

30.	WRIA/17441/2021	Lalit Kumar & Ors.
31.	WRIA/17919/2021	Ravindra Pratap Yadav & ors.
32.	WRIA/18167/2021	Anil Kushwaha & ors.
33.	WRIA/18496/2021	Reena Yadav & ors.
34.	WRIA/18529/2021	Noorulhaq & ors.
35.	WRIA/18709/2021	Indrageet Yadav
36.	WRIA/19050/2021	Nuruddin Ahmad & ors.
37.	WRIA/19564/2021	Anil Kumar & ors.
38.	WRIA/19601/2021	Arvind Kumar Yadav
39.	WRIA/20205/2021	Pravesh Kumar & ors.
40.	WRIA/22652/2021	Abhishek Kumar & ors.
41.	WRIA/22711/2021	Satendra Kumar Kushwaha
42.	WRIA/22808/2021	Mohd Alam Ansari
43.	WRIA/23751/2021	Aniket Chand & ors.
44.	WRIA/224401/2021	Kanika Yadav
45.	WRIA/26382/2021	Ashish Kumar & ors.
46.	WRIA/26805/2021	Shiv Prasad Yadav & ors.
47.	WRIA/26944/2021	Sneh Lata & ors.
48.	WRIA/27478/2021	Rakesh Kumar Yadav & ors.
49.	WRIA/28828/2021	Aanchal Verma & ors.
50.	WRIA/29292/2021	Alam Husain & ors.
51.	WRIA/29600/2021	Harish Babu & ors.
52.	WRIA/29632/2021	Kumari Gayatri & ors.
53.	WRIA/29687/2021	Krishan Kumar & ors.
54.	WRIA/ 29834/2021	Raj Kumar Yadav & ors.
55.	WRIA/29976/2021	Satish Kumar & ors.
56.	WRIA/29992/2021	Ghanshyam Yadav & ors.
57.	WRIA/30657/2021	Rajendra Prasad & ors.
58.	WRIA/138/2022	Ramesh Kumar & 86 ors.
59.	WRIA/258/2022	Ran Vijay
60.	WRIA/355/2022	Amit Kumar & Anr.
61.	WRIA/391/2022	Arun Pratap Singh & 17 ors.
62.	WRIA/435/2022	Reeta
63.	WRIA/472/2022	Jitendra Kumar & 116 ors.
64.	WRIA/688/2022	Mahendra Prasad Maruya & 6 ors.
65.	WRIA/719/2022	Kamlesh Singh & 5 ors.
66.	WRIA/919/2022	Puja Verma & ors.
67.	WRIA/1549/2022	Rakesh Patel & ors.
68.	WRIA/1556/2022	Sandeep Kumar & 261

		ors.
69.	WRIA/3608/2022	Ravindra Kumar
70.	WRIA/3651/2022	Anil Kumar Gautam & ors.
71.	WRIA/4230/2022	Sunil Kumar & 10 ors.
72.	WRIA/4653/2022	Vivek Kumar Singh & ors.
73.	WRIA/5816/2022	Kamishnar Yaday
74.	WRIA/5965/2022	Ankit Kumar Mourya & ors.
75.	WRIA/6398/2022	Richa Yadav
76.	WRIA/6562/2022	Vimlendra Kumar Suman & 2 ors.
77.	WRIA/6969/2022	Archana Yadav & ors.
78.	WRIA/7003/2022	Shipra Kumari
79.	WRIA/7078/2022	Priyanka Chaudhary & 47 ors.
80.	WRIA/7204/2022	Digvuay Singh & 15 ors.
81.	WRIA/7234/2022	Sunil Kumar Singh
82.	WRIA/7258/2022	Rajesh Yadav &2 ors.
83.	WRIA/7307/2022	Himanshu Yadav & ors.
84.	WRIA/11261/2020	Rajesh Kumar And Ors.
85.	WRIA/7460/2022	Akanksha Pal
86.	WRIA/7652/2022	Smt.Kanchan Pushpakar And 3 Others
87.	WRIA/7681/2022	Veerendra
		Singh Niranjan And Ors.
88.	WRIA/7908/2022	Manoj Kumar And Others
89.	WRIA/7930/2022	Suneel Kumar Jaiswal
90.	WRIA/8177/2022	Anirudh Kumar
91.	WRIA/8224/2022	Rudra Deo Verma

(B) Second category of Writ petitions comprises of those petition which have been filed by "General Category" candidates asserting that the reserved category candidates who have got the benefit of reservation in selection (both ATRE-2019 & TET) cannot be migrated from the reserved list to the unreserved/ open category list and as such has prayed for quashing the select list dated 01.06.2020 to the extent it allowed migration of such reserved category candidates from their own reserved category to the open category. Further, prayer has been made to quash the order dated 05.01.2022, by virtue of which permission has been granted by the state for appointment of 6800 "reserved category candidates" only over and above the 69000 vacancies of assistant teachers advertised on 05.12.2018 & 16.05.2020. The following writ petitions would be placed under this category:

1.	WRIA/8142/2020	Rovin singh & ors.
2.	WRIA/9683/2020	Shweta Chauhan & ors.
3.	WRIA/22188/2020	Shashnk Tiwari & 19 ors.

4.	WRIA/973/2022	Mohini Tiwari & 29 ors.
5.	WRIA/978/2022	Raghvendra Prasad Mishra & 49 ors.
6.	WRIA/1126/2022	Karuna Shankar Shukla & ors.
7.	WRIA/1144/2022	Shivam Pandey & 34 ors.
8.	WRIA/1162/2022	Vinay Kumar Pandey 34 ors.
9.	WRIA/1561/2022	Ashish Bajpai & 3 ors.
10.	WRIA/1566/2022	Nitesh Kumar Singh &174 ors.
11.	WRIA/1592/2022	Arpit Kumar Bajpai & ors.
12.	WRIA/1594/2022	Alok Singh & ors.
13.	WRIA/1596/2022	Kunwar Dharmendra nath & ors.
14.	WRIA/1598/2022	Adarsh Srivastava & ors.
15.	WRIA/1599/2022	Ashutosh Barua & ors.
16.	WRIA/1600/2022	Anita Singh & ors.
17.	WRIA/1602/2022	Shiv Prakash Mishra & ors.
18.	WRIA/1604/2022	Ram Shankar & ors.
19.	WRIA/1694/2022	Anju Tripathi & 19 ors.
20.	WRIA/2324/2022	Asheesh Baranwal & 26 ors.
21.	WRIA/3005/2022	Jyoti Singh & 50 ors.
22.	WRIA/3660/2022	Vishnu
23.	WRIA/7995/2022	Ajay Kumar Mishra And 49 Others

(C) Third category of Writ petitions comprises of petitions where the select list of 6800 reserved category candidates, has been sought to be challenged on various grounds, including that there future prospect of participating in the ATRE examination was being curtailed by filling 6800 post over & above the advertised seats of 69000. These petitioners either were unsuccessful in the ATRE-2019 or had become eligible after the conduct of ATRE-2019 Examination. The following writ petitions would be placed under this category:

1.	WRIT-A-323/ 2022	Bharti Patel & 5 Others
2.	WRIT-A-1713/2022	Anil Kushwaha & 8 Others

(D) Fourth category of Writ petition comprises those petitions where the horizontal reservation relating to providing the earmarked 4% prescribed quota for physically handicapped category of candidates have not been considered, while preparing the merit list. Most of the writ petitions under this category have been withdrawn on the ground of becoming infrcutous. The issue raised in this writ petitions were neither argued during the time of hearing nor these writ petitions were pressed during hearing. However, these writ petitions are mentioned herein to complete the chain and are being disposed of by this common order. The following writ petitions are placed under this category:

1.	WRIT-A-13792	Ram Kishor & Ors.
2.	WRIT-A-15460/ 2020	Sandeep Kumar Pandey & Others

3.	WRIT-A-26041/2020	Shiva Singh Raghubanshi
4.	WRIT-A-9035/2020	Lakshmi Narayan Singh and Others
5.	WRIT-A-9616/2020	Km. Anita Gupta and 2 Ors.
6.	WRIA/10327/2020	Prem Kumar and Others
7.	WRIT-A-9782/2021	Ranjana Tripathi

(E) Fifth Category of writ petitions are those petitions, which has been filed by candidates forming part of the 6800 candidates as per the select list of 05.01.2022. They have prayed that although there named have been mentioned in the select list, but they had not been appointed in view of the pending litigation, which is adversely affecting their service prospect and benefits. The following writ petitions would be placed under this category:

1.	WRIT-A-7576/ 2022	Krisha Chandra & Ors.

F. Interim orders

40. Various interim orders came to passed during the pendency of these Writ Petitions, including a stay to the select list of 6800 dated 05.01.2022. This court vide an order dated 25.08.2020 passed in Writ-A-13156 of 2020 (Mahendra Pal & Ors V/s State of Uttar Pradesh & Ors.), also the lead matter of the first category has passed the following order:

".....In these circumstances, it is directed that a master counter affidavit in this case shall be filed and while filing the counter affidavit in this case, a copy of the same shall be furnished to the learned counsel representing the other similar writ petitions. There will be no requirement of separate counter affidavit to be filed on behalf of the respondents in other matters and counter affidavit which may be filed in this case shall be treated to be counter affidavit in other similar matters as well. ....."

41. Thus, it was directed that one counter-affidavit be filed in the aforesaid lead matter, which was to be construed as a counter of the respondent in all the bunch of matters.

42. Further, this court in the same Writ Petition as mentioned supra vide an order dated 17.03.2021 has observed as follows:

".....The contention Shri Upendra Nath Mishra, learned Senior Counsel appearing for the petitioners is that 28,000/- reserved category candidates, who had secured more than 67.11 marks which was the cut off for the general category, were not adjusted in the general category select list but were maintained in the reserved list contrary to Section 3(6) of the Reservation Act, 1994 and the law laid down by the Supreme Court by which a reserved category candidate, if otherwise meritorious and entitled to be included in the general select list, should not be treated as a reserved category candidate. Shri Mishra relies upon a chart prepared by him a copy of which is annexed as Annexure No. SA-7 at Page 63 of the supplementary affidavit dated 27.01.2021 in this regard.

On 03.02.2021 this Court had sought a response from the State Authorities in this regard which has not been filed as yet.

Let the concerned official opposite parties file their response positively within a period of one week....."

43. Apparently, the state shied away from filing specific responses to the queries recorded by this court in its order from time to time and even during the arguments these issues remained unexplained. As a matter of fact, besides the statement that the reservation policy has been applied on the opposite direction and giving a data as to how many MRC candidates have been absorbed in the unreserved category and reserved category, there had been no data as to who and in what manner these reserved category candidates were construed to be MRC, so as to allow them to migrate into the open category.

44. Further, an Interim order, which has been passed in one of the bunch matters, being Writ -A- No. 323 of 2022, lead matter in third category of matters, requires special mentions. This court, vide an order dated 27.01.2022, observed as follows:

".....Today, Sri Raghavendra Singh, learned Advocate General has put in appearance on behalf of the official opposite parties and informed the Court that certain reserved category candidates had filed petitions before this Court, some of which are Writ -A. No.13156 of 2020 and Writ -A No.8142 of 2020 wherein certain orders were passed by this Court based on which, the State has revisited the implementation of reservation policy as also the provisions of the Reservation Act, 1994 and the law on the subject, according to which, such reserved category candidates who are otherwise meritorious, meaning thereby, they have secured marks higher than the cut-off for the general category are entitled to be considered and selected for unreserved posts. Accordingly, the State Government after revisiting the matter has taken a decision to issue a fresh select list containing names of 6800 candidates who are those reserved category persons who have secured higher marks than the cut-off for the unreserved category and as this exercise is the result of orders passed by this very Court, therefore, the Court should not interfere in the matter at this stage.

Learned Advocate General also informs the Court that, in fact, entire process of selection is informed by the State officials to the N.I.C. and it is the latter which prepares the select list.

Learned Advocate General also submitted that as regards the order of Hon'ble the Supreme Court quoted in the order of this Court dated 25.01.2022, the same is not applicable in the facts of this case, as already clarified hereinabove.

However, on being asked as to how if 69000 posts have already been filled up as noticed in the earlier order, these 6800 selectees would be appointed, against which post they would be appointed, and whether against one post two persons can work and get salary, the learned Advocate General could not satisfy the Court on this count but stated that State has not taken any decision to oust the already appointed candidates who may have secured lesser marks than these 6800 candidates.

It is nobody's case certainly not that of the State that before issuing the list of 6800 additional selected candidates, as referred hereinabove, an equivalent number of candidates who have been appointed earlier have been disengaged in accordance with law.

Sri Upendra Nath Mishra, learned Senior Counsel for opposite party no.7 has invited attention of the Court to the orders passed by this Court which are annexed at page no.144-145 of the writ petition which have been referred by the learned Advocate General. He says that those writ petitions

should be heard on priority basis and he also says that additional 6800 selectees are, in fact, entitled to be appointed and those who are not entitled but have been appointed are liable to be ousted. He agrees to the extent that persons cannot be appointed in excess of the 69000 vacancies which were advertised.

Sri Rakesh Kumar Chaudhary, learned counsel who has put in appearance on behalf of opposite party no.10 adopts the arguments of Sri Upendra Nath Mishra. In addition to it, he says that physically handicapped candidates who have also filed writ petitions before this Court, leading writ petition is Writ-A. No.13792 of 2020 wherein certain orders have been passed by this Court for giving the benefit of the quota prescribed for such persons and therefore, inclusion of these physically handicapped persons in the impugned select list of 6800 persons is in accordance with the orders of this Court and need not to be interfered with, certainly not at the interim stage. However, on being asked as to whether the opposite party no.10 on whose behalf he appears is a physically handicapped, he submitted that no, he was not physically handicapped but he is the counsel in Writ-A. No.13792 of 2020 and connected matters, therefore, he has made the aforesaid statement.

At this stage, Sri Seth, learned Senior Advocate appearing for the petitioners further submitted that if 69000 vacancies of Assistant Teachers were advertised and all of them have been filled up as admitted by the Principal Secretary to the Department in the affidavit filed before this Court as already noticed in the earlier order dated 25.01.2022, then, assuming for a moment that the State was entitled to revisit the selection process and based on such exercise it found that there were 6800 candidates who had a better right of being selected and appointed based on the marks obtained by them, then, at best the select list already published ought to have been modified and an equivalent number of candidates who have secured lesser marks than those 6800 candidates should have been ousted from it in accordance with law and if they have already been appointed, this should have been done after due and proper notice to them, and these 6800 candidates should have been substituted in their place but without undertaking such exercise the impugned action of the State to induct 6800 additional selectees leads to a situation where the 69000 vacancies would be exceeded which is apparently illegal and prejudices the rights of the petitioners to be considered against equivalent number of vacancies (6800) which would otherwise be re-advertised and the petitioner nos.1 to 5 would have a right of being considered for selection against such vacancies irrespective of the fact that they have not succeeded in the earlier selection. The petitioner no.6 in fact has not appeared in the selection ARTE 2019 and is entitled to be considered against such vacancies as and when they are advertised.

As regards Sri Chaudhary's contention that the petitioners do not have locus to challenge the impugned action, the petitioner nos.1 to 5 who belong to reserved category had appeared in the selection and the contention of Sri Sudeep Seth, learned Senior Advocate as already recorded in the earlier order is that any vacancy other than 69000 will have to be re-advertised and fresh selection will have to be held in this regard in which the petitioner nos.1 to 5, even if, they have not succeeded in the earlier selection, are entitled to appear, therefore, filling up of any post in excess of 69000, without advertising these excess 6800 posts apart from being violative of law declared by

Hon'ble the Supreme Court and the constitutional provisions, encroaches on the rights of the petitioner nos.1 to 6 to appear in such selection. The petitioner no.6 did not appear in the selection in question and therefore, he in any case, will have a right to appear in future selection against these excess vacancies. Prima facie, at this stage, Sri Seth, learned Senior Advocate appears to be correct.

Considering the facts of the case as already noticed in the earlier order dated 25.01.2022 which need not be reiterated and which, at least at this stage, have not been rebutted satisfactorily, especially the order of Hon'ble the Supreme Court dismissing a writ petition wherein it was the case that vacancies in excess of 69000 which were not advertised on 01.12.2018 (A.T.R.E.-2019) should be allowed to be filled up on the basis of the said selection advertised on 01.12.2018, as it has been dismissed with specific observation that posts in excess of those advertised cannot be allowed to be filled up based on the said selection, a piquant situation has been created by the State by the impugned action, prima facie....."

45. This court after recording the other interim orders as referred by the Advocate General, observed & directed vide the said order dated 27.01.2022 in the following terms:

".....But the Court had only asked the State to file counter affidavit in the matter and the State was required to explain as to how the reservation policy has been implemented. The appropriate course for the State officials in these circumstances was to comply the said orders, revisit the matter, find out the facts and errors, if any, and on noticing them, to place the same before the Court either seeking its guidance or seeking permission to rectify the select list which had already been implemented or to modify the select list and disengage the persons already appointed, if they were erroneously appointed, as per law, but, instead of doing it, the State officials, for reasons best known to them, have hurried to issue a select list of 6800 persons in addition to the 69000 appointments already made by them without disengaging or cancelling the appointment of 6800 candidates already appointed if they had secured lesser marks. Considering the fact that only 69000 posts were advertised, candidates in excess of 69000 cannot be appointed and they already having been appointed, one fails to understand as to what purpose the issuance of select list of 6800 persons, who may otherwise have been entitled to selection and appointment, seeks to achieve in the factual scenario created by the State, as, in no circumstances, persons can be appointed in excess of 69000 which were advertised.

Now, it is for the State to decide what it has to do in the matter as it is the State which has created this situation but one thing is very clear that persons beyond 69000 vacancies cannot be appointed against such posts.

Considering the discussion made hereinabove, it is provided that in no circumstances, persons in excess of the 69000 vacancies which were advertised on 01.12.2018 (A.T.R.E 2019), shall be appointed and unadvertised vacancies shall not be filled-up without being advertised and selection being held in respect thereof. It is ordered accordingly.

Let Dasti notice be issued for service upon opposite party nos.6 and 8. In addition to it, considering the large number of selectees which are 6800 and the complications which may be involved in getting them impleaded individually and

having notices served upon them, especially as at this stage, they are only selectees and have not been appointed, the ends of justice would suffice if a publication is made in two daily newspaper, one of English and other of Hindi, having vide circulation in the state, namely, 'the Times of India' and 'Dainik Jagaran' notifying the selectees about the pendency of this petition so that they may, if they so choose, join in these proceedings, otherwise, persons have been impleaded in representative capacity. The Senior Registrar shall facilitate adequate steps being taken for publication in the newspaper as aforesaid.

Pleadings be exchanged between the parties.

List this case along with other matters i.e. Writ - A. No.13156 of 2020, Writ -A No.8142 of 2020 and connected matters referred hereinabove including Writ-A. No.13792 of 2020 and connected matters wherein pleadings are said to be complete....."

46. Further, this court finds that the aforesaid interim order dated 27.01.2022 was a subject matter of challenge in Special Appeal No. 86 of 2022 (Rahul Kumar & Ors. V/s State of U.P), wherein a Division bench of this court vide an order dated 15.03.2022 while directing for early disposal of the present matters has refused to entertain the said interim order passed by this court.

47. This court observes that pursuant to the aforesaid publication in Newspaper by the respondent Impleadment Application for 1158 candidates came to be filed in the third category of petition.

G. Contention of the Parties

48. Since, common issue has been raised in the present bunch of matters. This court with the consent of the Ld. Counsels appearing for the parties is taking up all the writ petitions and the same is being decided by this common order. However, the facts of the lead matter being Mahendra Pal & 13 others is being mentioned herein for the sake of clarity. The facts of the said writ petition as has been argued by the Ld. Counsel for the petitioners lie in a narrow compass, in as much as it has been claimed that except of petitioner No. 7 and 9, all the other petitioners are graduate degree holders having requisite educational qualification of B.Ed, whereas petitioner No. 7 & 9 are teacher with Basic Teachers Training (BTC). All the petitioners claim to have passed the U.P Teachers Eligibility Test (TET) conducted by the Government. All the petitioners belong to the reserved category of "Other Backward Classes", except petitioner No.11, who belongs to the reserved category of "Schedule caste". The petitioners also claim to have successfully qualified the Assistant Teachers Recruitment examination-2019 and as such according to them they possess the minimum requisite academic qualification for appointment on the post of Assistant Teachers prescribed under the U.P Basic education (Teachers) service Rules, 1981.

49. According to the petitioner, the state Government took a decision on 01.12.2018 to fill up 69000 vacancies of Assistant Teacher in the Junior Basic Schools of Uttar Pradesh, which was followed by an advertisement dated 05.12.2018 for conducting the ATRE-2019 on 06.01.2019, which was participated by them. Subsequently, on 07.01.2019, the respondent authorities issued a G.O for fixing the qualifying marks of the ATRE-2019 as 65% for open category and 60%

for reserved category. The said G.O fixing the qualifying marks was interdicted before a Single Bench of this court, which quashed the said G.O and directed to conduct the ATRE-2019 in terms of the qualifying marks of ATRE-2018, however in an intra-court Appeal, a division Bench of this Court set-aside the order of the Single Judge and upheld the G.O dated 07.01.2019. It has been further contended by the petitioners that several SLPs came to be filed challenging the order of the Division bench before the Hon'ble Supreme Court, wherein in one of the SLP's being "Ram Sharan Maurya Vs State of U.P & Ors." (SLP (Civil) Diary No. 11198 of 2020), the Supreme Court passed an interim order dated 21.05.2020, directing that the "Shiksha Mitra" who were presently holding on their posts as Assistant teachers would not be disturbed. Further, in another connected matter being "Subedar Singh & Ors Vs the State of Uttar Pradesh" (SLP (Civil) No. 6687 of 2020), the Hon'ble Apex Court vide an order dated 09.06.2020, directed the State Government to keep 37,339 post vacant, which was equivalent to the number of TET qualified Shiksha Mitra's and continue to fill the remaining vacancies.

50. It is argued that ATRE-2019 results were declared on 12.05.2020, wherein a total of 1,46,060 candidates were declared qualified. The petitioners claim to have obtained the minimum qualifying marks in the ATRE-2019 and as such pursuant to the notice dated 16.05.2020 issued by the secretary Basic education notifying the district-wise vacancies and guidelines dated 18.05.2020 issued by the Secretary Basic education Board relating to inviting the application form, the petitioners filled/applied online application form in the prescribed format for appointment to the post of Assistant teachers and legitimately expected to be selected in the said recruitment process. A reference has been made by the petitioners to a dispute relating to incorrect evaluation in the ATRE-2019, wherein certain challenges were made to the answer key published by the respondent- Authority on 08.05.2020. It has been submitted that in the lead writ petition No. 8056 of 2020(Rishabh Mishra and Ors V/s State of U.P & Ors.) an interim order dated 03.06.2020 was passed by a Single Judge, wherein the answer key dated 08.05.2020 was stayed, however a Division bench of this court vide an order dated 12.06.2020 passed in Special Appeal No. 154 OF 2020 (Examination Regulatory Authority, Allahabad and Others V/s Rishab Mishra and Ors.) stayed the interim order passed by the Single Judge and the respondents were granted liberty to continue with the process of selection to the post of Assistant Teachers.

51. The case of the petitioners as put in the nut shell is that the respondent-authority without declaring the category wise cut-off marks, issued a tentative select list of 67,867 candidates for appointment on 01.06.2020. According to the petitioners, the select list merely contains the names, roll numbers, other personal details of the candidates and the district in which such candidates have been selected and does not mentions the details of the merit of the selected candidates i.e the marks obtained by such candidates who were selected, vis-à-vis the final category wise cut-off marks, on the basis of which such selection were made.

52. It is the contention of the petitioners that being bereft of adequate information in the select list, they ventured

into conducting of some kind of self-inquiries and research, wherein they found more than 50% of the vacancies have been allotted to candidates falling in the unreserved category (including the MRC candidates) and as such the same falls foul of the scheme/quota of reservation as provided under section 3(1) and section 3(6) of the Reservation Act of 1994.

53. The Ld. Counsel for the petitioners have succinctly explained the said proposition by quoting section 3(6) of the Reservation Act, 1994, which says that if a person belonging to any of the reserved categories gets selected based on merit in an open competition with general candidates, the said reserved category candidate shall not be adjusted against the vacancies reserved for such category but they will be adjusted in the general category. Thus, it has been argued by the petitioners that by inclusion of some Meritorious Reserved Category (MRC) candidates in general category on the basis of their merit, the total number of reserved category candidates finally selected in a selection can be more than 50% of the total seats, but in no event the number of general category candidates can exceed 50% of the total seats and in case the number of general category candidates selected exceeds 50% of the total seats, it simply means that the selection of reserved candidates have been made on far less than the quota prescribed under section 3(1) of the Reservation Act and the said process is in the teeth of section 3(1) and section 3(6) of the Reservation Act, 1994.

54. The Ld. Counsel for the petitioners have also referred to government order dated 25.03.1994 and Government order dated 30.01.2015, which were issued by the State clarifying the provisions of applicability of section 3(6) of the Reservation Act, 1994 to buttress and drive his point home that when section 3(6) of the Reservation Act, 1994, is not applied with full rigour in any selection then the quota of reservation as provided under section 3(1) of the Act also automatically is violated and the entire reservation policy goes hay-wire as the beneficial provisions meant for those reserved category candidates who are unable to compete in the open competition, is rendered otiose. Thus, according to him, the reserved category candidates who need the support of reservation have been denied the same on account of faulty and illogical implementation of the reservation policy by the respondent authorities in as much as they have selected MRC candidates selected on the basis of their merit equal to or more than the minimum numbers scored by the general category candidates, have been arbitrarily adjusted against the reserved quota. Thus, as a result of the said action of the authorities an equal number of reserved vacancies have been illegally exhausted by the MRC candidates who ought to have been adjusted against the unreserved vacancies, which consequently had the effect of keeping the eligible reserved category candidates placed at the bottom like the petitioners out of the consideration zone for selection to the post of Asst. Teachers.

55. It is the further case of the petitioners that the respondents while presuming that these MRC candidates after being adjusted on the reserved quota, have in fact vacated their respective places in the general category, which was filled by excess candidates from the general category. Thus, it has been submitted by them that less deserving candidates of the unreserved/ general category have been got

selected on way beyond the 50% unreserved seats and more deserving reserved candidates like the petitioners were deprived of their fair consideration for appointment against the reserved seats. The petitioners, proceeding further, have given an instance of selection made in the district of Shahjahanpur, wherein as per the petitioners, out of total 1450 seats, a maximum of 725 seats ought to had been filled up by the unreserved/general candidates and the remaining 725 seats out to be filled by candidates belonging from the reserved category, however it has been pointed by them that in reality about 880 seats have bene filled from the unreserved/general candidates, including the MRC candidates and as such substantial number of seats belonging to the reserved category have been eaten up by the unreserved/ general category candidates.

56. The next point raised by the petitioners is relating to the reservation policy implemented by the authorities in allocating the districts of preference to the MRC Candidates. According to the petitioners, while allocating the districts of preference to these MRC candidates, the authorities have "substantively" treated them as "reserved category candidate", whereas according to the various judgments of this court as well as the Hon'ble Apex Court, MRC candidates have to be only treated "notionally" as reserve category candidates for the said purpose for allotment of districts. Thus, it has been argued that the respondent authorities have arbitrarily presumed that the unreserved seats left over by the MRC candidates were available for even more selection of general candidates, which consequently led to excess selection of general category candidates in the left-over seats of the MRC, who in turn were illegally adjusted against reserved quota vacancies, instead of unreserved vacancies. Thus, it has been submitted by the petitioners that on account of this excess selection of general candidates, the reserved candidates like the petitioners were denied selection against the reserved seats, though it was their legal right of fair consideration to be selected against the reserved seats u/s 3(1) and section 3(6) of the Reservation Act, 1994.

57. Thus, the select list of 01.06.2020 is sought to be challenged to the extent it violates the provisions contained in section 3 (6) of the Reservation Act of 1994, because according to the petitioners, although as per section 3 (6) of Reservation Act of 1994, an MRC candidate is required to be adjusted on the unreserved vacancies, but in reality and in fact the respondent authorities have adjusted the MRC candidate on the reserved vacancies on the pretext of allotting him the district of his choice and similarly by not counting the MRC candidates in the unreserved category, the respondents have reduced the actual reservation quota of OBC, SC and ST, which is violative of the section 3(1) of the Reservation Act of 1994, which is in contravention of article 14 and 16(4) of the Constitution of India.

58. Similar Writ petitions came to be filed as mentioned herein above and this court vide an order dated 25.08.2020 passed in the lead matter directed that a master counter affidavit be filed in the said lead matter and a copy of the same be furnished to the learned counsel representing the other similar writ petitions and there would be no requirement of separate counter affidavit to be filed on behalf of the respondents in other matters and counter affidavit filed in the lead case would be treated to be counter affidavit in

other similar matters as well. Further, this court vide an order dated 7th of December,2020, while issuing notice to the affected persons directed that, in the meantime, appointments made on the post of Assistant Teacher shall be subject to the final decision of these petitions.

59. The counter Affidavit came to be filed by the respondent authorities on 19.01.2021, wherein inter-alia they sought dismissal of the writ petition on various grounds including that the writ petitions have been field merely on apprehension and there has been no document filed along with the writ petition substantiating their apprehension. According to them the procedure for reservation has been properly followed and the select list dated 01.06.2020 has been prepared strictly as per the quality point marks obtained by the candidates and the reservation was made based on entry made by the candidates in the application form by a software process developed by NIC and it was a mechanical process, wherein no interference of any authority was possible. The respondent also raised a technical point of the writ petition being not maintainable as far as quashing the select list of 01.06.2020 was concerned as it failed to implead each & every selected candidate. According to the respondents, 67,867 candidates have been selected against various quotas against the total advertised post of 69000 and about 1133 post of schedule tribe was still vacant due to non-availability of requisite candidates.

60. The respondents also gave a break-up of district wise appointment of Asst. Teachers and stated that against the 34,598 posts for unreserved category, 19805 candidates of General Category, 13007 candidates of the OBC(MRC), 1753 candidates of the SC (MRC) and 24 candidates of Scheduled Tribes have been selected. It has been contended by the respondent-Authority that as per section 3(1) of the Reservation Act, 27% seats were reserved for OBC and as per the select list, 18598 candidates belong to OBC have been selected in the said OBC quota, besides 13007 candidates of OBC(MRC) have been selected in the unreserved category. According to the respondent, in this manner about 31605 candidates have been selected belonging to the OBC category and as such there was no anomaly in the select list.

61. The respondents, also in order to drive home their point also mentioned the cut-off marks of various category as follows:

Unserved Category	67.11
Other Backward Class (OBC)	66.73
Schedules Caste (SC)	61.01

and contended that in the selection process of 69000 Assistant Teachers Recruitment, the procedure prescribed under U.P Public Service (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994 has been strictly followed and the select list had been prepared strictly as per the quality point marks obtained by the candidates and there was no violation of merit list for any candidates. Thus, it was contended that the writ petitions was devoid of any merit and liable to be dismissed.

62. The petitioners in their rejoinder, while reiterating their contention as made by them in their writ petitions, also

contended by giving the following chart, which was prepared on the basis of information provided by the respondent authorities in their counter-affidavit:

Category	Total Seats	Cut-off	Bifurcation of selected total candidates (Total-67,867)
Unreserved (UR)	34,589	67.11	Unreserved (UR) 19805 (GEN) 13007(OBC-MRC)) 1753(SC- MRC) 24(ST- MRC)
OBC	18598	66.73	18598
SC	14459	61.01	14459
ST		56.09	221 (1133 seats left vacant due to non-availability of candidates)

The petitioners referring to the aforesaid chart submitted that as per the own information of the respondent authority, they have considered only 14784 candidates as MRC candidates. According to the petitioner, after the receipt of the counter-affidavit, they got prepared yet another chart by providing category of the candidates as well as the marks obtained by them as provided in the website of Shiksha Parishad and were astonished to find that at least 7149 additional/extra general category candidates have been named/selected in the select list, as their name appears after serial number 34589 i.e the total number of seats in the general quota, which they say could not had happened, had the respondent applied the reservation policy in its true light and spirit.

63. The petitioner, further submits that from the data available from the website, they have been also able to collate a data of all the reserved category candidates who were able to obtain more marks than 67.11 i.e cut-off mark of the un-reserved category and thus, the chart would further depict as follows:

Category	Reserved Candidates having more than or equal to 67.11 marks i.e MRC (A)	MRC candidates actually selected as MRC in UR category(B)	MRC candidates who have been illegally treated as reserved category candidates (A minus B)
OBC	28,978	13,007	15,971
SC	4,742	1,753	2,989
ST	52	24	28
Total	33,772	14,784	18,988

Referring to the chart, it has been contended by the petitioners that a total of 18,988 reserved category candidates having obtained more than the cut off marks of general category ought to have been shifted to the unreserved category, whereas the same had been adjusted in the reserved category in gross violation of section 3(6) of the Reservation Act, 1994. According to them, since a total number of 28,978 OBC candidates had obtained marks more than general category, whereas only 13007 candidates have been treated as MRC. Thus, the very fact of adjusting 15971 of such MRC candidates in the OBC quota seats is not only in the teeth of section 3(6) of the Reservation Act, 1994, but has also reduced the total availability of OBC quota seats from 18598 to mere 2627 due to illegal adjustment of 15971 OBC-MRC candidates in OBC quota seats. Thus, it has been claimed that against 27% of OBC quota seats, only 3.80% quota seats has been actually made available for OBC candidates. Similarly, for SC quota seats,

against the statutory availability of 21% seats, only 16.62% quota seats has been actually made available for SC candidates. On similar lines, it had been contended that as far as ST quota seats were concerned, the total vacant seats would had been 1161 instead of 1133, had the 28 ST-MRC candidates been given their rightful due and adjusted in the General category seats.

64. Thus, it has been submitted by the petitioners in the rejoinder that in the teeth of section 3(1) of the Reservation Act, 1994, the quota of reservation has been drastically reduced i.e from 27% to 3.80% in case of OBC category and from 21% to about 16.62% in the case of SC category and as such the select list is in violation of the provisions of section 3(1) of the Reservation Act, 1994, Rule 9 of the U.P Basic education (teachers) service Rules, 1981 and Article 14 and 16(4) of the constitution of India. It is the case of the petitioners that had the respondent-Authority treated all the aforesaid 33,772 MRC candidates in the General Category and not had shifted 18,988 candidates to the reserved category, then additional reserved category candidates like the petitioners would had been selected for the post of Assistant teachers.

65. The Ld. Counsel for the petitioners while trying to vindicate his point that reservation policy has not been implemented in its right perspective also argued that probably the entire mistake has been committed by the Respondent's due to misinterpretation of legal provisions of section 3(1) and 3(6) of the Reservation Act of 1994, wherein while allocating the district of preference to some of the MRC candidates, the respondent authorities have "substantively' treated them as "reserved category candidate' only (instead of treating them as such notionally) whereas, according to the various pronouncements of the Hon'ble Apex Court and also of this Hon'ble Court in the *Shikha Singh Case* (Supra), MRC candidates have to be only treated "notionally' as reserve category candidates for the purpose of allotment of districts and thereafter would substantively be treated as General Category. It is the contention of the petitioner that the Single Judge in the said Judgment had directed the respondents *"to carry on the 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.'*

66. It is the contention of the petitioners that after committing a wrong in the allotment of districts to MRC candidates, the respondent authorities have arbitrarily presumed that the unreserved seats left over by the MRC candidates are available for even more selection of general candidates and consequently excess unreserved selection were made precisely to the extent of MRC candidates who were illegally adjusted against reserved quota vacancies, instead of unreserved vacancies. On account of this excess selection of general category candidates, the reserved candidates like the petitioners were denied selection against the reserved seats, though it is their legal right of fair consideration of selection against reserved seats u/s 3(1) and 3(6) of the reservation Act, which has been blatantly violated by the respondent authorities.

67. During the hearing of the present bunch of matters, the petitioners filed a supplementary Affidavit dated 27.01.2021 contending therein that the state government expedited the process of filling up of vacancies from the select list dated

01.06.2020 by issuing order dated 24.09.2020, wherein a direction was issued to fill up 31,661 vacancies in the 1st stage by issuing appointment letters to the selected candidates drawn from the select list dated 01.06.2020. Thus, a sub-select list dated 11.10.2020 was issued by the state, which consisted a list of 31,277 candidates and yet again the vigilant petitioners made inquiries to check as to whether any general category candidate having less than 69.25 quality point marks has been selected on the basis of vertical reservation or not. The score 69.25 quality point marks being the marks obtained by the 34589th candidate, which technically was the last seat meant for the unreserved category. Admittedly, the petitioners found out that in the 31,277 list, the last general candidate who has been given appointment on the basis of vertical reservation had obtained 71.2 quality point marks.

68. It is the contention of the petitioners that although the Apex Court vide its judgment dated 18.11.2020 (Ram Sharan Maurya case) had given liberty to the state government to continue with the selection process in pursuance of the 69000 advertised vacancies, however the said liberty does not in any way give liberty to the state government to make selection in violation of section 3(1) and section3 (6) of the Reservation Act of 1994 and therefore the state government cannot in any away be permitted to take shelter of the judgment dated 18.11.2020 in order to encroach upon the reserved category seats by treating some 18988 MRC category candidate in the reserved category on the pretext of giving them their district of choice.

69. Vide an order dated 23.07.2021, the U.P Basic education Board and its secretary were directed to issue a circular and publish in the daily newspaper intimating those candidates who have been selected against the vacancies reserved in the OBC, SC and other categories, who may have concern to defect themselves as per the provisions of the Rules of the Court.

70. That a counter-affidavit/reply dated 23.07.2021 was filed by the respondents in response to the supplementary affidavit filed by the petitioners. According to the respondent, the selection was being carried in compliance of the judgment and order dated 09.06.2020 passed by the Apex Court in the case of Subedar Singh & Ors Vs State of U.P, SLP No. 6687/2020, pursuant to which GO dated 24.09.2020 and GO dated 06.10.2020 was issued for conducting the counselling for selection of the Asst. Teachers. In the first phase a total of 31277 posts were filled up, thereafter vide GO order dated 24.11.2020 filling up for remaining vacancies of 36590 was initiated. Thus, according to them counselling has been carried out for 67867 successful candidates in compliance of the Hon'ble Apex Court Judgment and vide GO dated 17.5.2021 the third round of counselling has been conducted for remaining vacant posts in the 69000 recruitments as per the information furnished by the respective districts, after following the relevant rules and GO related to reservation through the software developed by NIC.

71. In the said reply, the respondent mentioned that the reservation prescribed in the UP Public service (Scheduled Reservation for Scheduled castes, Scheduled Tribes and Other Backward Classes) Act 1994 and in the Government Order dated 28th August, 2015, 21% for Scheduled Castes, 2% for Scheduled Tribes

and 27% for other backward classes has been given in the present selection. It was also mentioned that 4% horizontal reservation for handicapped as per the GO dated 25.09.2018, 2% horizontal reservation for dependent of freedom fighter, 5% horizontal reservation for ex-servicemen and 20% horizontal reservation for women has been provided in the respective categories as per the relevant Act and GO dated 25.09.2018 and 21.06.2021. The respondent narrated their own version relating to the distribution of seats as per the district allotment list of 67,867 candidate published on 01.06.2020, which can be depicted in the form of chart as follows:

Category	Total Seats	Bifurcation of selected total candidates (Total-67,867) Unreserved (UR)
Unreserved (UR)	34,589	19805 (GEN) | 7159 (Horizontal Reservation under special reserved category) 12,646 (General Category) 13007(OBC- MRC)) 1753(SC- MRC) 24(ST- MRC)
OBC	18598	18598 | 8418 (Horizontal Reservation under special reserved category) 10,180 (OBC candidates for Vertical Reservation)
SC	14459	14459 | 960 (Horizontal Reservation under special reserved category) 13499 (SC candidates for Vertical Reservation)
ST	1354	245 | 10 (Horizontal Reservation under special reserved category) 211 (ST candidates for Vertical Reservation)

72. Thus, it was claimed by the respondent authorities that the entire process has been carried out after following the provisions with regard to reservation policy and in compliance of the judgment of the Hon'ble Apex Court and according to them a total of 48,062 candidates belonging to the reserved category have been selected either through MRC, special reservation quota, vertical reservation quota against the total seat of 67,867. Thus, they say that entire selection process was transparent and commensurate to the provisions of UP Public service (Scheduled Reservation for Scheduled castes, Scheduled Tribes and Other Backward Classes) Act 1994 and the U.P Basic Teachers Rules, 1981.

73. In yet another rejoinder, the petitioners have refuted the stand of the respondent and according to them the counter-affidavit filed by the authority was misleading as several General category candidates, not having any special reservation in the form of horizontal reservation, have been selected beyond serial no. 34589. The petitioners have named atleast three general category candidates, who have been without any

horizontal reservation selected at serial number 34591, 34594 and 41905. According to them, at least 7149 general category candidates have been selected beyond the available unreserved vacancies. It has been contended by them that the explanation of the respondent that these general category candidates have been selected under the horizontal category was misleading and was an attempt to create a false impression before this court. The petitioners have also contended that the respondent-authority, although being a repository of records did not give any specific reply to para 17(a), 17(b) and 18 of their supplementary Affidavit, notwithstanding specific direction for providing the same by various orders of this court, including order dated 03.02.2021 and 17.03.2021. It has been contended by the petitioners that the respondent has always shied away in not only failing to give specific reply, but have also failed to disclose the actual number of the candidates from the reserved category who have obtained equal to more than 67.11% marks and thus the select list is neither legal, nor proper nor tenable in the eyes of law.

74. During the hearing of the matter, the petitioner sought to file an application seeking amendment of the writ petition and praying for inserting certain paragraphs and making additional prayers in view of the subsequent development in the matter. The petitioners have contended that the select list of 01.06.2020 was sought to be implemented for appointment vide through two separate tranches i.e one through sub-select list dated 11.10.2020 and another through sub-select list dated 30.11.2020 and thereafter the government issued another select list dated 26.06.2021 for making appointments on the 6696 vacant seats on which no candidates have joined. It is the case of the petitioner that while the respondent did not file a suitable reply to the queries raised by this court relating to the actual number of reserved category candidates obtaining the 67.11% marks and as to why instead of allotting 27% seats to OBC category and 21% seats to SC category only 3.80% and 16.62% seats respectively have been actually allocated to them, the state issued a press-note dated 24.12.2021 admitting the folly in applying the reservation policy in the 69000 assistant teacher selection process and assuring that the same would be made good by making appointment of the reserved category. It has been argued by the petitioners that on the heels of the said press-note, the secretary/spl. Secretary, Department of Basic education issued a G.O dated 05.01.2022 for appointment of 6800 reserved category candidates in the said compelling circumstances.

75. According to the petitioner, the select list dated 05.01.2022, which has been issued in pursuance of the said G.O. of the same date, wherein only about 6800 reserved category candidates have been included, goes on to show that the State government has only partially rectified its mistake in application of the provision of section 3(1) and 3(6) of the reservation Act on the selection in question. It is noteworthy here that the petitioners had already showed it in the Supplementary affidavit dated 28.01.2021, filed in this petition itself, that about 18988 reserved category candidates needs to be adjusted and selected, however the state government has chosen to give appointment to only about 6800 reserved category candidates, which is in blatant violation of the provision of section 3(1) and 3(6) of the reservation act 1994. It is evident that the

benefit of reservation has not yet been provided to about 13000 candidates.

76. This court has narrated the contention and contra contention of the parties in extenso in the aforesaid 1st category of the writ petitions as the facts and arguments in all other connected categories are overlapping, except that these other categories have been filed by a different set of aggrieved petitioners with a modulated set of prayers. Thus, this court does not wish to burden this judgment any further with the facts of each category of case.

H. Discussion & Findings

77. Heard Heard Shri Amrendra Nath Tripathi, Advocate assisted by Shri Raj Kumar Vishwakarma and Shri Shailendra Tiwari, Advocates; Shri Maya Ram Advocate; Shri Ashwani Kumar Singh, Advocate; Shri Shivam Pandey, Advocate; Shri Vinay K. Pandey, Advocate; Shri I.M. Pandey, Advocate; Shri Shrikant Mishra, Advocate; Smt. Bulbul Godiyal, Senior Advocate assisted by Shri Rajeev Narayan Pandey, Advocate; Shri Sudeep Seth, Senior Advocate assisted by Shri Nitesh Kumar Advocate; Shri Asit Kumar Chaturvedi, Senior Advocate assisted by Shri Durga Prasad Shukla and Shri Vivek Mishra, Advocates; Shri Girish Chandra Verma, Advocate; Shri Onkar Singh, Advocate; Shri Sandeep Dixit, Senior Advocate assisted by Shri Deepak Singh, Advocate; Shri Amrendra Nath Tripathi, Advocate assisted by Shri Anas Sherwani and Shri J.K. Mishra, Advocates; Ms. Jyoti Sikka, Advocate; Shri Abhishek Singh, Advocate; Shri Gajendra Pratap Singh, Advocate; Shri Dharmendra Kumar Singh, Advocate; Shri Kamlesh Kumar Yadav, Advocate; Shri Vikas Yadav, Advocate and Shri Shyam Mohan Upadhyay, Advocate as learned counsel for their respective petitioner(s);and Shri Sanjay Bhasin, Senior Advocate assisted by Shri Ran Vijay Singh, Additional Chief Standing Counsel as learned counsel for the State; Shri Rakesh Kumar Chaudhary, Advocate; Shri Shreya Chaudhary, Advocate and Dr. Lalta Prasad Mishra, Advocate assisted by Shri Prafulla Tiwari, Advocate as learned counsel for their respective respondent(s)/intervenor.

78. Having heard the parties and the ld. Senior Counsels of the parties at length, this court is of the view that the core issue to be decided in these bunch of writ petition is as to whether section 3(6) of the Reservation Act of 1994 would apply where a candidate of reserved category though has availed relaxation meant for reserved category candidates in the TET (Teachers Eligibility Test) or ATRE (Assistant Teachers Recruitment Examination), can still be allowed to compete with general category candidates in an open selection by securing more marks than the last selected general category candidates. The said question gains prominence in the sense that the result of the said question would have rippling effect as it would answer the other consequential questions of (i) whether the select list dated 01.06.2020 is vitiated because of non-consideration of these Meritorious reserved category (MRC) candidates in the open category, which consequently led to their selection in the quota meant for reserved category, (ii) whether selection in question is vitiated because of non-compliance of section 3(1) of the Reservation Act, 1994 as due to non-migration of MRC candidates and they being consequently absorbed in the reserved category, the actual percentage of

candidates availing the reserved category diminished/reduced, (iii) Whether a redrawing of the selection list dated 01.06.2020 is merited in the facts of the present case. The other ancillary question, which falls for determination is as to whether the state could publish any additional select list beyond the 69000 originally advertised seats allegedly admitting its folly in implementing the reservation policy for the ATRE-2019 and that too for the reserved category candidates only. Some writ petition have also been filed seeking implementation of the additional select list of 6800 dated 05.01.2022, which also is a question before this court to be decided along with the bunch of matters.

79. The submissions made by the learned counsel for the parties are all over-lapping. Reference to case laws are also almost common. In the opinion of this court, it is not necessary to consider in detail the numbers/figures of the reserved/unreserved categories candidates, who eventually could make to the select list of 01.06.2020 with regard to the nature and extent of reservation.

80. This court after hearing the rival submission and examining the pleadings and various documents field by them on record is of the view that the core issue needs to be decided first and the rest of the issue would automatically fall in line as all other issues are inter-connected to each other.

81. It has been argued that reservation availed by the reserved category candidates at the level of TET and ATRE disentitle them to migrate to the unreserved category and since the respondents have allowed them to migrate to the open category, seats meant for general category candidates in the open category have been taken/occupied by this migrated reserved category, whereas on the other hand reserved category candidates have argued that MRC candidates were not allowed to migrate to the open category quota by the respondent, consequently which led this MRC candidates to take/occupy the seats meant for reserved category and thus large number of legitimate reserved category candidates, who were entitled to be considered in the reserved category could not avail reservation and have been left out by the respondent.

82. Article 16 (1) & (2) of our constitution essentially refers to equality of opportunity in matters of public employment and assures to all citizen of this country equality of opportunity in matters relating to employment or appointment to any office under the State and ensures that a citizen of this country is not discriminated on grounds of religion, race, caste, sex, descent, place of birth, residence, or any of them for any public employment. The said Article being a fundamental right is in the nature of command and directive. However, although Article 16(4) of our Constitutionopens with a non-obstante clause -"Nothing in this Article shall prevent the State from making any provision for reservation.....", which technically has been added to uphold its enforceability over Article 16(1) or 16(2), but on the face of it is in the nature of an enabling provisions as it confers discretion and protects the state, in case of making any provisions for reservation in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

83. Further, as held in the constitutional bench judgment of Indra

Sawhney, AIR 1993 SC 477, reservations can take various forms. They may consist of preferences, concessions, exemptions, extra facilities etc or of an exclusive quota in appointments. When measures, other than an exclusive quota for appointments, are adopted, they form part of the reservation measures or are ancillary to or necessary for availing of the reservations. Reservation is the highest form of special provision, while preference, concession and exemption are lesser forms. The Constitutional scheme, and the context of Article 16(4), makes it clear that the larger concept of reservations takes within its sweep all supplemental and ancillary provisions as also lesser types of special provisions like exemptions, concessions and relaxations, consistent with the requirement of maintenance of efficiency of administration - the admonition of Article 335.

84. It is no longer res integra that the state is empowered to lay down the criteria for grant of exemption, concession and reservation, and prescribe the method and manner in which such reservation should be effected. Reservation, being an enablingprovision, the manner and extent to which reservation is to be provided may be spelt out in the orders issued by the Government. Migration of reserved category candidates, into the general category, is also part of the larger concept of reservation. While providing reservation, the Government can, in its discretion, place restrictions on the migration, of those who are extended the benefit of reservation, to the general category. It can also, while extending concessions and providing relaxation in favour of the backward classes, bar those, who receive the benefit of such relaxations and concessions, from migrating to the general category.

85. The state of Uttar Pradesh has enacted the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 and by virtue of Rule 9 of the U.P. Basic Education (Teachers) Service Rules relating to reservation in Teachers Recruitment the same is applicable to the present recruitment process.

86. The primary issue encircles around implementation of section 3(6) of the Reservation Act, which inert-alia states as herein under:

(6) If a person belonging to any of the categories mentioned in subsection (1) gets selected on the basis of merit in an open competition with general candidates, he shall not be adjusted against the vacancies reserved for such category under sub-section (1).

87. As far as the factual matrix of the present case is concerned, this court is of the view that the concession of reservation as argued by the Ld. Counsel of the parties was made available to the reserved category candidates at three stages. First at the level, when these reserved category candidates armed with the concessional pass marks in TET, were allowed to fill forms and participate in the ATRE-2019. The second stage kicks in at the stage when a reserved category candidate appears and qualifies in the said ATRE-2019 with the concessional minimum marks prescribed for their category in the ATRE-2019 itself and thereby comes within the consideration stage of the select list. The final stage is the preparation of the selection list on the basis of quality points as provided in Appendix-1 of the rules. It has been argued that since relaxation of marks was applied at the stage

of TET as well as the ATRE level to these reserved category candidates, they found their place in the select list and since there was no equal level playing ground for the reserved category with the unreserved category, any migration/transition of reserved category candidates into the open category was against the provisions of section 3(6) of the Reservation Act, 1994

88. Before this court comes to the determination of the application of section 3(6) of the Act, to the present controversy of selection of Assistant Teachers, it would be expedient to first understand as to whether TET or ATRE, were part of the eligibility criteria or a part of selection process for the ATRE-2019. Further, a significant question arises as to when a reserved category candidate could be termed to participate in the open competition, so as to enable him or her to migrate to the open category and not be adjusted against vacancies in the reserved category as provided under section 3(6) of the Act.

89. This court finds that both **"TET"** and "ATRE" were introduced by the UP Basic (Teachers) Service (20th Amendment) Rules, 2017 amending 1981 rules on 09.11.2017.

90. As far as the "Teachers Eligibility Test" popularly known as **"TET"** is concerned, shorn of the history of the TET, it would be appropriate to mention that the National Council for Teachers' Education Act, 1993 (NCTE Act) was enacted for planned and coordinated development for teacher education system in India and the Right of Children to Free and Compulsory Education Act, 2009 (the RTE Act, 2009) was enacted by Parliament for free and compulsory education to all children of the age of 6 to 14 years. Section 23 of the RTE Act provided for qualification for appointment of teachers and NCTE was designated as authority under Section 23(1) to lay down the qualifications for appointment of teachers. In view thereof, NCTE issued Notification dated 23-8-2010 laying down such qualifications, wherein, one of the requirements for being appointed as a Techer under the said notification was passing the Teachers Eligibility Test (TET).

91. This court would not go into the details of the history relating to relaxation of the said requirement of passing TET under Section 23(2) of the RTE Act by the Central government and the related controversy and rights of the Shiksha Mitra engaged by the state of Uttar Pradesh. Suffice to say that the same stands decided by a very celebrated judgment of the Hon'ble Apex Court in **"State of Uttar Pradesh & Another V/s Anand Kumar Yadav & Others" (2018) 13 SCC 560**, pursuant to which, the state of Uttar Pradesh issued a press note on 21.08.2017, notifying various modalities, amongst others, which included:

- Shiksha Mitra's who had been absorbed/adjusted in the post of teachers would be deemed reverted on the post of Shiksha Mitra w.e.f 01.08.2017.

- The State Government would be organizing exam of TET in the month of October 2017 and all such Shiksha Mitras shall be provided an opportunity to acquire the required qualification.

- After TET examination is held, for the purposes of selection of Assistant Teachers in the Primary Schools under the Board, advertisement of vacancy in appropriatenumber shall be got published in the month of December 2017 and all the

eligible applicants shall be provided with opportunity to make application.

92. As far as the conducting of TET examination is concerned, the NCTE, had vide its notification dated 11.02.2011 issued guidelines under Section 23(1) of the Right to Education Act, 2009, for conducting Teacher's Eligibility Test (TET) by various state government which specifically prescribed qualifying marks as 60% (i.e. 90 out of 150 marks). It also further gives power to state Governments to give concessions to SC/ST/OBC and differently abled persons in accordance with the reservation policy of the state Government. It was in this regard that the state of Uttar Pradesh granted concessions of 5% to the candidates belonging to the reserved category i.e. SC/ST/OBC and differently abled persons, Ex-Service men for passing the TET, wherein the candidates belonging to reserved category were allowed to be declared pass by securing 55% marks.

93. Vide notification dated 17.10.2019, the state of Uttar Pradesh notified the UP TET 2019 and as per Clause 9 of the said notification provided for qualifying marks, which also prescribed the passing marks of 82.5 out of 150 for reserved category candidates (i.e. 55%) while for unreserved category candidates the same was provided as 90 out of 150 (i.e. 60%).

94. Thus, as contended by candidates from the unreserved category that since, these reserved category candidates after availing the benefit of reservation in passing TET (i.e pass marks of 55%) cannot come to compete with the open category candidate to avail the benefit of section 3(6) of the Act.

95. As already stated herein above, this court finds that both **"TET"** and "ATRE" were introduced by the UP Basic (Teachers) Service (20th Amendment) Rules, 2017 amending 1981 rules on 09.11.2017 and the essential qualification of candidates for appointment as Assistant Teachers could be found in Rule 8(ii), which inter-alia stated as follows:

(a) Bachelor's degree from a University established by law in India or a degree recognised by the Government equivalent thereto **together with** any other training course recognised by the Government as equivalent thereto **together with** the training qualification consisting of a Basic Teacher's Certificate (BTC), two years BTC (Urdu) Vishisht BTC, two-year Diploma in Education (Special Education) approved by Rehabilitation council of India or four year Degree in Elementary Education (B.El.Ed.), two years Diploma in Elementary Education (by whatever name known) in accordance with the National Council of Teacher of Education (Recognition, Norms and Procedure), Regulation or any training qualifications to be added by National Council for Teacher Education for the recruitment of teachers in primary education

and

Teacher eligibility test passed conducted by the Government of India

and

Passed Assistant Teacher recruitment Examination conducted by the Government.

(b) A trainee Teacher who has completed successfully six months special training programme in elementary education recognized by National Council for Teacher Education.

(c) a shikshamitra who possessed bachelor's degree from a University

established by law in India or a degree recognised by the Government equivalent thereto **and** has completed successfully two year distant learning B.T.C. course or basic Techer's Certificate (B.T.C.), Basic Teacher's Certificate (B.T.C.) (Urdu) or Vishisht B.T.C. conducted by the State Council of Educational Research and Training **and** passed the Teacher Eligibility Test conducted by the Government of India **and** passed Assistant Teacher recruitment Examination conducted by the Government.

96. Thus, a pass in both the TET and the ATRE was envisaged by the 20th Amendment, which was a part of essential qualification. However, merely passing of the TET or the ATRE did not ensure any right to the candidate to seek for his appointment as his name ought to appear in the select list for being appointed as an Assistant Teacher. This court finds that the preparation of the selection list was guided by rule 14, which inter-alia prescribed three points for inviting application:

(i) Candidates should possess prescribed training qualification;

and

(ii) Pass in Teachers eligibility test (TET) conducted by the Government;

and

(iii) Pass in Assistant Teacher Recruitment Examination conducted by the Government.

Further, rule 14(2) says that the appointing authority shall scrutinize the applications received as aforesaid and prepare a list of such all persons as would appear to him to possess the prescribed academic qualifications and be eligible for appointment. Rule 14(3)(a) states that the names of candidates in the list prepared shall then be arranged in such manner that the candidate shall be arranged in accordance with the quality points and weightage as specified in the Appendix-I. Interestingly, appendix -1 gives 10% weightage to the marks obtained by the candidate in High School, Intermediate, Graduation Degree and BTC training. The weightage for passing TET is conspicuously missing and a large chunk of weightage being 60% is given to the examination conducted under the name of ATRE.

97. It is significant to note that although the Rules mandated that it was an essential qualification for appointment on the post of Assistant Teacher in basic schools, (i) to have passed Teacher's Eligibility Test (hereinafter referred as the "**TET**") and (ii) also to pass ATRE examination held for the selection in question by the Basic Education Board, U.P., Allahabad, however, the passing of Teacher's Eligibility Test was merely eligibility in nature as the marks obtained in the said Test was not to be included at the time of preparation of the final list, whereas ATRE served dual purposes as it was not only eligibility criteria but also the marks obtained in the said examination was included in the preparation of the final select/merit list.

98. Thus, ATRE was envisaged to be both qualifying in nature and also an integral part of the selection process as the marks obtained in ATRE was to be included in the final merit list prepared for the purposes of selection, whereas TET was merely qualifying only and merely enabled a candidate to apply for ATRE. Further, this court finds that as far as ATRE is concerned the same being an essential qualification was done away with the 22nd Amendment, although it continued to be a

part of rule 14 dealing with the selection process.

99. Apparently, a pass in TET was merely an eligibility criteria, so as to enable a particular candidate to become eligible to fill the form for the ATRE-2019 as is also clear from point 7(2) of the government order dated 01.12.2018, which specifically prescribed that examination would be conducted of short-listed candidates, who could take part in the ATRE and the result of which would be valid for the said current recruitment only. Evidently, there is no challenge to the said G.O dated 01.12.2018, which prescribed the procedure for recruitment of Assistant Teachers through the ATRE-2019.

100. As a matter of fact & records, approximately 4 Lakhs candidates fulfilled the eligibility criteria (i.e pass in TET along with other qualification) and filled the requisite forms of ATRE-2019, which was conducted on 06.01.2019. The Government of U.P subsequently on 07.01.2019, brought a circular stating the minimum passing marks criteria for general category and reserved category as 65% and 60% respectively. The said circular in clear terms mentioned that passing in the ATRE-2019 is one of the eligibility criteria for the selection process and candidates merely by obtaining the minimum marks would not be entitled for appointment. ATRE-2019 was mentioned as an eligibility criteria as securing of the minimum marks by a candidate would bring him or her within the consideration zone of selection as ultimately the selection would be as per the merit list prepared on the basis of quality points secured by a candidate as per Appendex-1 of the Rules and candidates who could not make to the merit list shall have no right to be appointment on the basis of ATRE-2019.

101. No doubt the selection to the post of Assistant Teachers was to be made on the quality points prepared as per the Appendix-I, however whether the preparation of the Appendix-1, resulting in the select list was an open competition, or passing the ATRE was an open competition, or filling the form for ATRE with the concessional TET marks was an open competition is the moot point, because in case it is held at any stage of examination that it was an open competition, the reserved category candidates would naturally be entitled to be considered & migrated in the open category due to the operation of section 3(6) of the reservation Act.

102. "The term 'competition' muchless 'open competition' has not been defined under the Reservation Act. The Cambridge Dictionary, defines "competition" to mean "anorganizedeventin whichpeopletrytowinaprizeby being thebest,fastest, etc". Similarly, Encyclopaedia Britannica has defined "Competition" to be an act or process of trying to get or win something (such as a prize or a higher level of success) that someone else is also trying to get or win. Thus, in common parlance, the meaning of competition would be an event or a process, wherein each person is trying to win by being the best. Therefore, an open competition as could be understood, relevant to the context, would be a competition which is open to one and all, wherein the participants are trying to win by being the best and in that process the participants have not availed any concession or privilege. Thus, in the said open competition, the best is chosen from

the rest. The parameters applicable to all of them are one and equal and they are adjudged on the same scale of merit and most importantly, "level playing field" is afforded in the said open competition.

103. On a plain reading of section 3(6) of the Reservation Act, 1994 it is evident that the said clause has been enacted to serve dual purposes. The said clause on the one hand, allows the reserved category candidates who is competent enough of meeting the challenges of competence with that of the general category candidates is encouraged & required to be placed amongst the general category candidates and on the other hand, it preserves the reserved category candidate quota for all those reserved category candidates, who inspite of their best ability is otherwise not able to compete with the general category candidates. According to this court, the said clause fulfils the aims and object of reservation and fulfilment of quota of reserved candidates without making any compromise with respect to the merit and talent of a candidate, who otherwise belongs to reserved category but is more meritorious and successfully makes his place along with the general category candidates. Thus, section 3(6) of the Act echoes the cardinal principle for providing reservation to backward classes as it ought to be a means for their upliftment and not the end as has been dreamed by the framer of our Constitution.

104. Thus, the question falls for determination is as to at what stage of competition for selection of candidates in ATRE-2019, it could be termed as an open competition or there is no stage at all for open competition in the said Examination.

105. The phrase open competition with general candidates' bears significance, as unless there is competition amongst the general candidates and reserved category candidates at the same level, the benefit of the said phrase may not be available to the reserved category candidate. In a selection, to be termed as an open competition, the candidature of the reserved category candidates as well as the general category candidates is to be tested on the same merit and if in that case a reserved category candidate succeeds or score more than minimum marks scored by the general category candidate in the open competition, he would be placed amongst the general category candidates in the open category. In the instant case, at the level of applying for the Assistant Teachers Recruitment Examination-2019, wherein any candidate has passed the TET with the concessional marks or higher marks does not make any difference or gives any added advantage to any candidate in the ATRE, as all these candidates in order to be eligible for coming within the consideration zone for appointment as Assistant Teachers had to not only mandatorily appear, but has also to obtain certain qualifying marks in the said ATRE in order to further progress in the stages of selection process. Thus, candidates competing with concessional marks in TET do not have any advantage as such, over the general category candidates in the ATRE. In fact, this court is of the view that the said stage has been set-up for a broad base of talented candidates to compete openly, so that the best talent is chosen over the rest. Therefore, reserved category students passing TET on concessional marks cannot be shackled in their own category at that stage and in any case it is not any manner works to the disadvantage to the general category candidates. It has to be understood that at the time when the concession of TET were availed, open competition had not commenced; it commenced only when all

candidates, who fulfilled the eligibility conditions, were permitted to sit in the ATRE-2019; and, with concessional TET or the age relaxation or the fee concession, reserved candidates were merely brought within the zone of consideration, so that they could participate in the open competition on merit.

106. This court finds that both the reserved as well as the unreserved category candidates have appeared in the same examination and have been tested on the anvil of the same set of questions & difficulty. In the opinion of this court, the relaxation in the passing marks of TET does not in anymanner upset the "level playing field". However, once these broad base of candidate, appear in the ATRE-2019, wherein the State Government has prescribed the criteria of minimum marks for qualifying marks of the reserved category candidates as 60% and for the general category candidates as 65% respectively and in case a reserved category candidate at this stage progresses further to the selection list stage taking benefit of the minimum marks prescribed i.e 60%, he ought to be compartmentalised into his category only. Thus, qualifying in the ATRE-2019 with concessional marks would amount to reservation. However, in case the said reserved category candidate obtains 65% or more in the said ATRE-2019 examination, he cannot be restricted into his category and ought to migrate into the open category in view of section 3(6) of the reservation Act. To the mind of this court, the whole difficulty has arisen due to the use of the word "unreserved category" and "open category" interchangeably. There is no quota for unreserved category, which actually is an open category, wherein merit only counts, irrespective of his/her category.

107. Further, this court finds that, once these candidates qualify with or without the prescribed minimum marks, which depends as to whether they belong to reserved category or unreserved category, to make to the selection process, wherein a merit list would be prepared on the basis of quality points as per Appendix-1 of the rules, the concept of open competition is lost in the said preparation of the select list as the candidates (who were declared successful in the ATR Examination) were then merely asked to fill an online form and submit their academic results and mark sheets, which were used to prepare a merit list based on the weightage prescribed by the Rules and the explanatory Government Order. The enumeration of a candidate in the list, in accordance with the quality marks to prepare a merit select list does not form an open competition.

108. The said analogy could be well understood from the numbers as provided in the present case. Admittedly, about 4,31,466 number of candidates registered themselves for the ATRE-2019, all of whom have passed the TET with or without concessional marks. Thus, merely applying for ATRE-2019 armed with a concessional TET does not disarm any reserved category candidate the potential to compete with an unreserved category. As per the figure provided by the parties, amongst the aforesaid 4,31,466 candidates, about 1,46,060 candidates were declared successful. It is this step which was an open competition and accordingly in case the reserved category candidate is able to match with the minimum marks prescribed for the unreserved category, this court finds no reasons as to why the reserved category candidates would not be allowed to migrate into the open category as per the letter & spirit of section 3(6) of the reservation Act.

The preparation of the select list on the basis of quality point as per Appendix-1 of the rules is not an open competition as it is merely a natural progression for all those candidates, who have been declared successful, with or without the concessional marks applicable to the reserved category, for preparation of a select list of the number of vacancies, which in this case is 69000. Thus, reserved category candidates, who have obtained and matched with the minimum marks i.e 65% as prescribed for unreserved category would naturally progress into the open category and shall be accordingly selected in the said category, however, in case a reserved category obtains any number between 60% or less than 65% as has been prescribed as qualifying marks for reserved category and unreserved category respectively, he or she would be only considered in the reserved category only.

109. Further, when a reserved category candidate is able to obtain 65% marks in ATRE-2019 he or she obviously is at par with any general category candidate and as such ought to be adjusted in the open category, because he finds his entry into the open category like any other candidate who has participated in the ATRE-2019As held in various judgement of the Hon'ble Supreme Court, a meritorious candidate cannot be put to disadvantage and constrained to compete in his own category, although he is at par or more meritorious than the last general category candidate selected in the open category. Time and again this court as well as the Hon'ble Supreme Court has emphasised that the unreserved category is not a reserved category for general candidates but an open category, which is open for both the reserved category as well as the general category, wherein merit is the only criteria for selection, provided the selection is an open competition as envisaged under section 3(6) of the Act. Further, Government order dated 25.03.1994 issued under **The Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994** [Act 4 of 1994] clearly states that even though the reserved category candidates have previously benefitted from certain relaxations, they will not be barred from application of section 3 of the Act, i.e., if they become eligible to be placed in open competition, they'll be so placed irrespective of any previous relaxation.

110. Moreover, as the manner and extent of reservation should be spelt out in the Government Order, it is only if there is an express bar in the Government Order, for migration of those who belong to the backward classes to the general category, would they then be disabled from competing for general category posts, for otherwise reservation underArticle 16(4)does not operate as a communal reservation. If members belonging to the socially and educationally backward classes get selected in the open competition field, on the basis of their own merit, they will not be counted against the quota reserved for the backward classes. They will be treated as open competition candidates. Ld. Counsel for the parties were not able to point out any such government order, which expressly barred such migration of reserved category candidates in the present Selection.

111. In this context, this court may refer to the Judgment in the case of Ritesh R. Sah v. Dr. Y.L. Yamul & Ors., (1996) 3 SCC 253. In the said case, thequestion that emerged for consideration before the Apex

Court was whether a candidate who belonged to the Scheduled Caste or any other reserved category could be counted against the quota meant for the reserved category even if he was entitled for selection for admission in open competition on the basis of his own merit or would he be treated as an open competition candidate. Their Lordships in paragraph 13 of the said decision expressed the view as under:

"13. There cannot be any dispute with the proposition that if a candidate is entitled to be admitted on the basis of his own merit then such admission should not be counted against the quota reserved for Scheduled Caste or Scheduled Tribe or any other reserved category since that will be against the Constitutional mandate enshrined inArticle 16(4)."

In arriving at the aforesaid decision, their Lordships referred toIndra Sawhney v. Union of India, 1992 Supp (3) SCC 217 wherein it has been held thus:

"In this connection it is well to remember that the reservations underArticle 16(4)do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates."

112. Further, this court refers to the judgment in the case of R.K. Sabharwal v. State of Punjab, (1995) 2 SCC 745 wherein the Constitution Bench was considering the question of appointment and promotion and roster points vis-à-vis reservation and had opined thus:

"When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at thereserve points are to be filled from amongst the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand the reserve category candidates can compete for the non-reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation. Article 16(4) of the Constitution of India permits the State Government to make any provision for the reservation of appointments or posts in favour of any Backward Class of citizens which, in the opinion of the State if not adequately represented in the Services under the State. It is, therefore, incumbent on the State Government to reach a conclusion that the Backward Class/Classes for which the reservation is made is not adequately represented in the State Services. While doing so the State Government may take the total population of a particular Backward Class and its representation in the State Services. When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said Backward Class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the Backward Class have already been appointed/promoted against the general seats."

113. At this stage, it is immensely instructive to refer to paragraph 811 of

Indra Sawhney (supra) which reads as follows:

"811. In this connection it is well to remember that the reservation underArticle 16(4)do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition filed on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates."

114. In the said case, Sawant, J., while dealing with the philosophy and objectives of reservation has opined thus:

"411. The aim of any civilized society should be to secure dignity to every individual. There cannot be dignity without equality of status and opportunity. The absence of equal opportunities in any walk of social life is a denial of equal status and equal participation in the affairs of the society and, therefore, of its equal membership. The dignity of the individual is denied in direct proportion to his deprivation of the equal access to social means. The democratic foundations are missing when equal opportunity to grow, govern, and give one"s best to the society is denied to a sizeable section of the society. The deprivation of the opportunities may be direct or indirect as when the wherewithals to avail of them are denied. Nevertheless, the consequences are as potent.

412. Inequality ill-favours fraternity, and unity remains a dream without fraternity. The goal enumerated in the Preamble of the Constitution, of fraternity assuring the dignity of the individual and the unity and integrity of the nation must, therefore, remain unattainable so long as the equality of opportunity is not ensured to all.

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416. The trinity of the goals of the Constitution, viz., socialism, secularism and democracy cannot be realised unless all sections of the society participate in the Statepower equally, irrespective of their caste, community, race, religion and sex and all discriminations in the sharing of the State power made on those grounds are eliminated by positive measures."

115. Apparently, from the various judgments delivered by the Apex Court, it is apparent that the whole purpose of reservation is a generic concept and has different connotations under various circumstances. The Constitution of India, the fountainhead of all law, requires one to understand and appreciate the schematic interpretation of the organic law of the country to understand the said concept.

116. A Division Bench of the Delhi High Court in the case of Tej Pal Yadav Vs Union of India (174 (2010) DLT 510(DB) in identical situation held that, a student may appear in the preliminary examination declaring that he belongs to the OBC category and may qualify or may not qualify; if he does not qualify, that is the end of the road; if he qualifies, he then appears in the main examination; if he does not qualify in the said examination, his right to get admission becomes totally extinct; if he qualifies within the OBC category, he may put forth his claim in that category, but if he gets more marks than the general candidates, he would be justified to say that he can be considered in the general category; if the whole concept of reservation is understood in a holistic manner, it becomes clear that appearance of

a candidate from the OBC category, in the preliminary examination, is basically at the entry level; though both the preliminary and the main examinations may seem interconnected, on a deeper scrutiny it is clear that there is a subtle distinctive separation; if an OBC candidate appears in the preliminary examination as an OBC category candidate, and performs extremely well in the main examination, his claim should not be scuttled or smothered solely on the ground that he had taken the initial examination as an OBC category candidate; and in case this is allowed to be done, a general category candidate, who really could not compete with the OBC candidate in the main examination, would steal a march over him; and that would not be in public interest.

117. It may be true that in view of the advertisement the selection process ought to have been adopted in a manner also that it could have been an open competition with general candidates, i.e., by comparing the merit of the reserved category candidates along with the merit of the general category candidates obtained in the ATRE-2019 and thereafter final select list could have been prepared by placing the reserved category candidates in the list of finally selected candidates as per their merit but this procedure was not adopted. As a matter of fact, the Respondents had filed its Supplementary Counter Affidavit in connected writ petition in bunch of writ petitions vide Writ Petition No. 13156 of 2020 (Writ-A), dated 24.05.2022 sworn by Dr. Sarvendra Vikram Bahadur Singh, posted as Director of Education (Basic), Lucknow U.P. wherein at paragraph 7 and 8 it was categorically admitted that the select lists have been prepared without taking into account as to whether these reserved category candidates have taken the benefit of reservation in TET examination or Assistant Teacher recruitment examination.

118. Further, this court cannot be oblivious of the short counter affidavit dated 24.05.2022 filed in the lead matter (Writ- A- No. 13156 of 2020) by the Respondents, wherein they have admitted at paragraph 5 and 6 of the said counter-affidavit that the reservation policy for *Scheduled caste category and Scheduled Tribe Category and Other Backward Class category applied to the present recruitment was revisited by the authorities, wherein it was revealed that the application of horizontal and vertical reservation was applied in opposite sequence due to which, some of the candidate who have secured equal or higher cut-off marks to General Candidate have been appointed against reserved category seats.* Thus, the Respondents admitting there folly, whimsically decided to rectify the same and as such had issued the fourth select list of 6800 candidates, which was published on 05.01.2022. Similar admissions were also made by the Respondents in a short counter affidavit dated 04.05.2022 filed in Writ petition- A-No. 8142-2021.

119. This court finds that even the aforesaid reasons for an admitted flaw in the select list is not tenable factually as if for the sake of argument, it was presumed to be true that vertical and horizontal reservation have been applied in opposite sequence then unreserved category candidates ought to had been selected in lesser numbers and in place of list of reserved category candidates, list of unreserved category candidates would had been issued because the correct sequence as observed in para 18 of Hon'ble supreme Court judgment in case of Anil Kumar

Gupta [(1995) 5 SCC 173], is that vertical reservation ought to be applied first and horizontal reservation thereafter. If, the respondents would had applied the vertical & horizontal reservation in opposite sequence, which meant horizontal reservation was applied first and vertical reservation thereafter, then post reserved for horizontal reservation would had been taken from total number of vacancies and in this process all candidates (unreserved and reserved) should have been affected, therefore a select list of unreserved category would had been issued and not only list of reserved category candidates as has been sought to be done by the respondent.

120. During the course of hearing, this court on several occasions had directed the state to provide details of the candidates, along with their category and marks obtained by them in the ATRE-2019, however the state has merely provided figures and numbers of candidates selected in the reserved category as well as the open category and as such on the basis of the said numbers in the chart has been insisting that reserved category candidates have been allowed to migrate to the open category and thus there had been no violation of implementation of Section 3(6) of the Act. However, the marks scored by each candidate along with their category, who have been qualified in ATRE-2019 was never provided by the state nor the same was made available to the court and as such this court is of the view that correct appreciation of migration of MRC candidates to the open category cannot be determined with the available facts of the present case.

121. Before this Court arrives at a finding & records its conclusion, it would be omnipotent that the various judgments cited by the parties and their relevance to the issue may be discussed forthwith.

122. Various decision have been relied upon by the parties during the course of hearing. The first judgment relied upon by them has been passed by the Hon'ble Supreme Court in the case titled ***"Jitendra Kumar Singh v. State of Uttar Pradesh & Others (2010) 3 SCC 119"***. In the said case, a competitive examination was held for filling up the post of Sub-Inspectors of Civil Police and Platoon Commanders in PAC by direct recruitment. For SC, ST & OBC candidates there was waiver of examination fee and relaxation in the upper age limit which was in terms of Section 8(1) of the Uttar Pradesh Public Services (Reservation for Scheduled Caste, Scheduled Tribes and otherBackward Classes) Act, 1994. Section 3(6)of the above Act provided that if a reserved candidate got selected on the basis of a merit in an open competition with general candidates, he would not be adjusted against vacancies reserved for the reserved category.

123. The Government instructions dated 25th March, 1994 provided that if a reserved category candidate was selected on the basis of merit in the open competition along with general category candidates, he would not be adjusted towards reserved category i.e. he would be deemed to have beenadjusted against the unreserved vacancies. This was irrespective of whether he had availed of any facility or relaxation (like relaxation age limit). The Appellants, in the said case, who were general candidates contended that reserved category candidates should not be adjusted against the unreserved (UR) vacancies but only against the reserved vacancies. This was not accepted by the High Court. The

decision of the High Court was affirmed by the Supreme Court. It was clarified as under:

"71. We are of the considered opinion that the concessions falling withinSection 8of the Act of 1994 cannot be said to be relaxations in the standard prescribed for qualifying in the written examination.Section 8clearly provides that the State Government may provide for concessions in respect of fees in the competitive examination or interview and relaxation in upper age limit.

72. Soon after the enforcement of the 1994 Act the Government issued Instructions dated 25-3-1994 on the subject of reservation for Scheduled Castes, Scheduled Tribes and other backward groups in the Uttar Pradesh Public Services. These instructions, inter alia, provide as under:

"4. If any person belonging to reserved categories is selected on the basis of merits in open competition along with general category candidates, then he will not be adjusted towards reserved category, that is, he shall be deemed to have been adjusted against the unreserved vacancies. It shall be immaterial that he has availed any facility or relaxation (like relaxation in age-limit) available to reserved category."

From the above it becomes quite apparent that the relaxation in age-limit is merely to enable the reserved category candidate to compete with the general category candidate, all other things being equal. The State has not treated the relaxation in age and fee as relaxation in the standard for selection, based on the merit of the candidate in the selection test i.e. Main Written Test followed by Interview. Therefore, such relaxations cannot deprive a reserved category candidate of the right to be considered as a general category candidate on the basis of merit in the competitive examination. Sub-section (2) ofSection 8further provides that Government Orders in force on the commencement of the Act in respect of the concessions and relaxations including relaxation in upper age limit which are not inconsistent with the Act continue to be applicable till they are modified or revoked.

73. Learned counsel for the appellants had submitted that in the present appeals, the issue is only with regard to age relaxation and not to any other concessions. The vires ofSection 3(6) orSection 8have not been challenged before us. It was only submitted by the learned Sr. Counsel for the petitioners/appellants that age relaxation gives an undue advantage to the candidate belonging to the reservedcategory. They are more experienced and, therefore, steal a march over General Category candidates whose ages range from 21 to 25 years.

74. It is not disputed before us that relaxation in age is not only given to members of the Scheduled Castes, Scheduled Tribes and OBCs, but also the dependents of Freedom Fighters. Such age relaxation is also given to Ex-servicemen to the extent of service rendered in the Army, plus three years. In fact, the educational qualifications in the case of Ex-servicemen is only intermediate or equivalent whereas for the General category candidates it is graduation. It is also accepted before us that Ex-servicemen compete not only in their own category, but also with the General category candidates. No grievance has been made by any of the appellants/petitioners with regard to the age relaxation granted to the Ex-servicemen. Similarly, the dependents of Freedom Fighters are also free to compete in the General category if they secure more marks than the last candidate in the General

category. Therefore, we do not find much substance in the submission of the learned counsel for the appellants that relaxation in age "queers the pitch" in favour of the reserved category at the expense of the General category.

75. In our opinion, the relaxation in age does not in anymanner upset the "level playing field". It is not possible to accept the submission of the learned counsel for the appellants that relaxation in age or the concession in fee would in any manner be infringement ofArticle 16 (1)of the Constitution of India. These concessions are provisions pertaining to the eligibility of a candidate to appear in the competitive examination. At the time when the concessions are availed, the open competition has not commenced. It commences when all the candidates who fulfill the eligibility conditions, namely, qualifications, age, preliminary written test and physical test are permitted to sit in the main written examination. With age relaxation and the fee concession, the reserved candidates are merely brought within the zone of consideration, so that they can participate in the open competition on merit. Once the candidate participates in the written examination, it is immaterial as to which category, the candidate belongs. All the candidates to be declared eligible had participated in the Preliminary Test as also in the Physical Test. It is only thereafter that successful candidates have been permitted to participate in the open competition."

124. In the present case, also the concession given in passing marks in TET does not in anymanner upset the "level playing field". The passing of TET is a provision pertaining to the eligibility of a candidate to appear in the competitive examination. At the time when the TET is passed, albeit under the concessional marks, the open competition has not commenced as it commences when all the candidates who fulfill the eligibility conditions, namely, qualifications, TET, age etc. are permitted to participate in the ATRE. As observed by the Hon'ble Supreme Court in the aforesaid judgment, by giving relaxation in the passing marks of TET, the reserved candidates are merely brought within the zone of consideration, so that they can participate in the open competition on merit i.e the ATRE-2019. Once the candidate has participated in the ATRE-2019, it is immaterial as to which category, the candidate belongs and in terms of section 3(6), in case a reserved category candidate is able to match the score of the general category, he ought to migrate and be considered in the open category.

125. The next judgment relied upon by the parties is by the Apex Court in ***Vikas Sankhala v. Vikas Kumar Agarwal, (2017) 1 SCC 350***, wherein the issue arose in the context of appointment of teaching staff through the Teachers Eligibility Test(TET) conducted by the State of Rajasthan. There was relaxation in the minimum pass marks in the TET to the extent of 10% to persons belonging to SC, ST and OBC category. One of the issues considered by the Supreme Court was framed as inter-alia:

"38.3 (iii) Whether reserved category candidates, who secured better than general category candidates in recruitment examination, can be denied migration to general seats on the basis that they had availed relaxation in TET.?"

126. In answering the said question in negative the Supreme Court referred to the

circulars issued by the State Government from time to time. It was noted that the mere fact that some relaxation was given in the pass marks in the TET did not give any advantage to the reserve category candidate as it only enabled them to compete with others by allowing them to participate in the selection process. Therefore, in terms of the circular dated 11th May, 2011 issued by the Government in that case "the reserve category candidates, who secured more marks than the marks obtained by the last candidate selected in general category would be entitled to be considered against unreserved category vacancies." The observation of the Hon'ble Supreme court was captured at paragraph 80 of the Judgment which inter-alia stated:

"80. Having regard to the respective submissions noted above, first aspect that needs consideration is as to whether relaxation in TET pass marks would amount to concession in the recruitment process. The High Court has held to be so on the premise that para 9(a) dealing with such relaxation in TET marks forms part of the document which relates to the recruitment procedure. It is difficult to accept this rationale or analogy. Passing of TET examination is a condition of eligibility for appointment as a teacher. It is a necessary qualification without which a candidate is not eligible to be considered for appointment. This was clearly mentioned in guidelines/notification dated February 11, 2011. These guidelines pertain to conducting of TET. Basic features whereof have already been pointed out above. Even para 9 which provides for concessions that can be given to certain reserved categories deals with 'qualifying marks' that is to be obtained in TET examination. Thus, a person who passes TET examination becomes eligible to participate in the selection process as and when such selection process for filling up of the posts of primary teachers is to be undertaken by the State. On the other hand, when it comes to recruitment of teachers, the method for appointment of teachers is altogether different. Here, merit list of successful candidates is to be prepared on the basis of marks obtained under different heads. One of the heads is marks in TET. So far as this head is concerned, 20% of the marks obtained in TET are to be assigned to each candidate. Therefore, those reserved category candidates who secured lesser marks in TET would naturally get less marks under this head. We like to demonstrate it with an example. Suppose a reserved category candidate obtains 53 marks in TET, he is treated as having qualified TET. However, when he is considered for selection to the post of primary teacher, in respect of allocation of marks he will get 20% marks for TET. As against him, a general candidate who secures 70 marks in TET shall be awarded 14 marks in recruitment process. Thus, on the basis of TET marks reserved category candidate has not got any advantage while considering his candidature for the post. On the contrary, "level playing field" is maintained whereby a person securing higher marks in TET, whether belonging to general category or reserved category, is allocated higher marks in respect of 20% of TET marks. Thus, in recruitment process no weightage or concession is given and allocation of 20% of TET marks is applied across the board. Therefore, the High Court is not correct in observing that concession was given in the recruitment process on the basis of relaxation in TET.

127. This court finds that in ***Vikas Sankhla*** case the Hon'ble Supreme Court permitted the Migration of reserved

category candidates from reserved category to general category to be admissible to those reserved category candidates who secured more marks than the last unreserved category candidates, irrespective of availing concession of passing marks in TET. Further, in the said case, the selection of Teachers was to be made on the basis of marks obtained under different heads including that of marks obtained in TET. Thus, obtaining of marks in TET was also a criteria which effected the overall selection of a candidate as a Teacher and even in that circumstances, the Apex Court refused to consider the concessional marks obtained in passing the TET to be an embargo for Migration of reserved category from reserved category to open category, whereas in the case in hand, admittedly TET is merely an eligibility criteria and does not have any influence on the selection list as obtaining of marks in TET is not a part of the quality points as mentioned in Appendix-1 of the rules.

128. The third judgment relied upon by the parties is ***the case of Gaurav Pradhan v. State of Rajasthan, (2018) 11 SCC 352***, wherein the issue was relating to recruitment in the post of Constables under the Rajasthan Police Subordinate Service Rules, 1989. Various circulars had been issued by the State Government from time to time. A Division Bench of the Rajasthan High Court allowed the plea of the reserved category candidates to the extent that after despite getting relaxation of age if they were higher in the merit than the general open category vacancies they could migrate to the general open category vacancies. However, if they had availed relaxation/concessions while participating in the competitive test/ process of selection they would not be eligible for said migration.

129. The Hon'ble Supreme Court in that case, referred to circulars issued by the Rajasthan Government from time to time and noticed that in 6.2 of a circular dated 24thJune, 2008 there is an express bar as under:

"6.2 In the state, members of the SC/ST/OBC can compete against non-reserved vacancies and be counted against them, in case they have not taken any concession (like that of age, etc.) payment of examination fee in case of direct recruitment."

130. Thus, in view of the aforesaid express bar and following the earlier decision in Deepa E.V. V/s Union of India (2017) 12 SCC 680, the Supreme Court held that there could be no migration in the above circumstances permitted for those SC candidates to the unreserved vacancies in the following terms as could be found at paragraph 49 of the Judgment:

"49. In view of the foregoing discussion, we are of the considered opinion that the candidates belonging to SC/ST/BC who had taken relaxation of age were not entitled to be migrated to the unreserved vacancies, the State of Rajasthan has migrated such candidates who have taken concession of age against the unreserved vacancies which resulted displacement of a large number of candidates who were entitled to be selected against the unreserved category vacancies. The candidates belonging to unreserved category who could not be appointed due to migration of candidates belonging to SC/ST/BC were clearly entitled for appointment which was denied to them on

the basis of the above illegal interpretation put by the State. We, however, also take notice of the fact that the reserved category candidates who had taken benefit of age relaxation and were migrated on the unreserved category candidates and are working for more than last five years. The reserved category candidates who were appointed on migration against unreserved vacancies are not at fault in any manner. Hence, we are of the opinion that SC/ST/BC candidates who have been so migrated in reserved vacancies and appointed should not be displaced and allowed to continue in respective posts. On the other hand, the unreserved candidates who could not be appointed due to the above illegal migration are also entitled for appointment as per their merit. The equities have to be adjusted by this Court."

The Hon'ble Apex Court, in order to balance the equity concluded by issuing the following directions:

"50. On the question of existence of vacancies, although learned counsel for the appellant submitted that vacancies are still lying there, which submission however has been refuted by the learned counsel for the State of Rajasthan. However, neither appellants had produced any details of number of vacancies nor the State has been able to inform the Court about the correct position of the vacancies.

51. We thus for adjusting the equity between the parties issue following directions:

51.1 The writ petitioners/appellants who as per their merit were entitled to be appointed against unreserved vacancies which vacancies were filled up by migration of SC/ST/BC candidates who had taken relaxation of age should be given appointment on the posts. The State is directed to work out and issue appropriate orders for appointment of such candidates who were as per their merit belonging to general category candidates entitled for appointment which exercise shall be completed within three months from the date copy of this order is produced.

51.2 The State shall make appointments against the existing vacancies, if available, and in the event there are no vacancies available for the above candidates, the supernumerary posts may be created for adjustment of the appellants which supernumerary posts may be terminated as and when vacancies come into existence.

131. The Court next proposes to discuss the case law relied & reported as Deepa E.V. V/s Union of India (2017) 12 SCC 680. The facts in Deepa E.V. (supra) were that the Appellant applied for the post of Laboratory Assistant, Grade-II in the Export Inspection Council of India functioning in the Ministry of Commerce and Industry, Government of India. The Appellant was in the OBC category and was among the 11 candidates from that category called for the interview. She secured 82 marks. One other OBC candidate who had secured 93 marks was selected. In the general category none of the candidates secured the minimum cut off of 70 marks.

132. The Appellant accordingly contended that she should be accommodated in the general category. Her writ petition was dismissed by the Single Judge and her appeal against that judgment was also dismissed by the Division Bench. However, the Supreme Court referred to condition three in the proceedings dated 1st July, 1998 issued by the Department of Personnel and Training, Government of India on the subject *"Reserved vacancies to*

be filled up by candidates lower in merit or even by released standards-candidates selected on their own merits not to be adjusted against reserved quota." Condition three read as under:

"3. In this connection, it is clarified that only such SC/ST/OBC candidates who are selected on the same standards as applied to general candidates shall not be adjusted against reserved vacancies. In other words, when a relaxed standard is applied in selecting an SC/ST/OBCcandidates, for example in the age-limit, experience, qualification, permitted number of chances in written examination, extended zone of consideration larger than what is provided for general category candidates, etc. the SC/ST/OBC candidates are to be counted against reserved vacancies. Such candidates would be deemed as unavailable for consideration against unreserved vacancies."

133. It was on the account of the fact that specific bar as above had not been challenged by the Appellant in that case that the Supreme Court was unable to grant her the relief prayed for.

134. The Ld. Counsel for the parties have placed much reliance on Apex Court decision, which requires special mention. The case reported as ***"State (NCT of Delhi V/s Pradeep Kumar"(2019) 10 SCC 120"***. In the said case, Special Education Teachers under the Government of Delhi were sought to be recruited. The respondents had obtained CTET under the relaxed pass norms of OBC category, in the states other than Delhi and as such his candidature was found to be not eligible, which did not find favour with the Central Administrative Tribunal, which directed the candidates to be appointed. The said decision was upheld by the Division bench of the High Court of Delhi. However, the Apex Court reversing both the decision observed in the said peculiar facts that in the said recruitment process, the respondents did not possess OBC (Delhi) certificate and thus they could not be considered for the OBC category vacancies. The issue in that case was not migration of reserved category to open category rather the issue was regarding availing of employment in reserved category posts earmarked for OBCs who are certified by the Delhi Government. The Apex court, in the said Judgment observed the distinguishing & peculiar facts at paragraph 19.5, which inter-alia states:

"19.5 The other distinguishing aspect in Vikas Sankhala (supra) is that the candidates who had applied under the reserved category belonged to Rajasthan. For the selection and aspirants from the same State i.e., Rajasthan, the Court allowed such candidates to migrate to the unreserved category. In the present case, however, the candidates (i.e. the respondents) belong to States other than Delhi. Being OBC (outsiders), they could have been considered only under the unreserved category if they secure at least 60% marks in the CTET. The respondents admittedly did not secure 60% and thus were ineligible. Moreover, an OBC candidate not certified in the State/Territory outside of Delhi cannot be eligible to avail of employment in reserved category posts earmarked for OBCs who are certified by the Delhi Government."

135. The next judgment relied by the parties during the hearing of the matter was ***Saurav Yadav V/s State of Uttar Pradesh, (2021) 4 SCC 542***. The facts in that case

relating to recruitment of Police constables both under U.P Civil Police and Provisional Armed Constabulary in the state of Uttar Pradesh. The controversy in that case was relating to the correct method of filing the horizontal quota reserved for women candidates, wherein it was complained by largely women candidates belonging to OBC's, that the state had not correctly applied the rule of reservation and as such have denied the benefit of "migration" i.e adjustment in the General Category Vacancies. Although the issue was relating to the inter-play between the vertical (social) reservation and horizontal (special) reservation, however the said issue is not engaging the attention of this court in the present bunch of matters. However, the conclusion by Justice S. Ravindra Bhat, who gave a separate affirmative & supplementing judgment is of special significance as it clinches the issue. Justice Bhat inter-alia held;

"66. I would conclude by saying that reservations, both vertical and horizontal, are method of ensuring representation in public services. These are not to be seen as rigid "slots", where a candidate's merit, which otherwise entitles her to be shown in the open general category, is foreclosed, as the consequence would be, if the state's argument is accepted. Doing so, would result in a communal reservation, where each social category is confined within the extent of their reservation, thus negating merit. The open category is open to all, and the only condition for a candidate to be shown in it is merit, regardless of whether reservation benefit of either type is available to her or him."

136. In any case, the Respondents would be guided by the aforesaid judgment as far as implementation of "Horizontal Reservation" is concerned, as the aforesaid judgment is an authority on the said aspect.

137. The next case relied by the parties is ***Niravkumar Dilipbhai Makwana vs Gujrat Public Service Commission, (2019) 7 SCC 383,*** wherein the Hon'ble Apex Court was considering recruitment to the posts of Assistant conservator of Forest and Range Forest officer in the state of Gujrat. It was argued that the relaxation/concession in age granted to the candidates at the initial stage was only to enable a candidate belonging to the reserved category without granting him/her any preferential advantage in the matter of selection cannot be treated as an incident of reservation underArticle 16(4)of the Constitution of India. Further, the Circulars dated 29.01.2000 and 23.07.2004 issued by the Government of Gujarat was sought to be interpreted to show that a concession in age in the matter of selection to a post cannot be treated as an incident of reservation. The Hon'ble Apex court dismissing the contention of the petitioners in that matter, was pleased to hold;

"25. In the instant case, State Government has framed policy for the grant of reservation in favour of SC/ST and OBC by the Circulars dated 21.01.2000 and 23.07.2004. The State Government has clarified that when a relaxed standard is applied in selecting a candidate for SC/ST, SEBC category in the age limit, experience, qualification, permitting number of chances in the written examination etc., then candidate of such category selected in the said manner, shall have to be considered only against his/her reserved post. Such acandidate would be deemed as unavailable for consideration against unreserved post.

138. Thus, it is seen from the aforesaid judgment that each case turned on the peculiar facts and the conditions as specified in the recruitment notices, the prevailing statute and the circulars issued from time to time. It is seen that in Nirav Kuamr Dilipbhai case, Deepa E.V. case and Gaurav Pradhan Case, there were specific instructions which barred the consideration of the reserved category candidates against Unreserved category vacancies, whereas in Jitendra Kumar Singh Case and Vikas Sankhala Case they permitted accommodating the reserved category candidates against Unreserved Category vacancies if they bettered the Unreserved Category cut off marks. During the course of hearing, the Ld. Counsels were not able to point out any specific instruction applicable to the present facts of the case, which barred the migration of reserved category to the open category. In fact, section 3(6) of the Reservation Act coupled with the Government order dated 25.03.1994 specifically entails such migration. As far as the Pradeeep Kumar case is concerned, the same is distinguishable on facts as there was an altogether different issue, which engaged the attention of the Apex Court, wherein it was held that an OBC candidate not certified in the State/Territory outside of Delhi cannot be eligible to avail of employment in reserved category posts earmarked for OBCs who are certified by the Delhi Government.

I. Allocation of preferential Districts

139. Having discussed the judgment relating to migration of MRC (Meritorious Reserved Category) to open category seats, this court comes next to another point in issue in this present bunch of matters. It has been contended that the reservation policy implemented by the authorities in allocating the districts of preference to the MRC Candidates have been flouted. According to candidates belonging to General Category, once a MRC is not allocated the preferred district as far as the merit of the open category is concerned and this MRC candidate for his own good reason is reverted to the reserved category for preferred district allocation, the seats vacated by such MRC candidates from the open category should be filled by candidates from General category only. These candidates have referred to the Hon'ble Apex Court Judgment passed in the case of ***Union of India Vs Ramesh Ram& Ors (2010) 7 SCC 234***. These candidates have relied on the conclusion of the said Judgment, which appears at paragraph 50 as herein below:

"50. We sum up our answers-:

i) MRC candidates who avail the benefit of Rule 16 (2) and adjusted in the reserved category should be counted as part of the reserved pool for the purpose of computing the aggregate reservation quotas. The seats vacated by MRC candidates in the General Pool will be offered to General category candidates.

ii) By operation of Rule 16 (2), the reserved status of an MRC candidate is protected so that his/ her better performance does not deny him of the chance to be allotted to a more preferred service.

iii) The amended Rule 16 (2) only seeks to recognize the inter se merit between two classes of candidates i.e. a) meritorious reserved category candidates b) relatively lower ranked reserved category candidates, for the purpose of allocation to the various Civil Services with due regard for the preferences indicated by them.

iv) The reserved category candidates "belonging to OBC, SC/ ST categories" who are selected on merit and placed in the list of General/Unreserved category candidates can choose to migrate to the respective reserved category at the time of allocation of services. Such migration as envisaged by Rule 16 (2) is not inconsistent with Rule 16 (1) or Articles 14, 16 (4) and 335 of the Constitution."

140. However, candidates of the reserved category have contended that the authorities have wrongly while allocating the districts of preference to MRC candidates have "substantively" treated them as "reserved category candidate", whereas according to the various judgments of this court as well as the Hon'ble Apex Court, MRC candidates have to be only treated "notionally" as reserve category candidates for the said purpose for allotment of districts. Thus, it has been argued that the respondent authorities have arbitrarily presumed that the unreserved seats left over by the MRC candidates were available for even more selection of general candidates, which consequently led to excess selection of general category candidates in the left-over seats of the MRC, who in turn were adjusted against reserved quota vacancies, instead of unreserved vacancies.

141. This court finds that the argument of the candidates of general category is a long shot. First and foremost, the argument of the general category candidate apparently seems to be the adversely effected by assuming that open category is a quo for general category candidate. It is clarified that open category as the name signifies is not a quota as any quota is fixed to the limit of 50% as available to the OBC, SC & ST. The argument is premises on the believe that there is 100% quota, wherein 50% belongs to OBC, SC & ST, whereas the other 50% belongs to general category. Once, this confusion is removed, the argument also vanishes in thin air.

142. Further, the judgment in Ramesh ram has not been relied in the correct perspective by the open category candidates as the Hon'ble Supreme court in the case of ***Union of India Vs Ramesh Ram& Ors (2010) 7 SCC 234*** was concerned with the Constitutional validity of Sub-Rules (2) to (5) of Rule 16 of the Civil Services Examination Rules, for the civil services examinations from 2005 to 2007 and was relating to choice exercised by a candidate for the coveted service of IAS/IPS/IRS, wherein in the present case, a choice is related to a preferential district only and the candidate continues to be an Assistant Teacher, juxtaposed to the Ramesh Ram case, wherein a candidate by choosing his preference can be selected either in IAS/IPS/IRS or some other allied services. Recently, the Hon'ble Supreme Court in the case of ***Tripurari Sharan Vs Ranjit Kuamr Yadav, (2018) 7 SCC 656***, which was related to admission in PG Medical college, wherein again a student by exercise of choice gets a different college, the Hon'ble Apex court after referring to the judgment passed in the Ramesh Ram case concluded as follows:

"14. In light of the cases discussed hereinabove, both questions are answered as follows:

i) A MRC can opt for a seat earmarked for the reserved category, so as to not disadvantage him against less meritorious reserved category candidates. Such MRC shall be treated as part of the general category only.

ii) Due to the MRC's choice, one reserved category seat is occupied, and one seat among the choices available to general category candidates remains unoccupied. Consequently, onelesser-ranked reserved category candidate who had choices among the reserved category is affected as he does not get any choice anymore.

To remedy the situation i.e. to provide the affected candidate a remedy, the 50th seat which would have been allotted to X - MRC, had he not opted for a seat meant for the reserved category to which he belongs, shall now be filled up by that candidate in the reserved category list who stands to lose out by the choice of the MRC. This leaves the percentage of reservation at 50% undisturbed."

J. Select list of 6800 dated 05.01.20222

143. The next question which falls for consideration is as to whether, the state admitting its folly can issue an additional list of 6800 dated 05.01.2022 meant for only reserved category candidates over and above the advertised seats of 69000. Well, there had been a preliminary objection raised relating to the maintainability of this kind of writ petitions as the petitioners, who had challenged this select list have either failed to qualify the ATRE-2019 or are candidates, who were not eligible to participate in ATRE-2019, but who became eligible subsequently. Thus, these petitioners in view of their future claim to participate in the ATRE have approached this court as any additional seat being permitted by the respondents at this stage would actually truncate the number of seats in future vacancy. Although, the relief being sought by these bunch of petitioners seems to be far-fetched as this court has been flooded with petitions relating to ATRE-2019 and there is no sight for future ATRE as of now, however keeping in view the gamut of issues raised and the hearing conducted by this court, the relief as sought by these petitioners are being dealt in a different manner.

144. It has been contended by Sri Sudeep Seth, learned Senior Counsel appearing for the petitioners in a bunch of writ petition that as against 69000 posts advertised on 1.12.2018 all the posts were filled up after selection as per the affidavit filed by the Secretary, U.P. Basic Education Board filed in Writ Petition No. 1389 (SS) of 1991, Jawahar Lal v. State of U.P. on 12.7.2021. He also points out that a writ petition was filed before the Hon'ble Supreme Court seeking relief that certain vacancies which had occurred subsequently could also be filed up on the basis of the selection held in pursuance to the advertisement dated 1.12.2018 which was in respect of the 69000 posts referred hereinabove, however, this relief was declined by Hon'ble Supreme Court vide its judgment dated 11.2.2021 passed in Writ Petition (Civil) No. 760 of 2020, Shivam Pandey & ors. vState of U.P. & ors. The said order reads as under:

"This petition filed under Article 32 of the Constitution of India prays inter alia that 26944 unfilled posts from the Assistant Teachers Recruitment Examination 2018 be directed to be filled through instant selection.

Heard learned counsel for the parties.

It is a matter of record that 69000 posts were advertised to be filled through

Assistant Teachers Recruitment Examination 2019.

In the circumstances, no direction can be issued to the concerned authorities to fill up posts in excess of 69000.

We, therefore, see no merit in the petition.

The writ petition is, accordingly, dismissed.

Pending applications, if any, also stand disposed of."

145. Mr. Seth, also submitted that the respondents have contended in one of the writ proceedings before this court, that the 6800 posts which are to be filled from the 'Reserved Category' candidates are not part of the 68500 vacancies on the posts of Assistant Teacher which were advertised on 9.1.2018 (A.T.R.E. 2018), nor as aforesaid they are a part of the present ATRE-2019 as admittedly all the seats stands filled-up. Thus, it is being contended by him that these vacancies were neither advertised on 01.12.2018 (ATRE-2019) nor on 09.1.2018(ATRE-2018) and, as such these 6800 vacancies allegedly meant for 'Reserved Category' candidates were never advertised and were not part of selection referred hereinabove relating to A.T.R.E. 2018 and A.T.R.E. 2019, therefore, they cannot be filled up on the basis of the said selection, as is apparent from what has been noticed hereinabove. He says that, therefore, unless these vacancies are advertised and a fresh recruitment exercise for recruitment is conducted, there is no way that these 6800 vacancies can be filled up, but it seems that based on the selection for the 69000 posts referred hereinabove these vacancies are being filled up, which is clearly in the teeth of the decision of Hon'ble Supreme Court dated 11.2.2021 as also the law on the subject. He says that petitioners who are not successful in A.T.R.E. 2019 could nevertheless be entitled to be considered for fresh appointment in the subsequent vacancies which would include the 6800 vacancies which are the subject matter of this writ petition, as petitioners belong to the Reserved Category from which these posts are to be filled up. Moreover, he says that the determination of these reserved vacancies itself is erroneous and, therefore, the other petitioners of the General Category have also a locus standi in the matter. He further says that out of the 6800 selectees, some of them have been arrayed in representative capacity. He says that on 5.1.2022 a select-list of 6800 reserved category candidates has been issued which is not tenable in law and is liable to be quashed.

146. This court finds force in the argument of Mr. Seth, Sr. Advocate as far as his contention relating to the order by the Hon'ble Supreme Court is concerned, wherein the Apex court has refused to find any merit in the request of the petitioner in that matter to direct the concerned authorities to fill the 26,944 unfilled posts from the ATRE-2018 through the ATRE-2019 and as such in the said peculiar circumstances has refused to issue any direction to the concerned authorities to fill up posts in excess of 69000. However, the contention of Mr. Seth as far as the maintainability of the writ petition is concerned, the same is farfetched. Although, a Full Bench of this Court in Sanjay Kumar Pathak Vs. State of U.P. and others, writ petition no. 65189 of 2006, decided on 25th May, 2007, has reiterated inter-alia that "Nobody can claim as a matter of right that recruitment on any post should be made every year." and moreover, these petitioners, have no ***locus standii*** as their cause is pre-mature and further

petitioners have a strong onus of proving there grievance as to come within the definition of ***"persons aggrieved"*** as devised by the Hon'ble Apex Court on many instances which has nowhere been discharged by these petitioners and especially when these petitions is not filed as a Public Interest Litigation, however, dehors the issue of maintainability of this writ petition, which this court is refraining to comment on this stage, this court is of the view that the law stands settled on the aspect that it was not permissible for the Government to hand out more appointments than the vacancies that are advertised. The law had been settled by a number of decisions of the Apex Court itself that it was against the law and also the rights of others to appoint more people than the vacancies advertised. A reference can be made to the following cases (i) Union of India Vs Ishwar Singh Khatri (1992) Supp 3 SCC 84, (ii) Gujrat State Deputy executive Enginers Association Vs State of Gujrat (1994) Suppl 2 SCC 591, (iii) State of Bihar V/s The Secretariat Assisstant S.E Union AIR 1994, SC 736, (iv) Prem Singh Vs Haryana State Electricity Board, (1996) 4 SCC 319 (v) Ashok Kumar V/s Chairman, Banking Service Recruitment Board, AIR 1996 SC 976. In each of these cases, it has been held that vacancies cannot be filled up over and above the number of vacancies advertised as "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution" of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies.

147. Further, it is apparent from the aforementioned chronology of events leading to the issuance of the select list of 6800 for reserved category candidates on 05.01.2022 that the stand and reason of the Respondent is both contradictory and vague. As per the own admission of the respondents, the said select list of 6800 has been issued to remove the anomaly in reservation in ATRE-2019 and they did not relate to 22,933 vacancies of ATRE-2018, as stated by the State Government in order dated 12.01.2022 passed in Special Appeal No. 79 of 2020 (Alok Kumar and Ors. Vs State of U.P). The natural corollary of the aforesaid admission is (i) there is an anomaly in implementing the reservation policy of ATRE-2019, which in the opinion of this court is more than enough to quash the select list of 01.06.2020 and secondly, (ii) in case, select list of 6800 is an outcome to remove the anamoly, how and in what manner the said anomaly has been sought to be removed, the respondent is completely silent on the said aspect, thirdly (iii) if the respondent have chosen to remove the anomaly, how can the respondent breach the number 69000, without disengaging equal number of candidates from the said list, fourthly, (iv) the Hon'ble Supreme Court vide its judgment dated 11.2.2021 passed in Writ Petition (Civil) No. 760 of 2020, Shivam Pandey & ors. v. State of U.P. & ors has refused to grant any relief for appointment in excess of 69000. Moreover, in view of the own admission of the respondent, 6800 reserved category select list cannot be related to or fill any vacancies in ATRE-2019 recruitment process as the respondent have stated in affidavit dated 12.07.2021 filed in this court that no vacancies were available in 69000 Assistant teachers post recruitment process.

148. It is settled law that an authority cannot make selection/ appointment

beyond the number of posts advertised, since it deprives the candidates ineligible for appointment on last date for submission of application and who became eligible for appointment thereafter, to participate in fresh selection exercise through fresh advertisement. Thus, filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason that it amounts to improper exercise of power. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not permissible in law. The judgment passed by the Apex court in the case of Suridner Singh & Ors. Vs State of Punjab & Ors. AIR 1998 SC 18 and Hoshiyar Singh Vs State of U.P (1993) Supp (4) SCC 377 is of special reference, wherein the Hon'ble Apex Court held at paragraph 10 as inter-alia:

"10. The appointment on the additional posts on the basis of such selection and recommendation would deprive candidates who were not eligible for appointment to the posts on the last date for submission of applications mentioned on the advertisement and who became eligible for appointment thereafter, of the opportunity of being considered for appointment on the additional posts because if the said additional posts are advertised subsequently those who become eligible for appointment would be entitled to apply for the same. The High Court was, therefore, right in holding that the selection of 19 persons by the Board even though the requisition was for 8 posts only, was not legally sustainable."

149. Further, the said observation was reiterated in the case of Arup Das and Others Vs State of Assam (2012) 5 SCC 559, wherein the Apex Court in Arup Das Case at Paragraph 17 held as follows:

"17. It is well-established that an authority cannot make any selection/appointment beyond the number of posts advertised, even if there were a larger number of posts available than those advertised. The principle behind the said decision is that if that was allowed to be done, such action would be entirely arbitrary and violative of Articles 14 and 16 of the Constitution, since other candidates who had chosen not to apply for the vacant posts which were being sought to be filled, could have also applied if they had known that the other vacancies would also be under consideration for being filled up."

150. For all the aforesaid reasons, the select list of 6800 dated 05.01.2022 issued for selection of reserved category candidates cannot be sustained in the eyes of law.

K. Conclusion

151. Thus, this court is of the view that concession granted at the level of TET, so as to make a candidate eligible to participate in the open competition, like the ATRE-2019 would not debar a reserved category candidate to be excluded from the consideration zone in the open competition, in case he is able to match and score more marks than the last general category candidate in the open category as the competition has not yet started at that point of time. However, in case a candidate seeks relaxation of marks in passing in the ATRE-2019, obviously he would not be considered to belonging to a meritorious reserved category as not only the competition has started but this relaxation would mean reservation.

152. To make it abundantly clear any reserved category candidate, who has

obtained 65% marks or more can be considered to be a meritorious reserved category candidate and accordingly allowed to compete with the general category candidate and progress to the open category, whereas a reserved category candidate, who has scored less than 65% and more than 60% in the ATRE-2019 would be considered in their own respective category and would not be allowed to progress into consideration zone with general category candidates on the basis of scoring more in the quality point as per Appendix-1 of the rules. The above proposition simply put may be understood as under :

(i) Any candidate belonging to a reserved category, who has availed relaxation of marks in ATRE-2019, which has been held to be an open competition, shall not be entitled to migrate from their respective category to the unreserved category while preparing the select list as per the quality points in terms of Appendix -1 of the rules.

(ii) Further, those candidate's, whether reserved or unreserved, scoring more than 65% marks in ATRE-2019 shall be encompassed within the consideration zone of the open category and a select list shall be accordingly prepared of these candidates separately on the quality points and accordingly 50% of the total seats shall be filled by these candidates, irrespective of whether they belong to reserved or unreserved category.

(iii) The balance 50% shall be filled by candidates from their respective reserved category as envisaged under section 3(1) of the Reservation Act.

(iv) Thereafter, the horizontal reservation as provided in the Government order should be applied accordingly, if any.

153. As regards, allocating the districts of preference to MRC candidates, MRC candidates have to be only treated "notionally" as reserve category candidates for the said purpose for allotment of districts and they can opt for a seat earmarked for the reserved category, so as to not disadvantage him against less meritorious reserved category candidates. Such MRC shall be treated as part of the general category only. Further, due to the MRC's choice, one reserved category seat being occupied, and one seat among the choices available to general category candidates remains unoccupied. Consequently, one lesser-ranked reserved category candidate who had choices among the reserved category is affected as he does not get any choice anymore and as such to remedy the situation i.e. to provide the affected candidate a remedy, the seat which would have been allotted to MRC, had he not opted for a seat meant for the reserved category to which he belongs, shall now be filled up by that candidate in the reserved category list who stands to lose out by the choice of the MRC, which would leave the percentage of reservation at 50% undisturbed.

154. Apparently, during the hearing of the present matter, there was no clarity of the score and details of the reserved category candidates, who have appeared in the ATRE-2019. There had been no endeavour from the respondents, who are custodian of the records of the ATRE-2019 and would had assisted this court in providing the said records. Thus, it is directed that the state shall review the select list of 01.06.2020 and prepare the quality point of candidates as per Appendix-1 of the rules and prepare the merit of the candidates as per the observation of this court. The said exercise

shall be conducted within a period of three months from today.

155. In the peculiar facts of the present case and purely to balance to equity, this court in exercise of its Jurisdiction under Article 226 of the Constitution of India directs that till the time the respondents prepare the revised list, the candidates already appointed and presently working as Assistant Teachers in various district shall continue to work in their post till such period and shall be not disturbed, keeping in mind the examination period and the end of education session. This court holds that the appointment of those teachers, who do not find any place in the revised list as has been directed herein above and who had been appointed as per the select list of 01.06.2020 was purely fortuitous and does not entail any right in them. The said direction is in conformity to the interim order dated 7th of December, 2020, wherein this court while issuing notice to the affected persons directed that, in the meantime, appointments made on the post of Assistant Teacher shall be subject to the final decision of these petitions.

156. In the overwhelming facts as narrated herein above, wherein apparently the teachers, who have been appointed and are working since the last more than 2 years, whether belonging to the reserved or unreserved category cannot be faulted with, as essentially, it is the respondents, who were under a constitutional duty to implement the provisions of section 3(1) & 3(6) of the Reservation Act in its letter and spirit, however the same having been not done, this court in order to balance the equity and keeping in mind that these young men & women, who as teachers are going to shape the future of this country, hereby grants liberty to the State Government to intervene in this matter in the peculiar facts of the present case and frame a policy for adjustment of these Teachers, who may be ousted by a revision in the select list dated 01.06.20020 in light of the explication provided in the case of ousted candidates in the judgment passed by the Hon'ble Apex Court in the case of ***Gaurav Pradhan v. State of Rajasthan, (2018) 11 SCC 352***¸ as already discussed herein above.

157. All impleadment Application stands allowed.

158. Since, it has been directed that the select list dated 01.06.2020 to be revised in view of the observation made in this Judgment, the select list of 6800 dated 05.01.2022 stands quashed.

159. Reservation should not be in any circumstances more than 50% of the total seats.

160. All the Writ petitions are **disposed of** in the aforesaid terms and all interim orders stands vacated.

161. In the facts of the present case, there shall be no orders as to cost.
